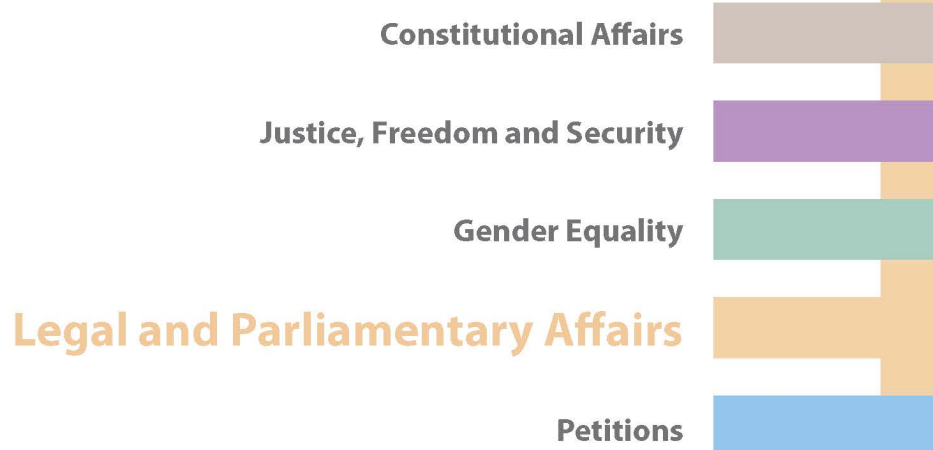


DIRECTORATE-GENERAL FOR INTERNAL POLICIES

POLICY DEPARTMENT **C**
CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS



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

STUDY





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LEGAL AFFAIRS

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Abstract

This report discusses the legal framework applicable to copyright contracts as well as the practices in artistic sectors. A careful revision of the copyright provisions, contractual law principles and case law in 8 Member States is presented together with a more specific analysis of a set of issues particularly relevant nowadays, such as collective bargaining, digital exploitation, imbalanced contracts, and reversion rights, among others. A set of recommendations aiming at improving the level of fairness in copyright contracts is proposed at the end of the study.

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LIST OF ABBREVIATIONS

- BGB** *Bürgerliches Gesetzbuch*, German Civil Code
- CDPA** Copyright Designs and Patents Act, United Kingdom
- CJEU** Court of Justice of the European Union
- CMO** Collective Management Organisation
- CPI** *Code de la Propriété Intellectuelle*, French Copyright Code
- EU** European Union
- HCA** Hungarian Copyright Law
- IP** Intellectual Property
- KC** *Kodeks postępowania cywilnego*, Polish Civil Code
- LDA** *Loi relative au droit d'auteur et aux droits voisins*, Belgian Copyright Law
- LDMA** Literary, musical, dramatic and artistic Work
- LPI** *Ley de la Propiedad Intelectual*, Spanish Copyright Law
- MOU** Memorandum of Understanding
- PECL** European Principles of Contract Law
- SzJSzT** Hungarian Copyright Expert Board
- UPAPP** *Ustawa roku o prawie autorskim i prawach pokrewnych*, Polish Copyright Law
- UrhG** *Urheberrechtsgesetz*, German Copyright Law
- URL** *Lag om upphovsrätt till litterära och konstnärliga verk*; Act on Copyright in Literary and Artistic Works, Sweden
- VerlG** *Verlagsgesetz*, German Law for Publishing contracts
- VOD** Video on demand

EXECUTIVE SUMMARY

One of the first relevant acts accomplished by the author, after the creation of an original work, is to entrust a publisher or producer to exploit commercially her rights, hence to give up some part of control over her work, in order to obtain access to the market. This first contract transferring copyright over an artistic work might be a tricky episode for creators as they will in most cases be in a weaker bargaining position, due to their inexperience, lack of information or will to be published or produced at any cost. Whereas copyright contracts could contribute to secure the financial autonomy of creators, granting them a fair remuneration, they might, if they are imbalanced in favour of the undertakings exploiting the works, fail to provide a fair share in the financial return deriving from the exploitation of copyrighted works.

This study assesses the rules and legal provisions applicable in the European Union that purport to protect creators in their contractual dealings. Failing a European harmonisation of the legal provisions related to creators' contracts, the matter is left to national laws that are largely diverging, from very detailed provisions to inexistent ones.

A first part of the study gives preliminary background on the methodology and definitions, and explains the context of the exploitations of works and of the contractual relationships pertaining thereto. Indeed, while the contractual relationship that is examined in this study is the one between the author and the first publisher or producer, the work is often the object of a whole chain of contracts, allowing its full exploitation (for instance, through broadcasting or streaming).

The second part analyses the relevant national legal provisions offering protection to creators, including both specific provisions of national copyright laws and the general principles of contract law.

A third part is devoted to the analysis of some specific issues arising in the contemporary world where the author might appear to lack some protection, in order to assess the efficiency of the legal protection in practice in particular contexts.

Some recommendations for further action, namely in the legislative field, to better protect authors are proposed at the end of the study.

The copyright contracts in context

This study is limited to an analysis of the legal framework (contractual law principles and copyright provisions) applicable to author's exploitation contracts, i.e., to contracts concluded between creators and publishers in the field of music, print or visual arts or creators and audiovisual producers, which allow the artistic work to be made available on the market and commercially exploited. It excludes contracts concluded by performers or other related rights holders (who are not considered as "creators" of an original artistic work), subsequent contracts between transferees of copyright and secondary exploiters (such as broadcasters or internet service providers), as well as end user licence agreements. This study tries to give an overall overview of legal provisions and contractual practices but, due to time and resource constraints, does not intend to provide a sector by sector investigation.

The research is based on an in-depth analysis of the legal framework of a selected number of Member States (i.e. Belgium, France, Germany, Hungary, Poland, Spain, Sweden, UK), reflecting a balance between different legal traditions, different intensity of protections and different size of copyright industries. In addition, a survey was conducted amongst relevant stakeholders, including European associations of authors, of publishers, and of producers, as well as national organisations and collective management organisations.

One key baseline of the present study has been to depart from considering the contract concluded by the author in isolation, but to place it back in the broader context of the exploitation of her work. That has key consequences. On the one hand, the contract that the author enters into with the producer or publisher encapsulates a precise deal in compensation of the transfer of her right: the author expects from the transferee that he undertakes the exploitation of the work, which could trigger some revenue and recognition for the author. This creates some reciprocal rights and obligations for both parties and the transfer of copyright deserves some fair return, both in terms of remuneration and in terms of actual exploitation of the work.

On the other hand, it should be reminded that the copyright contract concluded between the creator and the transferee will govern their relation from the negotiation of the contract to its execution and termination. Protection of the author is necessary at each stage of the contract: during the negotiation, to counterbalance her weaker position and lack of information; during the exploitation of the work, to guarantee the author her fair remuneration and control over the enforcement of the contract, if needed; in the termination of the contract, to enable the author to get out of an unfair deal.

Throughout all these stages of the contract's life, remuneration of the author will have a prominent importance. Contracting her rights is a means for the creator to secure some revenue and participation in the overall economic exploitation of her work. The fair determination of the remuneration in the contract, but also its effective payment to authors, should be one of the purposes of the protection of creators.

That the creator effectively gets a fair share of the revenues of her work along the whole value chain will strongly depend on elements other than the first contract. The first transferee of the copyright will enter into contractual relationships with subsequent exploiters (broadcasters, retailers, on-line platforms, video-on-demand providers, etc.), in which authors will have no say. The picture can be further enriched by the intervention of collective management organisations that will try and secure some fair remuneration for their authors in some modes of exploitation. The balance achieved in the contract between creators and publishers or producers should be considered in this bigger context, which is one of the objectives of the present study.

Legal provisions protecting the author in copyright contracts

The study has examined the national rules that could provide some protection to creators who have transferred their rights, either resulting from specific provisions in copyright law or from general principles of contract law. The legal framework of Belgium, France, Germany, Hungary, Poland, Spain, Sweden and the United Kingdom has been assessed to show a rather fragmented situation in the extent and means of protection of the authors.

Restrictions related to the form of transfer of rights: The three most common forms used to transfer rights in contracts are: (1) assignment, (2) licensing and (3) the waiving of rights. Some forms of transfer might not be authorised in certain Member States: for instance, assignment is not allowed in Germany, where 'use rights' can only be licensed, and arguably in Spain.

Form requirements: One key element of the legal protection of authors is often a requirement of a written form for the contract, for purpose of evidence or even, in some countries of validity, of the transfer. The extent and consequences of the requirement of written form varies from one country to another.

Determination of the scope of rights: A number of countries have introduced mandatory contractual provisions in their copyright laws to ensure that the contracts determine more precisely the exact scope and terms of the rights transferred, thereby preventing authors from signing a blank contract in transferring their rights. Depending on the country, such rules may include: (1) a general obligation to contractually and precisely determine the assigned/Licensed rights and modes of exploitation; (2) an obligation to determine the geographical scope and duration of the transfer of the rights; (3) a prohibition to waive or assign some rights for remuneration; (4) some limitation to transfer rights in future works; (5) a prohibition or limitation to transfer rights in yet unknown forms of exploitation; (6) restrictions to transfers of moral rights.

Determination of remuneration: Remuneration is an important part of the contractual bargain, and contractual protection of authors namely aims to secure them some fair revenue when transferring their rights. Most countries have rules concerning the remuneration of authors. Depending on the national laws, such rules may: (1) provide a general obligation to specify the amount of the remuneration in the contract; (2) impose a proportional participation of the authors in the profits from the exploitation of their works (thus prohibiting lump-sum payments) or an adequate remuneration; (3) require a revision of the remuneration agreed upon in the contract in case of a disproportionate advantage for the transferee (best seller clause); and/or (4) impose some monitoring and reporting obligations to the transferee to inform the author of the revenues yielded by the work.

Obligations of the parties: An obligation to exploit the work is sometimes imposed to the transferee, but not always or in all types of contracts.

Interpretation of contracts: Copyright law provisions dealing with copyright contracts generally lay down a rule of strict interpretation of the transfers of rights in favour of the author, who is the weaker party.

Termination of contract: Some countries provide for a possibility for the author to regain her rights from the person to whom they have been transferred under different circumstances (lack of exploitation, exploitation against the author's interests, lapse of time, etc.).

Transfer of contracts: the requirement of an explicit consent of the author for the subsequent transfer of her rights to be valid appears in a limited number of national copyright laws.

Rules applying to some types of contracts: A number of Member States have specific rules for works created under employment and for commissioned works that are less

favourable towards the author and give employers and commissioners more rights to exploit the works created by their employees.

Specific types of contracts, such as publishing contracts or contracts of production of audio-visual work, are regulated by more specific contractual provisions where the rights and obligations of the author and transferee have been detailed more precisely in the law.

The comparative analysis of the contractual protection of authors in the legislation of the Member States reviewed shows a lack of harmonisation and great disparities in the application of the existing rules, from legal regimes with very detailed provisions to regimes favouring a higher degree of contractual freedom. Amongst the protective rules, the requirement of a written form and the obligation to precisely determine the rights transferred and the scope of the envisaged modes of exploitation can assist authors to be better informed and not to sign a blanket transfer of rights. In addition to the rule prohibiting the transfer of yet unknown forms of exploitation and the obligation to exploit the rights assigned, this also prevents the author from giving away her rights with no clear conscience of the value and extent of the future exploitation of her work. Arguably, rules on remuneration will be essential to provide some fair participation of the author in the revenues of her creation. They exist in many countries but might not prove efficient in practice to secure fair remuneration to creators.

Aside from the application of specific rules aiming at protecting authors, the general principles of contract law and the principle of freedom of contract remain applicable to exploitation contracts and may complete the specific protection granted by copyright law, even though they are not tailored to the needs of creators and might sometimes favour the transferee rather than the author. These principles may sometimes lead to nullify or mitigate unreasonable clauses, although the principle of freedom of contract will, in most cases, prevail.

The principles of good faith, fairness and equity: Recognised by the Principles of European Contract Law, different doctrines of fairness or good faith exist in Member States and may specify, complement or create some obligations, as well as mitigate or set aside contractual clauses considered as unfair.

Usages: References to usages play some role in certain legal systems, sometimes to add some obligations to the parties or to extend the scope of the transfer (e.g. France).

Rules of interpretation: besides the rule of interpretation in favour of the author, which is sometimes foreseen by copyright law, general contract law will offer different tools to interpret an unclear contract, such as reference to the common will of the parties, interpretation in favour of the party committing herself to an obligation or purpose-of-grant interpretation. These interpretation rules, however, do not always result in better protection of the author.

Defect of consent and other conditions for the formation of contract: some legal rules aim to guarantee that the parties' consent to the contract is genuine; in case of lack of informed consent or uneven economic powers, the contract might be invalidated. Such rules have been applied by some national courts to protect the author in a copyright contract.

Legal provisions on unfair terms: primarily a tool of consumer protection law, provisions on unfair terms are based on the existence of uneven bargaining positions. A similar imbalance can be found, by analogy, in copyright contracts. Hungary, Sweden and Germany apply contract law provisions to address unfair terms in contracts transferring copyright. In some cases, representatives of authors are entitled to challenge contractual practices concerning authors before courts by collective action.

Undue influence, unconscionability, restraint of trade: These UK doctrines, and their equivalents in other countries, could lead to annul a contract where a party exploits the other's poverty or ignorance, and have sometimes been applied to protect vulnerable authors.

Revision of contract given unforeseen circumstances: Despite the general principle according to which the contract is binding on the parties, some doctrines admit the revision of contract in the case of a significant change of circumstances. They have not been applied to copyright contracts so far.

The present study concludes that specific protective rules, that take adequate consideration of the contractual position of authors, should be preferred over general contractual principles not tailored to address the authors' need of protection. Some inspiration could however be found in general principles of law, such as rules referring to usages, or in consumer protection, such as the regulation of unfair contract terms or the recourse to collective enforcement and action to help authors challenge unfair copyright transfers or contracts.

Collective agreements are another tool to protect creators. Since the author is considered as occupying a position of weakness in the negotiation with the exploiter, collective negotiations between representatives of authors on the one hand, and representatives of exploiters on the other, may be a means to reach a better balance. This study has examined two different models of collective dimension of regulation of copyright contracts:

- (1) the German collective agreements aiming to set the level of 'adequate remuneration': Such agreements are called upon by the German Copyright Law, even though only few agreements have been signed so far.
- (2) The French framework agreements that can determine many conditions applicable to copyright contracts in one sector and might be made mandatory by law. One recent agreement, related to transfers of digital rights for digital exploitation of books, that is very protective of the authors, is particularly studied.

Both examples allow the conclusion that collective negotiations and agreements have many assets, as they can help all authors to get a balanced bargain when transferring their rights. One limit however is that they cannot determine the remuneration due to the author or the tariffs for the exploitation of works, as this might run counter to competition law.

Specific issues

The study has selected six issues where the existing legal protection of authors has proven insufficient or inadequate in preventing them from being unduly deprived of their rights over their creation and/or of a fair remuneration. Those issues can usefully

complete the analysis of the existing legal provisions benefiting authors, assessing, in some concrete cases, the effectiveness of the legal rules.

Digital exploitation

Due to the limitation of transfer of rights to what has been expressly mentioned in the contract, rights for digital forms of exploitation have not always been dealt with by copyright contracts, or may have been included in a transfer drafted in very general terms, without any specification as to the remuneration or conditions for such transfer. This study explains why authors might not be duly associated in new forms of exploitation, when transfers of digital rights are not really negotiated or in case of buy-out contracts. The digital environment also produces constantly changing models of exploitation, with great uncertainties and unpredictability as to revenues streams, margins and benefits, as well as new modes of remuneration (subscription or advertising-based), which make it difficult to determine criteria for a fair remuneration of authors. Existing obligations to specify all modes of exploitation for which the rights are transferred seem insufficient, as they do not require enough detail in distinguishing digital uses and models. Authors might have transferred their rights for digital uses to an extent that does not correspond anymore to current models of exploitation. The generally long duration of transfer tends to lock up authors in agreements that do not take into account different and dynamic modes of exploitation or provide for a remuneration that is no longer fair due to a change in the revenues' streams generated by digital exploitation.

In some countries, authors are calling for new models of contracts dealing with digital uses, that should include distinct contractual provisions and remuneration, possibly fixed by collective bargaining, a specific obligation of digital exploitation, transparency and reporting obligations, as well as more flexible contracts, embedding a transfer limited in time or a possibility for authors to revise their contract when the context of digital exploitation changes. The recent French Agreement between authors and book publishers is an example of a collective agreement better protecting authors for digital modes of exploitation of literary works, with an obligation of digital exploitation and revision clauses. Sweden also imposes an obligation of exploitation combined with a limitation in time of copyright transfers, which helps authors to re-negotiate contracts if needed. Fixation of modes of remuneration by collective agreements or CMOs, as applied in some countries, or an unwaivable right to remuneration, as requested by the Society of Audiovisual Authors, also offer promising solutions.

The study examines solutions put forward in some national laws or collective agreements, and assesses their efficiency, taking into account the dynamic nature of digital markets.

Rights reversion

Copyright contracts are often concluded for a long period of time, sometimes even for the whole copyright term. Should the transferee no longer exploit the works, or should he do so, in conditions that are not satisfactory, creators may wish to have their rights back. This possibility is called 'rights reversion' and exists in some Member States for a number of reasons (e.g. lack of exploitation, exploitation contrary to the artist's wishes, changes of situation, transferee's bankruptcy).

The study examines the reversion provisions applicable in Member States and in the US Copyright Act, providing for a broad right of reversion. In principle, reversion can restore

some balance in favour of the author, despite it being a derogation to the principle of binding contract.

Imbalance between scope of waiving and exploitation

Many copyright contracts tend to transfer a bulk of the author's rights, sometimes extending beyond what is necessary for the envisaged exploitation, covering the whole duration of copyright, the whole universe or reaching to future works with no limitation in time. Many examples of excessive transfers have been reported by the stakeholders interviewed for this study. In some cases, as in the example of scientific publications, all-encompassing assignment contracts do not reflect the very limited exploitation that will be made of the work (one publication in paper and the inclusion of the work in databases of scientific publications), but bar authors from further publication, translation in another language, inclusion in open access repository or even use in their teachings. To counter such far-reaching contracts, German law applies a 'purpose of the grant' rule that, if the contract is ambiguous, limits transfers to rights that are necessary to fulfil the purpose of the contract.

A particular case of "excessive" contracts is the so-called 'buy-out' or 'all-rights included' contract that is increasingly used in some sectors to transfer all the author's rights in exchange for a lump sum payment. Current legal provisions on copyright contracts generally do not invalidate buy-out contracts despite some attempts of judiciary redress. The solution of an unwaivable right to an adequate remuneration has been proposed by representative of authors to counter this practice and is included in some form in the recent Term of Protection Directive for the benefit of performers. Other solutions can be thought of to restore a contractual balance between the transfer of rights and the fair participation of the author in the exploitation of the work.

Contractual waiving of rights to remuneration

Copyright contracts sometimes include the assignment or waiving of rights to remuneration (e.g. for private copy or reprography), which annuls the compensation granted to the author by law and by the *acquis communautaire*. In the *Luksan* case, the CJEU has decided in favour of the unwaivability of the right of remuneration for private copying, which is a first step towards a general rule of maintaining such rights with the author, even in presence of buy-out contracts, to guarantee some protection to the creators.

Transfer of rights in audiovisual works and collective management

When authors belong to collective management societies and bring their copyrights to collective management, the question of the articulation of such situation with other transfer contracts is intricate. Indeed, two transfers of rights seem to be overlapping: the one to collective management societies, on the one hand, and the one to the producer/publisher, on the other hand.

One particular issue is the compatibility of collective management with the presumption of transfer of the rights of exploitation to the producer, which applies in the case of audiovisual works. When filmmakers are members of a collective management organisation, that CMO exercises their rights against users, whereas the producer, by virtue of the presumption of transfer of the exploitation rights, exercises their rights that are necessary to ensure the primary exploitation of the film. Collective management

societies have sometimes faced opposition of broadcasters or cable operators to pay them the required royalties for public transmission of the works, on the ground that the rights of remuneration have been transferred to the producers and could not be exercised by the societies in charge of audiovisual authors. Thus, authors might ultimately be deprived of their remuneration, if producers do not enforce their rights against such operators or do not transfer them their share of the revenues they get from such operators.

Member States have solved this issue differently, by law or case law, or have not even addressed the issue. One solution that would both preserve the presumption of transfer of rights of exploitation to the benefit of the producer of audiovisual works and guarantee some remuneration to authors for secondary exploitations of their works would be to organise cohabitation, such as in France, between the transfer of exclusive rights of exploitation to producers and collective management of remunerations. The presumption of transfer of rights in audiovisual rights would merit some European harmonisation and definition of its proper scope, its relationship with remunerations of authors and its legal opposability to third parties.

Dual licensing

Another issue is the possibility for authors who are members of a collective society to individually exercise their rights to authorise some uses of their works. One example is the possibility for authors to apply an open access license (e.g. a Creative Commons license) to some of their works. CMOs generally oppose that individual licensing by arguing that authors have lost their exploitation rights to the sole benefit of the society. This has been perceived as an undue limitation of the freedom to contract of authors and as an impairment of their capacity to engage in self-promotion, open access movements or collaborative creation. A more flexible approach of collective management of copyright including some manoeuvre for dual licensing, as tested by a number of CMOs, could prove to benefit creators and creative process, without adverse effects on collective management.

Conclusion and recommendations

The existing contractual protection of authors, as included in copyright law and, indirectly, in general contract law, appears not to be sufficient or effective to secure a fair remuneration to authors or address some unfair contractual provisions.

Besides the causes that are generally put forward to explain this unbalance and lack of protection, new elements have emerged. Firstly, the increasingly dynamic markets for exploitation, notably digital markets, lead to the quick obsolescence of a contract agreed upon at any point in time. Secondly, due to the multiplicity of forms of exploitation and of undertakings exploiting works in the current environment, the contract between the publisher/producer and the author is only but one element in a web of contractual relationships and revenues streams. The examples given in this study of the difficulty to secure a fair remuneration in digital exploitations, of the practice of buy-out contracts, of the invocation of the presumption of transfer, of the refusal to pay CMOs remuneration for authors of audiovisual works, are illustrative of the shifting power among the stakeholders to the detriment of creators. A last factor is the cross-border dimension that increasingly characterises the exploitation and use of works, which is likely to enhance the discrepancies of the contractual protection of authors depending on the level of protection they enjoy in each of the countries involved.

The digital economy is based on creative works. A basic principle is that authors should be associated in the exploitation of their works and receive a fair remuneration each time the economic value of their work is exploited. The rules existing in some Member States to protect the creator aim, on the one hand, to define the conditions of negotiation so as to balance the bargaining power of both parties (acknowledging that such a balance is tilted against the author) and, on the other, to impose some basic obligations inherent to the bargain itself. Despite the additional recourse to the general principles of contract law, such rules do not address the following key issues:

- the adequate remuneration of the author is not sufficiently ensured by provisions on copyright contracts;
- the weaker position of the author in the enforcement of the protective legal provisions is largely ignored;
- no adaptive or corrective measures allow to amend contracts governing a dynamic and evolving situation;
- the obligation of an explicit determination of the scope of transfer of rights proves inefficient in preventing an all-encompassing, and time unlimited, assignment.

In conclusion, the following recommendations are made by the present study:

1. The real contractual nature of copyright contracts should be restored: authors agree on some reciprocal bargain in which effective exploitation and fair remuneration are the counterparts for the transfer of copyright. This **contractual bargain** would justify:
 - The imposition of **minimal formalities** in contracts transferring copyright, such as written form and the mandatory determination of the exact scope of the transfer and of the due remuneration.
 - The imposition of an **obligation of exploitation** for each mode of exploitation that has been transferred, allowing authors to get their rights back for any mode of exploitation not pursued by the publisher or producer.
 - **Reporting obligations**, that is, the obligation to detail on a regular basis the modes of exploitation undertaken and the revenues yielded by all exploitations, imposed on first transferees but also on other content providers and exploiters in order to enable the author to have a broader understanding of the financial flows related to her work and her actual share in its economic exploitation.
 - The introduction of an **unfair terms model** in copyright law to balance the contractual bargain between the creator and the transferee. By analogy to consumer protection, such a scheme would preclude "black" terms (determined in the law) as well as any provision causing a significant imbalance in the parties' rights and obligations arising under the contract to the detriment of the author.
2. Authors deserve some **fair remuneration** for all exploitations made of their works, which would justify:
 - The drafting of an **economic study on the remuneration of authors** as well as **further research on the impact on competition law on the admissibility of collective agreements**.

- The imposition of the **determination of a fair remuneration** of the author in the contract for each mode of exploitation, clarifying its mode of calculation and, if proportional, the types of revenues on which it will be based.
 - **Obligations of transparency and reporting of financial streams and revenues** related to the exploitation of works.
 - A principle of **unwaivability of the right to equitable remuneration** or fair compensation.
 - The enactment of other **unwaivable rights to remuneration**, notably for some kinds of digital exploitations.
3. The ***dynamic process of copyright contracts*** should guide the protection of authors in copyright law, in order to effectively protect the author at all stages of the contractual process (from the negotiation, exercise, enforcement, to the termination of contract). That would justify:
- The validity of transfer of rights for **unknown forms of exploitation**, upon the condition of a fair remuneration of authors and with the possibility of rights reversion.
 - The **limitation in time** of contracts transferring copyright from an author to a publisher or producer, including the possibility of some renegotiation or clause of revision (for the author) in consideration of the evolution of the modes of exploitation, of business models or models of consumption of works.
 - A general **principle of reversion** of the rights transferred to enable the authors to terminate a contract, namely in case of lack of exploitation, lack of payment of the remuneration foreseen as well as lack of regular reporting.
 - Some manoeuvre for **dual licensing** to enable authors to develop non-commercial exploitation.
 - Fostering a European **dialogue among stakeholders towards more flexible contracts and exchange of best practices**.
4. The protection of authors regarding their contractual relationships could further rely on ***collective agreements, management and enforcement***:
- **Collective agreements or model contracts** should be encouraged to secure a fair protection and remuneration of authors in individual contracts.
 - **Collective actions** should be allowed, namely by representatives of the authors, to act on a collective basis, particularly in the case of adhesion contracts, including by setting up collective mechanisms of alternative dispute resolution and mediation procedures.
 - **Education and awareness of creators** should be developed to better inform authors and enhance their bargaining position.

INTRODUCTION

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

Morrissey (The Smiths' singer), Autobiography

One key objective of copyright is to grant exclusive rights to authors and creators to enable them to reap the full value of their creation. Many legal provisions in the European Union framework tend to place the author at the core of the protection, by vesting copyright with the author¹, by aligning the duration of the protection to her life plus 70 years, and, at least in national laws, by granting moral rights to creators.

However, the economic reality of copyright requires that rights of creators be waived and exploited by publishers, (film and phonogram) producers and other economic entities. The French Minister of Culture in charge of copyright questions, Aurélie Filipetti, said in 2012 that "literature is made by publishers" - an affirmation that was much criticised, notably by authors, who are certainly the ones who create literature. However, it should be recognised that publishers play a significant role in transforming the creation into an economic asset by the act of production or publication, as well as by putting the work on the market. The creation, the literary or artistic work, becomes a book, a film, a music album. In most cases, producers and publishers take the risk and investment needed for the work to yield some revenue and provide access to the market for authors². The first copyright law, the UK Statute of Anne in 1709, recognised early on this reality, as its first provisions already mentioned the author and publisher side by side.

Therefore, one of the first relevant acts accomplished by the author, after the creation itself, is to entrust someone else to commercially exploit her rights, hence to give up some part of control over her work. This first contract may be a tricky episode for creators as they will in most cases be in a weaker bargaining position, due to their inexperience, lack of information or desire to be published or produced at any cost.

Conversely, commercial undertakings exploiting musical, audiovisual, literary or other works are generally better equipped than individual creators to draft contracts that protect their interests. The increasing concentration in the economic sector of entertainment and media strengthens even more their bargaining power and their possibility to impose unilateral and standard exploitation contracts that tend more and more to be so-called "adhesion contracts", that are proposed to authors with no real margin for negotiation, on a take-it-or-leave-it basis. As cultural markets are considered by economists to be winner-take-all markets, they hold a great part of risk for creators and commercial exploiters alike, a risk that has even been increased in the digital environment with the piracy threat. As a result, only a few creators can earn an income out of their creation and it has been estimated that the top 10% of the UK creators get about 60 to 80% of the total income of the creative profession³. It will come as no

¹ CJEU, 9 February 2012, Luksan, C-277/10.

² The digital environment might have given more room for authors to produce, publish and market their works themselves, but the role of producers and publishers as first exploiters of works remains significant in many cultural sectors.

³ M. KRETSCHMER, Est. DERCLAYE, M. FAVALE, R. WATT, *The Relationship Between Copyright and Contract Law*, Intellectual Property Office, 2010, p.3. Available at <http://eprints.bournemouth.ac.uk/16091/1/contractlaw-report.pdf>.

surprise that, on average, incomes of creators are well below the median income. The current economic situation of creators in Europe, who will be directly affected by austerity policies and the ensuing reduction of culture funding, might further increase their vulnerability.

Copyright contracts will not be a panacea to this troublesome economic situation; however, they could make it worse if they allow for assignments of rights that do not sufficiently consider the interests of creators. Contracts signed between creators and exploiters are indeed essential in the economic life of authors and their works. Whereas copyright contracts could contribute to secure the financial autonomy of creators, they might, if they are unbalanced in favour of the undertakings exploiting the works, fail to provide adequate financial return for creation and to enable the participation of creators in the increasing availability of forms of exploitation of copyrighted works in the digital economy.

This study aims at assessing the rules and legal provisions in the European Union that purport to protect creators in their contractual dealings. Since the European Union has so far declined to harmonise the legal provisions aimed at protecting creators in the contracts they enter into⁴, the matter is left to Member States. Some (e.g. Belgium, France, Spain or Italy) have a detailed and protective set of legal provisions aimed at rebalancing the bargaining power between the creator and her publisher/producer. Other countries have some rules and consider improving them (e.g. the Netherlands). Finally, there are Member States that have no contractual protection at all for creators (e.g. UK). The legal protection that exists in some countries consists of default and imperative rules that copyright contracts should comply with: they deal with transferability of rights (including the issue of moral rights), required formalities, restrictions on transfer of rights, obligations to specify the scope, duration, territorial scope and remuneration of the transfer, obligations of exploitation imposed to the person acquiring the rights, interpretation rules, and termination or revision of contract. Some specific provisions also apply to contracts applicable to defined categories of works, such as publishing contracts for literary works, production contracts for audiovisual works, etc. However, the waiver of copyright in employment contracts and commissioned contracts is generally less regulated.

Additionally, the general rules of contract law can be used to confer more protection on the authors. As the area of contract law is less harmonised in the European Union, the rules will differ greatly from one Member State to the other, but could include the principles of good faith, fairness or equity, the prohibition of unfair terms, some principles of interpretation of contracts, the recourse to usage, etc.

This study analyses the protection of authors in copyright contracts in a selection of Member States and the rules aiming at rebalancing the inequality of bargaining powers, ensuring a fair participation of the author in the exploitation of her works as well as a fair remuneration.

⁴ A previous study on copyright contracts was drafted by the Information Law Institute (IVIR) of the University of Amsterdam in 2002. It concluded that at the time the discrepancies amongst Member States in the field did not have a proven impact on the Internal Market, which might have helped decide the European Commission not to act on the issue. IVIR, "Study on the conditions applicable to contracts relating to intellectual property in the European Union", Report prepared for the EC, 2002.

A first part of the study will give some information on the methodology and definitions, as well as sketch out the background of the exploitation of works and of the contractual relationships pertaining thereto.

In a second part, the legal provisions that could provide some protection to creators will be analysed, whether they result from a specific protection laid down in copyright laws or from the application of general principles of contract law. In some countries, collective agreements add some level of protection for the author and will be examined as well.

A third part will be devoted to the analysis of specific issues where the author might appear to lack some protection. Such selected issues will help assess the efficiency of the protection analysed in the previous section which could require some specific solutions.

The final part of the study will address some recommendations for further action, namely in the legislative field, to better protect authors.

The study also includes, in Annex I, national reports with a more detailed analysis of the provisions in the copyright laws of the analysed Member States. A selection of collective agreements and model contracts that contribute to the protection of authors when assigning their rights is included in Annex III and IV.

1. THE COPYRIGHT CONTRACTS IN CONTEXT

1.1. Methodology

This study aims at discussing the legal framework (contractual law principles and copyright provisions) applicable to copyright creators' contracts as well as identifying the practices in various artistic sectors. The analysis is limited to **authors' exploitation contracts**: contracts whereby the author transfers (by assignment or licence) -or even waives- the exploitation rights in respect of her work to an intermediary (such as for example a publisher, a producer or any other first exploiter of a work). This analysis therefore excludes contracts concluded by performers to assign or transfer their rights to producers. The study focuses on publishing contracts in the field of books, music and visual arts and production contracts for audiovisual works. In the field of music, as contracts assigning copyright in the composition are generally made with music publishers, the producers of phonograms have not been specifically addressed⁵. Finally, contracts between the first transferee of copyright and secondary exploiters or users of copyrighted works (e.g. content providers, distributors, broadcasters) are not concerned as the creator is not a party to such contracts.

In order to draw some conclusions, the legislative framework, case law and practices of a selected number of Member States has been analysed, i.e. Belgium, France, Germany, Hungary, Poland, Spain, Sweden, UK. The selection has been made taking into account the following criteria:

- Countries belonging to **different legal traditions** (common law vs. continental law, copyright vs. *droit d'auteur*⁶);
- Countries with a **different intensity of protection** and level of detail as regards the regulation of copyright contracts (thereby covering a different range of categories: from those with very detailed regulation on exploitation contracts –e.g. Spain - to countries – such as Sweden or the UK - where contractual provisions in their copyright laws are scarce, to those where collective bargaining has a long tradition or prominence – France, Germany);
- A **geographical balance**, including countries representing different European regions (Northern, Southern, Eastern, Western, and Centre Europe); and
- The **size of the country** as well as of their **copyright industries**.

⁵ In the music industry, music publishers and phonogram producers play different roles. Historically, music publishers were in charge of publishing music sheets and were transferred copyright to the composition itself. They generally still own copyright in the composition nowadays, even though no sheet music is published anymore. Phonogram producers on the other hand have neighbouring rights in the phonogram, by making and producing the master of an album. Phonogram producers need to acquire authors' and performers' rights to proceed to the fixation of the works and performances. This distinction is not as fixed as it appears: due to concentration in the music sector, a same company can be a music publisher and a phonogram producer and therefore own different rights in a musical work.

⁶ It is typically said that copyright systems in common law countries greatly differ from author's rights traditions in civil law countries. The main differences would be a stronger focus on the author, more extensive exclusive rights, broader moral rights and limited and closed exceptions in author's right (*droit d'auteur*) models, whereas in copyright systems, the rights would be limited, some open provision of fair use would limit copyright and the author would be less protected (the copyright being vested in the employer or the moral right being minimal, for example). However, this distinction is increasingly attenuated, notably due to the European harmonisation of copyright systems in Europe. Also the differences might appear exaggerated when the systems are genuinely compared. See on that point A. STROWEL, *Droit d'auteur et Copyright – Divergences et Convergences*, Bruylant/LGDJ, 1993.

For each country, a detailed questionnaire concerning the national legal framework both as regards copyright provisions and contract law has been answered by local experts. The following national experts have been associated to the research:

Belgium: Séverine Dusollier & Caroline Ker

France: Séverine Dusollier & Caroline Ker

Germany: Thomas Hoeren

Spain: María Iglesias

Hungary: Peter Mezei

Poland: Maciej Barczewski (assisted by Mr Michal Cieszewski)

Sweden: Antonina Bakardjieva Engelbrekt & Anna Hammarén

United Kingdom: Estelle Derclaye

The valuable inputs of national experts have been taken into account throughout the entire study. A summary concerning the relevant provisions in national copyright laws is included in Annex I.

Furthermore, the analysis of the practices in the Member States has been enriched by the direct inputs of stakeholders representing the interests of both creators and “exploiters” of copyright works, who were consulted by means of questionnaires and through direct interviews. The consulted stakeholders (see the list in Annex II) comprised European associations of authors, of publishers, and of producers, as well as national organisations and collective management organisations. 49 organisations participated in the survey.

The timeframe to produce the present study has been very short, as it was only running for 5 months. However, that has not prevented the collection of an extensive amount of information about copyright contracts in Europe. This report endeavours to present the complexity of the contractual situation of authors in the European Union in a comprehensive manner and its practical consequences for a fair participation of creators in the exploitation of their works. It raises some specific issues but could not, due to its limitation in scope and in duration, provide a thorough analysis of all copyright contracts and practices.

1.2. Definitions

The copyright analysed by this study relates to contracts entered into by creators with producers, publishers or other first exploiters of their works. In what follows, we will talk of creators or authors. The choice of a standard term to designate the other party to the contract was more difficult. “Exploiter” refers to an economic approach and could be confused with any person making an exploitation of a work, i.e. reproducing, distributing, communicating or making works available to the public, with no direct contractual relationship with authors. “Producers” or “publishers” will designate economic actors in specific fields, whether audiovisual or musical sectors for producers or literary, music or visual arts works for publishers. For want of a better or more neutral term, this study will use the terminology of “transferee” to indicate that the other party to the contract with the creator is generally transferred the copyright in order to ensure (and in counterpart of) its exploitation through production, publication and placement on the market.

Despite the choice of the term “transferee”, that seems to indicate a full assignment of copyright, the copyright contracts reviewed here will cover assignments or licences of

copyright. The difference between assignment and licence is not strict or acknowledged in the same way in all Member States. The following definitions apply to these terms for the purpose of the present study:

- **Transfer:** the term transfer should be understood broadly, as covering any act of transmission of rights;
- **Assignment:** there is an assignment of rights when the author alienates her rights to another person to the effect that the author loses the right, which now belongs to the assignee;
- **Licence:** the term licence refers to the authorisation granted by the author to undertake certain forms of exploitation of the work; licences may be exclusive or non-exclusive and may refer to a single right /exploitation modality or a bundle of rights/exploitation modalities;
- **Waiver:** the common understanding of a waiver is the act by which an author relinquishes a right or foregoes enforcing it. This study will refer to copyright waivers when the author abandons her rights. However 'waiving' is sometimes used in copyright as a synonym of assignment to a third party, particularly when discussing about 'unwaivable right' – a term that refers to a right that may not be given up or transferred to a third party.

The contracts referred to in this study are contracts by which the author transfers her rights to a producer or publisher. Other contracts will also be dealt with, namely:

- **Employment contract:** the creation of work can intervene in the framework of a labour relationship between an employer and an employee, who creates works during her work hours.
- **Commission contract:** works can also be created on commission. In such a case, the author is commissioned to create a specific work for some purpose or context.

Exploitation rights are referred to according to the terminology used in the *acquis communautaire*, and notably in the Copyright in the Information Society Directive (Directive 2001/29/EC of the European Parliament and of the Council). Thus:

- **Reproduction right** refers to the right to authorise or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part.
- Right of **communication to the public** refers to the exclusive right to authorise or prohibit any communication to the public of one's works, by material or immaterial means. This right also includes the right of **making available** to the public: the exclusive right to authorise or prohibit any communication to the public of one's works in such a way that members of the public may access them from a place and at a time individually chosen by them.
- **Distribution right** refers to the exclusive right to authorise or prohibit any form of distribution to the public by sale or otherwise, which has been defined by the CJEU as any act of transfer of ownership of the original of a work or a copy thereof.

1.3. The context of exploitation of creative works

1.3.1. The contractual bargain in copyright contracts

Copyright contracts are *contracts*, which mean that they give rise to reciprocal rights and obligations. The “contract” entered into refers not only to the formal document that has been signed between the parties (called the *instrumentum*) but more specifically to what a contract is by nature: it encapsulates and conveys a reciprocal commitment of parties, a mutual agreement (called the *negotium*). When the author licenses or assigns her copyright to a publisher or producer, she does so in consideration of a contractual bargain, of a deal providing some advantages in compensation of the transfer of her right. What is at stake in such a contract is the exploitation of her work by a producer or a publisher and the reciprocal parts of the agreement are the transfer of rights and the remuneration for such a transfer. What the author aims at is that her work be publicly distributed and disseminated, so as to bring her some revenue and recognition.

This first contract concluded by a creator and pertaining to her creation is a fundamental act for the work, as it enables it to become an economic asset and to yield some revenue⁷. The transferee is normally an economic actor that will provide to the author, in counterpart to the transfer, the necessary investment in the production, publishing, and marketing of the work, its capacity of production and promotion, some endeavour in exploiting the work and finding channels for its public diffusion, access to the market, and the expertise and know-how in the said market. The publisher or producer takes the risk of commercialisation of the work, by making it happen (film or phonogram production), by manufacturing commodities (books or phonograms publishing) or by including the work into some comprehensive product (newspapers articles or scientific articles). That does not mean that the author does not have access to production capacities or the market on her own, but that she can entrust the producer or publisher to assume such a role.

The assignment or licence of copyright is the contractual counterpart of the investment and risk undertaken by the transferee. In return, some remuneration should be paid to the creator for that transfer, as the producer will exploit the work of the author and hopefully generate some profit from some material that is not her own.

This conveys the essential bargain that should underlie copyright contracts between creators and producers or publishers. It already assumes that the transfer of copyright deserves some fair return, both in terms of remuneration and in terms of exploitation of the work. Creators expect something in return for the transfer of their rights: remuneration is part of it, but access to the market and investment in making their work ready for such market, which can be collected under the notion of “exploitation”, are also significant parts of authors’ expectations. Additionally, as creative works are “experience goods” in economic terms, meaning that their value is only revealed after their use, that will have some consequences on the difficulty to assess the value of the work and hence, the adequate remuneration for its transfer.

⁷ On the notion of publication see O. BOMSEL (ed.), *Protocoles éditoriaux – Qu’est-ce que publier ?*, Armand Colin, Paris, 2013.

1.3.2. The contractual process: from negotiation to termination

The copyright contract concluded between the creator and the transferee will govern their relation from the negotiation of the contract to its execution. When the author is said to be a weaker party in the negotiation process, one should not neglect her equally weaker bargaining position in other stages of the contractual relationship.

Negotiation of the contract is certainly a decisive moment as it defines the scope, conditions and modalities of the transfer of copyright and sets out the agreement between the parties. It sets the boundaries of the relationship between the author and her producer or publisher.

The **execution** of the contract, i.e. the exploitation of the work according to what has been agreed upon in the contract and the remuneration of the author, is equally relevant for the author and might reveal an unequal power between the transferee and the creator. The latter might not have the information, financial means or power required to challenge the way the contract is executed and the exploitation is undertaken. Neither has the author the financial information necessary to check that the remuneration paid, when her royalties are calculated by a percentage of the benefits generated by the exploitation, corresponds to the revenue earned by the transferee.

By definition, the execution of the contract will happen for the duration of the contract, which can be as long as the duration of copyright. During such a long period, the bargaining power of the author can change for better or worse, depending principally on her success, and the relationship between the author and the producer can be weakened, which makes it even more difficult to get the relevant information and monitoring about the actual exploitation of the work. **Enforcement** of the contract before the courts, should the transferee not comply with their obligations, might be costly or complicated. Authors might be reluctant to proceed due to the cost of litigation or the fear of being blacklisted in their cultural sector⁸.

The author might also be in a less favourable situation as regards the **termination** of contract. The author might be willing to require the termination of the contract in court and recover her rights, e.g. for a lack of exploitation or any other default of execution of the contract, but might refrain from doing so for financial reasons or fear of retribution (in the form of exclusion from the market).

The legal provisions aiming at protecting the author in the contractual process will partially follow the contractual process and can be separated into two categories. The first ones impose some formal conditions to ensure that the contract is concluded in a fair manner. By requiring a written form, or the determination of some elements of the scope of the transfer, the law aims at getting the attention of the author on what will be agreed upon, and might have an effect on the validity or proof of the transfer itself. In that regard, this protection mainly relates to the time of negotiation of the contract. Other legal obligations can conversely pertain to actual obligations of the parties (obligations of exploitation, of reporting, etc.) and regulate the matter of the contract itself. They will have an effect on the exercise of the contract.

⁸ Such blacklisting appears to be rather frequent, based on several reports by the persons interviewed for the present study. Authors decline to challenge the unfairness of contracts they have signed or their lack of execution for fear of not being able to find a production deal in future. Stories of 'defiant' authors who were in practice excluded from the profession after having sued their producers have been reported to us.

1.3.3. Copyright contract and remuneration

For most authors, one essential aim of the copyright contract is to secure some remuneration for the transfer of their work. This is also a repeated principle in the EU directives in the field of copyright. For instance, the Copyright in the information Society Directive states that "if authors or performers are to continue their creative and artistic work, they have to receive an appropriate reward for the use of their work, as must producers in order to be able to finance this work"⁹. This is a matter, for the same directive, of "safeguarding the independence and dignity of artistic creators and performers"¹⁰.

The setting of a remuneration for the assignment or licence of copyright in her works is the first means for a creator to secure some revenue in exchange of the transfer of her rights and to determine some participation in the revenue and economic exploitation that will be undertaken by the transferee and subsequently, by other exploiters with whom the creator will not have any relationship.

The contract might determine the model for remuneration but will not necessarily in itself ascertain that some remuneration will be paid, as this might depend on the benefits generated (or not) by the work, when the remuneration is proportional thereto, and on the good execution of the contract by the transferee.

It should be noted finally that, in some fields, the remuneration will not be the primary purpose of the exploitation of the works and that authors will not customarily get paid. This is the case of scientific publications or some specific works. Authors can also opt for free dissemination of their works, even partially (as in the case with open access licensing models). The lack of remuneration in some cases would give a different balance to the contract that should also be considered.

1.3.4. The copyright contract in context

This study addresses the contract agreed upon between the author and the publisher or producer, who is the first exploiter of the work and is generally in charge of the initial act of putting the work on the market.

This contract, however, is only one element in the many relationships related to the exploitation of the work:

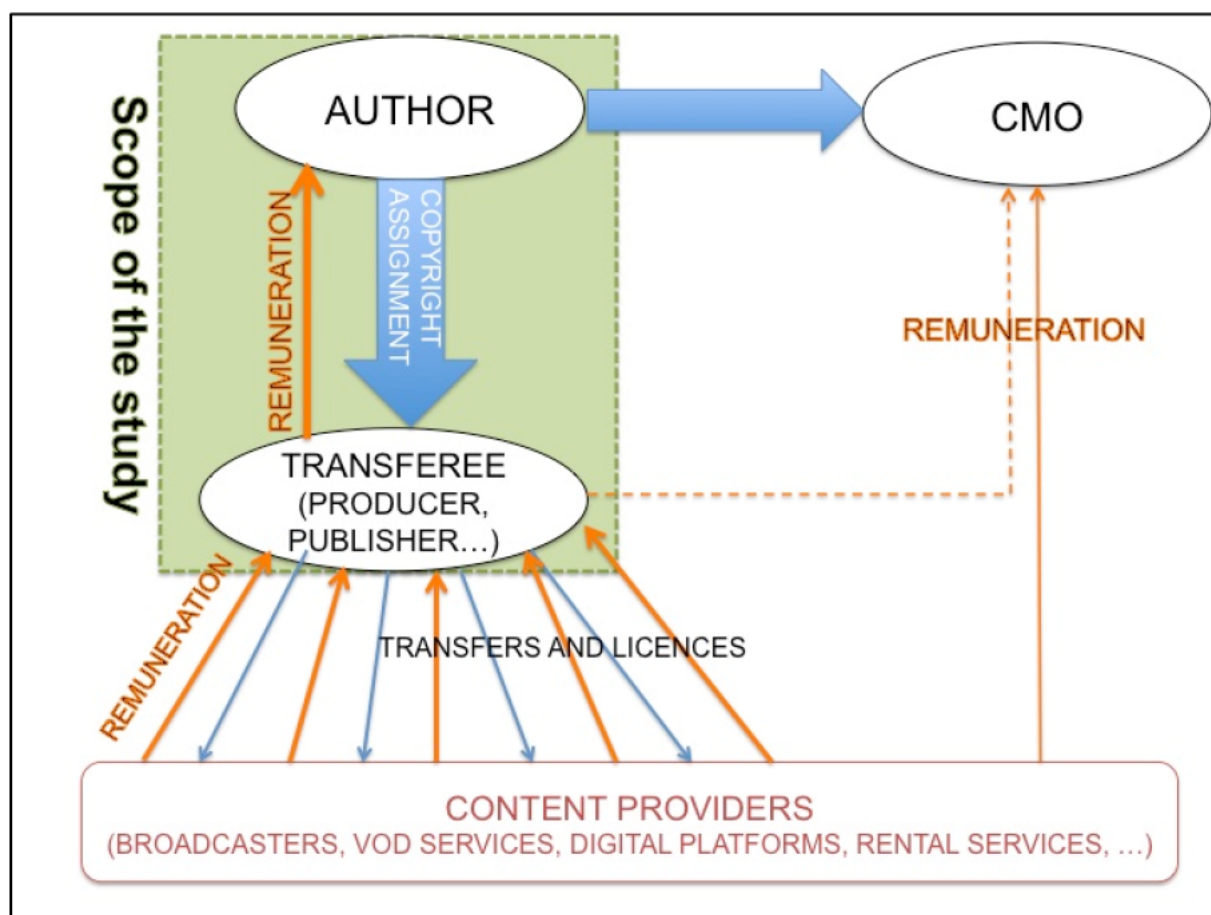
- the author can be member of and entrust her rights to a CMO that will manage such rights on her behalf and collect remuneration for some forms of exploitation;
- the scope and modalities of exploitation will be decided through many contracts entered between the first transferee and other exploiters (e.g. content providers, broadcasters, authors or producers of derivative works,

⁹ 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, recital 10 (hereinafter Copyright in the Information Society Directive); See also recital 5 of 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 (hereinafter Renting and Lending Rights Directive), and recital 3 of 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 (hereinafter Resale Right Directive) ("The resale right is intended to ensure that authors of graphic and plastic Works of art share in the economic success of their original works of art").

¹⁰ Recital 11.

- retailers), to which the author is not a contracting party. Yet, the subsequent contracts between the first transferee and other exploiters are made possible by the assignment granted by the author to the former;
- the remuneration of the author can also result from other contracts signed with exploiters of works (e.g. employment contract, commission contracts).

This web of contractual relationships and remuneration flows could give the following picture:



The location of the copyright contract between the author and the first exploiter of the work in this bigger picture should not induce any neglect of the indirect effect that the contracts subsequently entered into by the transferee of copyright with other exploiters might have on the forms, modalities and remuneration of further exploitation. Remuneration of the author for the exploitation of her work undertaken by subsequent exploiters that acquire the rights from her producer or publisher will arguably be influenced by the deal that the latter has obtained with those exploiters. However, the authors will generally have no say in those subsequent agreements.

Intervention of CMOs in the decisions concerning modes of exploitation or management of remuneration, when such issues were left open by the contract between the author and the transferee, will also disrupt the traditional picture of an isolated contract as the sole determination of the remuneration for the exploitation of the work.

Both elements will be taken into consideration throughout this study, as they seem necessarily entangled with the copyright contracts themselves.

This overall picture should be qualified depending on the type of creation and of the cultural sector concerned:

- *Literary works* (focusing on the book sector): authors of literary works will generally assign their rights to publishers in exchange for publication of the work. Publishers will produce books in printed or electronic form and will put them on the market through retailers, bookshops, or e-books platforms, entering licensing agreements with the latter. Authors can also be represented, depending on the country, by agents or CMOs. Depending on the countries, collective management organisations of literary works for the most part collect some remuneration rights or also exercise exclusive rights on behalf of the authors. The copyright contract concluded with the publisher aims at transferring the right to primary exploitation and setting the royalty rate for the sale of the book.
- *Musical works*: Authors of musical works will generally assign their copyright to music publishers, who then own copyright over the songs, whereas record producers or labels will own the related right in the master recording. The phonogram will be produced and put on the market by a producer for royalties collected by the music publisher. In addition, some rights in music (performance and mechanical reproduction) are managed by CMOs which are unavoidable in the music sector, due to the difficulty of individually managing rights for some kinds of music exploitation (such as broadcasting and public communication). Further exploitation by content providers will generally have to clear copyright from producers and CMOs¹¹.
- *Audiovisual works*: Authors of audiovisual works will assign their rights to producers and might be members of CMOs that will manage some rights on their behalf. The producers will then conclude contracts with further exploiters (broadcasters, VOD platforms, etc.). Some of those contracts pre-exist the making of the audiovisual work, as the licence of the right to broadcast or otherwise exploit the work might be remunerated by a financial participation in the production.
- *Visual arts*: the situation in visual arts will be radically different as the author will generally not sign an assignment contract with a producer or publisher, but will manage her rights with several exploiters requiring the use of a work either by a licence or by assignment (for instance, in order to insert a photograph in a book). CMOs in visual arts might sometimes act as a sort of agent, providing the works of their members for use. A broad part of the remuneration perceived by visual artists might also come from sources other than remuneration for specific exploitations, such as commission contracts.

We will also see further on that some individual copyright contracts might be accompanied by collective agreements that will set the overall framework for the obligations of the parties. This collective dimension might involve several stakeholders and be validated by law to give them some *erga omnes* legal effect.

¹¹ For instance, a broadcaster will have to pay rights to the producer for broadcasting the phonogram, but he will also have to pay rights to authors' CMO for the broadcasting of the songs. This will be even more intricate in the case of multi-territorial licensing directly from the publishers through the new entities created ad hoc; see KEA, Licensing music works and transaction costs in Europe, 2012. Available at: <http://www.keanet.eu/docs/musiclicensingandtransactioncosts-full.pdf>

The very first contract in the chain or web of contractual relationships illustrated above should facilitate the participation of the authors in the benefits generated through the whole value chain. The existing tradition of collective negotiation between CMOs and users (broadcasters, content providers) is a key element too. The dynamics and business models of the different sectors, and within the sector depending on the kind of work/contract, certainly differ. While in some sectors remuneration primarily derives from primary uses (books), in other sectors (ex. in music) remuneration from secondary uses might be more important. Contracts concluded by creators and their modes of remuneration will thus strongly depend on the economic organisation of each cultural sector, which requires the consideration of the peculiarities and practices of each sector when studying the application of contractual rules, the issues faced by the authors and any suggestion for legal or regulatory intervention.

All this shows the complexity of the analysis. This study tries to give an overall overview of legal provisions and contractual practices but, due to time and resource constraints, does not intend to provide a sector by sector investigation.

2. LEGAL PROVISIONS PROTECTING THE AUTHOR IN COPYRIGHT CONTRACTS

2.1. Copyright Law

In this section a comparative analysis is made of the different rules that exist for copyright contracts in eight EU Member States: Belgium, France, Germany, Hungary, Poland, Spain, Sweden and the United Kingdom. In the EU, there are still 28 different national copyright regimes and there is no truly harmonised system across European borders. Certain aspects of copyright law have been harmonised in a number of EU Directives,¹² but are implemented differently throughout the EU.¹³

The analysis focuses primarily on the provisions in the copyright legislation and case law that are favourable towards the authors and designed to protect their contractual rights as they are presumed to be in a weaker bargaining position with respect to a transferee.

The national legal frameworks of the eight countries under review are quite fragmented and there are many disparities. On the one hand, countries like Belgium, Germany, France and Spain have detailed rules to protect the contractual relations of authors; on the other hand, Member States such as Sweden and the UK provide transferees with more contractual freedom to negotiate the content and conditions of a contract with an author. As said before, legal provisions protecting the interests of authors will intervene at different stages of the contractual process, consisting either of imposing formalities to ensure the contract is concluded in a fair manner or of imposing actual obligations to the benefit of authors. A summary of existing legislation is presented in the following sections.

2.1.1. Restrictions related to the form of transfer of rights

Authors can use different categories of contracts to exploit their rights. The type of contract used by contracting parties is one of the key elements to determine the legal relationship between the author and the transferee when exploiting the works of the author. The author can transfer by contract all or part of her rights. The three most common forms used to transfer rights in contracts are: (1) assignments, (2) licensing and (3) the waiving of rights.

¹² 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 (hereinafter Satellite and Cable Directive); Council Directive 96/9/EC of 11 March 1996 on the legal protection of databases (hereinafter Protection of Databases Directive); Copyright in the Information Society Directive; Resale Right Directive; Council Directive 2004/48/EC of 29 April 2004 on the enforcement of intellectual property rights; Council Directive 2009/24/EC of 23 April 2009 on the legal protection of computer programmes; Rental Rights and Lending Rights Directive; Council Directive 2011/77/EU of 27 September 2011 amending Directive 2006/116/EC on the term of protection of copyright and certain related rights (hereinafter Term of Protection Directive); Council Directive 2012/28/EU of 25 October 2012 on certain permitted uses of orphan works (hereinafter Orphan Works Directive).

¹³ M. KRETSCHMER et al. 2010, p.76; Commission Report on the public lending rights in the European Union COM/2002/0502 final; Commission Report on the harmonisation of certain aspects of copyright and related rights in the information society SEC (2007) 1556; IVIR, *The Recasting of Copyright & Related Rights for the Knowledge Economy*, Amsterdam, 2006; T. DREIER, B. HUGENHOLTZ, *Concise European Copyright Law*, Kluwer Law International, 2006.

In the case of an assignment of rights, the author transfers the ownership of the (usually economic) right to another legal entity. As a result of an assignment, the transferee stands in the shoes of the author and can do what she pleases with the rights. An assignment could be compared to a sale – it confers to the transferee the right itself and thereby deprives the author of such a right. The author loses all claims on her rights and may no longer perform the acts, conferred by the rights she transferred, without the transferee's permission.¹⁴ In most EU Member States, with the exception of Germany and to some extent Hungary, author's rights may be subject to assignment.

If the rights have been licensed, the author remains the owner of the rights but the transferee is allowed to exercise the right – so long as the use falls within the terms of the licence. A licence is defined as the permission to perform an act which, if that authorisation was lacking, would be an infringement of the author's right.¹⁵ There are exclusive and non-exclusive licensing agreements as well as express and implied licences.¹⁶ An exclusive licence is a special form of licence, as it authorises the transferee to exploit the rights to the exclusion of all persons, including the author. In all Member States the licensing of rights is permitted.

By waiving her rights, the author renounces certain rights to the benefit of the transferee or renounces to enforce her rights. This is possible in all countries, although limitations exist for the remuneration and moral rights of the author (see section 1.3 and 1.4 below).

The level of protection of an author can depend on the type of contract used to transfer her rights, with more protective rules applicable to assignments of rights and less stringent rules or no rules at all for licensing contracts, as in these cases the author remains the owner of the rights.

Germany does not permit the assignment of the author's rights.¹⁷ Its copyright law favours the author rather than the transferee and provides for the licensing of the so-called "use rights" ("*Nutzungsrechten*")¹⁸ - a licence may be exclusive, or relate to particular manners of exploitation, or be limited in respect of place, time or purpose.¹⁹ The author thus merely grants her "use rights" and the author's right itself remains with the author, at least until her death, after which it may pass to her heirs.²⁰ Also Hungarian law is restrictive and the assignment of rights can only be used in exceptional cases, such as for the assignment of the rights in jointly created works,²¹ works made for hire,²² works ordered for advertising²³ and film contracts.²⁴ In all other cases Hungarian law prescribes the use of a licensing agreement for the transfer of rights.²⁵

¹⁴ See supra Chapter I. Also: IVIR, 2002, p. 28

¹⁵ *Idem*, p. 28.

¹⁶ *Idem*, p. 28 - "An implied licence will be deemed to exist for example when, viewing the facts objectively, the words and conduct of the alleged licensor, as made known to the alleged licensee, in fact indicated that the licensor consented to what the licensee was doing".

¹⁷ UrhG, s.29.

¹⁸ The reason therefore is the monist character of copyright in German law, that is to say it consists of only one right in which the moral right and the economic rights are intertwined and are one of the same thing. This explains why copyright cannot be assigned.

¹⁹ UrhG, s.31 and 32.

²⁰ UrhG, s.28.

²¹ HCA, art. 6.

²² HCA, art.30.

²³ HCA, art. 63.

²⁴ HCA, art. 66.

²⁵ HCA, art. 9(3).

In all the other Member States, authors' rights can be assigned. In Belgium, France, Sweden and the UK the contracting parties have more freedom to decide the form they wish to use to exploit the authors' rights. In Spain, the legislation is not very clear, but the legal doctrine considers the full assignment of all authors' rights incompatible with the Spanish legal tradition.²⁶

In practice, it is not always obvious if in a contract the rights have been assigned or licensed. This is particularly true when the wording of the contract is unclear.²⁷ The similarity between assignments and exclusive licences has led a number of legal scholars to conclude that the distinction is more academic than practical.²⁸

The Polish legislation has a useful provision for these cases: if there is no clear provision in the contract on the form of the transfer, it is deemed that the author has granted a licence.²⁹

2.1.2. Form requirements

Authors tend to be better protected if there is a requirement in the law to have a written agreement signed by both the author and the transferee, outlining clearly the scope and conditions under which the author has transferred her rights. For transferees, this written agreement is also useful if they, for example, wish to sue a third party for infringements of the transferred rights. Requiring the contract to be in written form also helps the parties to lay down the scope of the assignment and the obligations of the parties, which would reduce further dispute.

A written document can serve a number of objectives. First, it can encourage parties to negotiate. Second, it gives both parties some reflection time and protects them against the disadvantageous consequences of an impulsive decision. Third, it can ensure that both parties provide the required information for the drafting and conclusion of a contract.³⁰ Fourth, it is useful for evidence purposes ("*ad probationem* effect") - the general rules of civil evidence often impose much stricter requirements of proof on an informed or professional party claiming the execution of an obligation than on a non-professional or weaker party owing that obligation.³¹ Fifth, in certain cases it also serves as a condition for the validity of the contract ("*ad validitatem* effect"). In these cases the author can have a stronger position to defend her rights and call on the nullity of the transfer of her rights if there is no written agreement.

While in certain countries a written form is needed for all contracts transferring exploitation rights, in others it is only required for certain types or forms of contracts used by parties to transfer rights. Also, the legal effect of the requirement may vary from one country to another.

In Belgium³² and Spain³³ the situation is relatively simple and in principle a written form is needed for the transfer of all rights. In Hungary³⁴, Poland³⁵ and the UK³⁶ this is also

²⁶ S. CAVANILLAS, in R. BERCOVITZ, *Manual de Propiedad Intelectual*, Tirant Lo Blanc, 2007, p. 1462 et seq. 1538.

²⁷ According to UK case law, it is a matter of construction and the words used by parties are not conclusive (see *Jonathan Cape v Consolidated Press* [1954] 3 All ER 253).

²⁸ IVIR, 2002, p.29.

²⁹ UPAPP, art. 65.

³⁰ IVIR, 2002, p.31.

³¹ IVIR, 2002, p.31.

³² LDA, art. 3 (1. 1er, al. 2).

³³ LPI, art. 45.

the case, but it is slightly more complicated as there are a number of exceptions to the general rule. For example, in Poland and the UK a written form is required for the assignment of rights and exclusive licensing agreements. A written contract is, however, not needed for non-exclusive licensing agreements³⁷ - they can be oral agreements. Hungary does not make this distinction and has introduced two other exceptions: written contracts are not needed for works published in a daily newspaper or periodicals³⁸ and for works made available by the author through electronic means.³⁹

There are also differences in the legal effects of the requirement of a written form for contracts. In Belgium⁴⁰ and Spain⁴¹ the requirement has an *ad probationem* effect in favour of the author, which means that authors can validly transfer their rights without a written form, but if a contract does not have a written form, the author is the only contracting party that can ask the court to declare the contract void.⁴² In Hungary⁴³ and Poland, the written form requirement has an *ad validitatem* effect.

In France, copyright law only requires a written form for certain contracts (publishing, performance and audio-visual contracts), but in practice, this is also necessary for other types of contracts. This rule has an *ad probationem* effect in favour of the author. Case law does admit tacit agreements provided they are unequivocal.

Despite the written form requirement foreseen by law, in the UK an assignment can also be made orally and the equitable rule will apply - i.e., so long as there is consideration, an oral contract purporting to assign rights will be enforceable. In the UK a court may find that there is an implied licence, but there are only two circumstances in which courts will imply terms in a contract: (1) they are implied by law and are inherent in the nature of the contract and (2) terms may be implied to fill gaps in an agreement but only if it is necessary to provide business efficacy.⁴⁴

No written form is needed in Germany⁴⁵ and Sweden. Contracts can be concluded orally or even by tacit agreement. In practice, most contracts are in writing in Sweden, with the exception of agreements concluded in the advertising industry.⁴⁶

2.1.3. Determination of the scope of rights transferred

A number of countries have introduced mandatory contractual provisions in their copyright laws to ensure that contracts determine more precisely the exact scope and terms of the rights transferred (including issues such as category of rights, geographical scope, duration, future works, unknown forms of exploitation, etc.). Authors can claim the nullity of a contract if certain of these mandatory items have not been laid down in it.

³⁴ HCA, art. 45(1).

³⁵ KC art. 73(1).

³⁶ CDPA s.90 and 92(1). According to UK case law an invoice or receipt is enough to comply with the written form requirement - See *Savoury v World of Golf* [1914] 2 Ch. 566.

³⁷ KC, art. 73 (3).

³⁸ Compare to case BH1992.525 ; Legf. Bír. Pf. IV. 20 062/1992. sz..

³⁹ HCA, art. 45(2).

⁴⁰ LCA, art. 3 (1)

⁴¹ J. A. TORRES LANA, in R. BERCOVITZ (ed.), 2007, p. 793.

⁴² IVIR, 2002, p.48.

⁴³ This legal effect was decided in court decision of the AppBH1994.129 and confirmed by the court in *Decision no. 4.P-20.188/2010/7* of the County Court of Győr-Moson-Sopron, Hungary.

⁴⁴ *BP Refinery (Westernport) v Hastings Shire Council* [1977] 16 ALR 363.

⁴⁵ Written form is however required for the transfer of future rights or unknown forms of exploitation, and it is needed for the agreement to be valid. See also decision of the German Federal Supreme Court ZR 50/69, GRUR 1971, 362 and the decision of the Higher Regional Court Frankfurt (OLG), 6 U 103/89, NJW-RR 1992, 756.

⁴⁶ J. ROSEN, *Upphovsträttens avtal (Copyright contracts)*, Norstedts juridik, 2006, p. 83.

These provisions strengthen the position and legal certainty of authors. They allow authors to be more aware of the scope and the terms under which they transfer their rights. The contracting parties are forced to be specific when drafting the contract, thereby ensuring an informed consent on the part of the author. These rules thus prevent authors from signing a blank contract in transferring their rights.

An indirect effect of these types of provisions will be to limit the automatic transfer of the rights of an author to one single exploiter. An author can decide, for example, to exploit certain rights herself or to contract with other exploiters for a number of exploitation modes, geographical territories etc. In practice, however, few authors have the possibility to choose different exploiters for their works.

Provisions are stricter in countries such as Belgium, France, Poland or Spain. More lenient provisions exist in Germany⁴⁷, Hungary⁴⁸, Sweden⁴⁹ and the UK⁵⁰.

Below, an overview is given of the mandatory clauses that certain countries require to be laid down in contracts.

2.1.3.1. General obligation to determine the assigned/licensed rights and modes of exploitation in contracts

In Belgium,⁵¹ France,⁵² and Poland⁵³ the type of rights to be transferred as well as each exploitation mode need to be expressly specified in the contract. Otherwise, the authors are entitled to claim its nullity. According to relevant case law,⁵⁴ in Belgium the transfer of rights for a specific exploitation mode is deemed not to have taken place if it is not mentioned in the contract.⁵⁵ In Poland, the legal doctrine and case law are disputing the need for all exploitation modes to be mentioned in a contract.⁵⁶

2.1.3.2. Obligation to determine the geographical scope and duration of the transfer of the rights

In Belgium,⁵⁷ France⁵⁸ and Spain⁵⁹ the geographical scope and the duration of the assignment must be laid down in the contract.

In Belgium and France, authors may claim the nullity of a contract that does not specify these matters. The *Cour de cassation*⁶⁰ in France declared a contract void because it did

⁴⁷ The law stipulates that if the different modes of exploitation have not been specifically defined when they were granted, the modes of use are determined in accordance with the purpose envisaged by both parties in the contract (UrhG, s.31 (5)).

⁴⁸ HCA, art. 42(2).

⁴⁹ URL, art. 27.

⁵⁰ In the UK, the law only requires parties to identify clearly what is being transferred or licensed. The work must be identified clearly enough that it can be ascertained. However, oral evidence can be adduced to assist in identifying the work. UK case law: *Savoury v World of Golf* [1914] 2 Ch 566 and *Batjac Productions v Similar Entertainment* [1996] FSR 139). A mere sale or transfer of the work does not mean that the copyright of it has been assigned.

⁵¹ LDA, art. 3 (1).

⁵² CPI, art. 131-3(1).

⁵³ UPAPP, art. 50.

⁵⁴ *Hof van Cassatie*, (1e Kamer), 11/5/1998, (*C.V.S. v. B.V.B.A.C.*), *Rechtskundig Weekblad* 1998-1999, nr. 21, 23 Januari 1999, p.713.

⁵⁵ IVIR, "Copyright Contract Law: Towards a Statutory Regulation?" , Amsterdam, 2004, p. 36

⁵⁶ T. TARGOSZ, K. WŁODARSKA –DZIURYŃSKA, *Umowy przenoszące autorskie prawa majątkowe*, Wolters Kluwer Polska, Warszawa, 2010, p. 39.

⁵⁷ LDA, art. 3.

⁵⁸ CPI, art. 131(3).

⁵⁹ LPI, art. 43.

not include a clause on the scope and duration of the rights transferred.⁶¹ In Spain, the sanction is less strict and the law stipulates that if a contract fails to lay down precisely the duration and geographical scope, the transfer will be limited to five years and the territory in which the contract was concluded.

It should be pointed out that in Belgium, despite these strict rules, authors are allowed to transfer their rights for global exploitation and for the entire length of the term of protection, provided that it is done explicitly.⁶² There are some limits on the duration of contracts for live performances in Belgium.⁶³ They must be concluded for a limited length or quantity of the number of communications of the work to be made to the public – both are to be determined in line with what is considered to be the normal business practice in the sector. For the exclusive licence for live performances, the legal length of the contract is limited to three years. If a contract exceeds these limits, the exceeding part of the contract will be void.

In Hungary, the duration will be based on customary duration in contracts concluded for the use of similar works and the geographical scope will only include the territory of Hungary if the contract is not clear.⁶⁴ Sweden has a non-mandatory provision for the transfer of the communication to the public right and the public performance right - limiting the transfer to three years and not conferring any exclusivity to the transferee.⁶⁵ Contracting parties are not obliged to follow this rule and the provision can be used as a guideline.

2.1.3.3. Prohibition to waive or assign some rights for remuneration

In some countries, some rights of remuneration for private copy or reprography are deemed unwaivable. This option has been imposed by the CJEU in the recent Luksan case,⁶⁶ according to which the right of a filmmaker to receive a fair compensation for a private copy may not be part of the presumption of transfer to the producer. This issue will be further analysed below (Chapter III, section 4).

2.1.3.4. Future Works

Mandatory provisions referring to future works protect the rights of authors with regard to works that have not yet been created. Future works can be understood as works for which the author does not know what form or content they will have. Future works are in fact creations upon which no copyright is yet granted.⁶⁷

These rules are aimed at protecting the author against contracts that oblige her to transfer rights in future works, as this may be asked of young and unknown authors. Transferees are often interested in including future works in a contract in order to build in

⁶⁰ French case law: *Cass. (1^e chambre civile), January 2001 (Edition Cerce D'art), in Légispresse 2001/180. p. 61*

⁶¹ IVIR, 2004, p. 35.

⁶² F. DE VISSCHER, B., MICHAUX, *Précis du droit d'auteur et des droits voisins*, Bruxelles, Bruylant, 2000.

⁶³ LDA, art. 31.

⁶⁴ HCA, art. 43(3).

⁶⁵ However, if the right is transferred for a longer period and under exclusivity, after a period of three years the author is granted back the right, or he can transfer the rights to another person, if the transferee has not exercised the right within this period. In practice, the license is transformed from an exclusive license to a non-exclusive one. This provision does not apply to audio-visual works.

⁶⁶ CJEU, 9 February 2012, Luksan, C-277/10.

⁶⁷ IVIR, 2002, p.50.

more financial security, as they will also be taking the risk of exploiting the work(s) of the authors.

Such provisions may limit the number and type of works to be covered in a contract, as well as the duration of the transfer of the rights for these works. There are some variations on how future works should be covered in contracts in the Member States, but the majority of countries have rules to protect the rights of the author.

Contract clauses licensing the use of an unlimited number of future works are null and void in Belgium,⁶⁸ France,⁶⁹ Hungary,⁷⁰ Spain⁷¹ and Poland,⁷² but there are some differences between them as to how future works can be licensed.

Both France and Spain consider as null and void clauses that refer to a global transfer of exploitation rights on all future works.⁷³ In practice, the provisions on future works are difficult to apply in France, in particular for contracts with an indefinite duration obliging an author to produce and deliver a series of works in the future. Creative solutions have been found to solve this problem, for example by constantly updating the transfer of the rights.⁷⁴ In Spain, it is permitted to transfer rights on future works if they are perfectly identifiable.⁷⁵

In Belgium, the transfer of rights in future works is permitted under certain conditions: the duration and type of works ('genres') must be laid down in a contract and the duration must be reasonable. These rules are not applicable to works carried out under employment contracts or commissioned works.⁷⁶

Germany admits the possibility to grant exploitation rights for unspecified works that are not yet in existence but are to be composed in the future.⁷⁷ These rights do not need to be specified in any way in an agreement.⁷⁸ Since 2008 such agreements however do need to be put in writing to be valid (this is one of the exceptional cases in which the German copyright law requires a written form to transfer rights). The contract can be terminated by either party after five years. The author's right to termination may not be waived in advance.⁷⁹

In the UK it is also possible to assign future rights according to case law;⁸⁰ there are no rules limiting the transfer of future works to protect the interest of the authors.

⁶⁸ LDA, art. 3(2).

⁶⁹ CPI, L. art. 131-1.

⁷⁰ HCA, art. 44(1).

⁷¹ LPI, art. 43(4).

⁷² E. TRAPLE, *Umowy o eksploatację utworów w prawie polskim*, Wolters Kluwer Polska, Warszawa, 2010, p.48.

⁷³ In France, there are exceptions to this rule, such as pre-emption clauses in edition contracts, and "the general contract of representation" where a show-business company may be authorized by a CMO to communicate to the public the "existing and future works" of the CMO's repertoire.

⁷⁴ IVIR, 2004, p. 42.

⁷⁵ M. del C. GETE-ALONSO, in R. BERCOVITZ (ed.), 2007.

⁷⁶ LDA, art. 35 (3).

⁷⁷ UrhG, s.40(1).

⁷⁸ UrhG, s.40.

⁷⁹ UrhG, s.40 (2).

⁸⁰ *Schroeder Music Publishing v Macaulay* [1974] 3 All ER 616 (HL). This only works if the agreement is for valuable consideration (s. 91(1)). See *PRS Ltd v B4U Network (Europe) Ltd* [2012] EWHC 3010).

2.1.3.5. *Unknown Forms of Exploitation*

Technological changes and new digital media are opening new exploitation modes for authors to exploit their rights. Rules on unknown forms of exploitation allow authors to retain a certain level of control over how their rights can be exploited in the future and ensure that they have the freedom to exercise their rights in the way they consider would best serve their interests. This is in particular the case if the author cannot evaluate the economic importance of the forms of exploitation that will arise in the future. Such rules also permit authors to have the possibility to benefit from the potential new profits that will be generated by transferees through new forms of exploitation.

Stringent rules are applied in Belgium,⁸¹ France,⁸² Hungary,⁸³ Poland⁸⁴ and Spain⁸⁵ - limiting the possibilities of the parties to sign a contract to transfer all unknown modes of exploitation. The law in Belgium expressly states that a transfer of rights for all modes of exploitation cannot be extended to forms of unknown exploitation and declares such clauses in contracts null and void. This has been confirmed in the *Central Station* case⁸⁶ (see Chapter III, section 1). The nullity only affects the clauses in question, not the entire contract,⁸⁷ and can only be claimed by the author. It is not forbidden to transfer the rights for unknown forms of exploitation in employment contracts or for commissioned works.⁸⁸

The legislation in France is slightly more flexible and permits the transfer of rights in certain restricted cases. The transfer is prohibited unless the participation of the author in the profits from its exploitation has been expressly laid down in the contract.⁸⁹ The *Plurimédia* case⁹⁰ dealt with the on-line distribution of news articles of the printed press and television. The court decided that the contract that the journalist had signed with the publisher in 1983 did not foresee the use of the Internet as an exploitation mode at that time, so the on-line distribution of the articles of the journalist was not covered by the contract and the journalist had not given his consent. After this case, the courts continued to render judgements⁹¹ in favour of authors/journalists.⁹²

Germany has added a new provision in its legislation that differs from the rules of other European countries.⁹³ Since 2008, authors (not performers) are entitled to demand adequate remuneration instead of challenging the transfer of the rights for new form of unknown exploitation. Before the introduction of this provision, contracts on future uses unknown at the time of the licensing agreement were prohibited. The new rule simplifies dealing with copyright rights. Contracts dealing with unknown types of exploitation have to be in a written form and authors have the right to revoke the transfer of the right(s)

⁸¹ LDA art. 3(2).

⁸² CPI, L. art. 131-6.

⁸³ HCA, art. 44(2).

⁸⁴ UPAPP, art. 41 (4).

⁸⁵ LPI, art.43.

⁸⁶ *Central Station v. AGJPB*, Tribunal de première instance de Bruxelles, 16 October 1996, No. 96/6601/A ; in P. B. HUGENHOLTZ & A. M.E. DE KROON, *The Electronic Rights War. Who owns the rights to new digital uses of existing works of authorship?*, IRIS – Legal Observations of the European Audiovisual Observatory, 2000-4.

⁸⁷ IVIR, 2002, p.49.

⁸⁸ LDA, art 3 (3).

⁸⁹ CPI, L. art. 131-6.

⁹⁰ *Plurimédia*, Regional Court Strasbourg, 3 February 1998, *Légipresse*, p. 19 and 149-III, p. 22; cited in IVIR 2002, p. 65.

⁹¹ *Le Figaro*, TGI Paris, 14 April 1999, *Légipresse* 162-I, p. 69 en 162-III, p. 81; *Le Progrès*, TGI Paris, 21 July 1999, *Légipresse* 166-I, p. 132 en 166-III, p. 156; Court of Appeal of Lyon, 9 December 1999, *Légipresse* 168-I, p. 9 and 168-III, p. 7 ; cited in IVIR 2002 p. 66.

⁹² IVIR, 2004, p. 40.

⁹³ UrhG, s.31a (1).

within a period of three months after the transferee informed the author about the new form of exploitation. The author may not exercise this right contrary to the principle of good faith if her work is part of an entity of works that is being exploited⁹⁴.

Sweden and the UK have no provisions in their legislation regulating the transfer of rights for future and unknown forms of exploitation.

2.1.3.6. Restrictions to transfer moral rights

In addition to economic rights, authors also have moral rights in their works. These rights protect the non-economic interests of authors. They cover, among others, the right to be named when a work is copied or communicated (the right of attribution) and the right to control the form of the work (the right of integrity).⁹⁵ Rules restricting the assignment and/or waiving of moral rights can be found in various national laws.⁹⁶ With the exception of the UK,⁹⁷ they cannot be waived entirely, although partial and limited waiving is possible in some countries. In France, there is an extensive jurisprudence on the waiver of the author's moral rights and courts tend to be very protectionist, especially with respect to the author's right of attribution and the right of integrity.⁹⁸

In practice, transferees in many countries are asking authors to sign standard contracts, which require them to waive a number of their moral rights, such as their integrity rights to allow adaptation of their works⁹⁹. There is a lot of criticism that such wide waivers (in particular in the UK) are eroding the moral rights of authors.

2.1.4. Determination of remuneration

The remuneration of the author is one of the most important features of a contract. Authors are presumed to be in a much weaker position to negotiate an adequate level and type of remuneration with the often more powerful transferees. Fair and clear rules can assist authors in obtaining an adequate remuneration for the exploitation of their works, as contracting parties tend to have conflicting interests: authors will generally wish to receive a high reward for their works, while the transferees, wary of the commercial risk they take and not knowing what could be the potential success of the exploitation, might not be inclined to pay a high price to the authors.

The countries reviewed (with the exception of the UK) have a number of rules concerning the remuneration of the authors and acknowledge in their legislation the right of the author to be remunerated for the transfer of her rights. The majority of countries leave the amount of the remuneration due to the author to be set by the contracting parties.¹⁰⁰ However, a small number of countries, particularly the ones known for having rules to protect the contractual rights of authors, also have legislation to determine the type of remuneration to be used to compensate authors (such as proportional remuneration,

⁹⁴ UrhG, s.31a (3).

⁹⁵ Berne Convention, art. 6 bis (1) "...Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honour or reputation".

⁹⁶ Belgium, LDA, art. 1(2); France, CPI, art. 121(1); Germany, UrhG, s.29Abs. 1; Hungary, HCA, art. 9(2); Poland UPAPP; Spain, LPI art. 14, Sweden, URL, art. 3.

⁹⁷ CDPA, s. 87(2). There is a restriction on the possibility to assign moral rights – they are not assignable between living people (s. 94) but are on death (s. 95).

⁹⁸ IVIR, (2002), p.64.

⁹⁹ Survey carried out by the authors of this report.

¹⁰⁰ IVIR, (2004), p.32.

equitable remuneration and lump sum). Germany has recently amended the copyright law and recognises adequate remuneration as a key objective of copyright (s. 11 UrhG). These rules will be discussed below.

2.1.4.1. General obligation to specify the amount of remuneration in the contract

In Belgium¹⁰¹ and France there is a general obligation to specify in the contract the amount of remuneration to be paid for the transfer of rights. There is, however, no obligation in Belgium to remunerate the author: the transfer can be equal to a zero sum if this has been expressly stated in a written agreement. In France, on the contrary, case law has ruled that publishing contracts must stipulate a remuneration that does not equal zero (see section 1.9).¹⁰²

Authors can claim nullity of the transfer in France and Belgium if the contract does not expressly stipulate the remuneration for each of the exploitation modes. This is also the case in Belgium if all exploitation modes have been transferred, but the remuneration for one of the transfers of rights has not been stipulated in the contract.¹⁰³

In Germany,¹⁰⁴ Hungary¹⁰⁵ and Poland¹⁰⁶ authors have a right to remuneration for the transfer of rights, but contracts will not be declared null and void merely because they do not mention this right. For example, in Germany, if no specific payment is determined, the authors will have the right to an adequate remuneration (see below).¹⁰⁷

2.1.4.2. Type of remuneration (proportional remuneration, equitable remuneration or lump sum)

There are different ways to remunerate the author. The three most common forms used are (1) proportional remuneration, (2) equitable remuneration and (3) a lump sum. A combination is also possible.

Proportional remuneration allows authors to be associated with the success of their works. The copyright laws in France¹⁰⁸ and Spain¹⁰⁹ require a proportional participation of the authors in the profits from the sale of copies of their works and the exploitation of their rights. In France, this rule applies to all works, unless the law stipulates otherwise.

France has the most detailed set of rules on remuneration.¹¹⁰ It has general rules applicable to all contracts and more detailed rules for specific contracts such as publishing contracts, communication to the public contracts, audio-visual contracts and advertising contracts (see section 1.9). The revenue of the transferee is the basis for the calculation. For the sales of physical copies (e.g. books, video-grams, multimedia goods), the case law has determined that the remuneration needs to be based on the actual

¹⁰¹ LDA, art. 3(1).

¹⁰² TGI Paris, 30 nov. 1999, *CEE* 2001, comm. 87, note Caron.

¹⁰³ A. BERENBOOM, *Le nouveau droit d'auteur et les droits voisins*, 3d edition, Bruxelles, De Boeck et Larcier, 2005, point 128.

¹⁰⁴ UrhG, s.52.

¹⁰⁵ HCA, art. 16 (4).

¹⁰⁶ KC, art. 43.

¹⁰⁷ UrhG, art. 32. According to different translations, the word used can be either « fair », « appropriate », or « adequate ». They are used indifferently and refer to the same notion.

¹⁰⁸ CPI art. L.131-4.

¹⁰⁹ LPI art. 46.

¹¹⁰ CPI L. art. 131-4.

selling price.¹¹¹ Exceptions are made to this rule of proportional remuneration and lump sums are allowed for example if it is difficult to determine the basis of the remuneration or the calculation and monitoring costs are high;¹¹² in certain cases, this also applies to audio-visual works (see section 1.9). Spain also permits the payment of a lump sum under similar conditions.¹¹³

According to Hugenholtz and Guibault,¹¹⁴ the stringent rules of proportional remuneration in France have led to the paradoxical situation that contracting parties have been forced to agree on lump sum remunerations. There are two technical difficulties to determine the level of a proportional remuneration: first, the basis on which the percentage must be calculated, and second, the determination of the control measures that must be used to calculate the remuneration without revealing sensitive company information.

In Belgium, proportional remuneration is only obligatory for publishing contracts and communication to the public contracts; however, even for these contracts lump sums are permitted in certain cases¹¹⁵ (see section 1.9). A non-imperative rule on proportional remuneration is stipulated for contracts on audio-visual works (see section 1.9).¹¹⁶

Germany is the only country that has introduced the principle of "adequate remuneration"¹¹⁷ in the revision of its law in 2002. New provisions guarantee an adequate remuneration for the transfer of rights in case the contract contains no specific agreement. Moreover, if the negotiated remuneration is not adequate, the author can claim an adequate remuneration. Remuneration is considered to be adequate if it corresponds to what is customary and fair in business relations, given the nature and extent of the possibility of exploitation that is granted, in particular the duration and time of exploitation, and considering all circumstances. The remuneration stipulated in the framework of collective agreements is presumed to be fair:¹¹⁸ the author may therefore not ask for the revision of the contract, if the remuneration paid for the use of her work is regulated under a collective bargaining agreement.¹¹⁹ There is no annual reporting obligation for the transferee and this has been criticised by legal scholars.¹²⁰

This unconditional right to an adequate remuneration is praised by authors' representatives as it contributes to balance the contractual relationship with exploiters, since it provides authors with a significantly increased bargaining power.¹²¹ Exploiters' representatives, on the other hand, regret that the legal provision ensuring an adequate remuneration creates a situation of legal uncertainty, rendering calculations in the long-term more difficult.¹²² Since 2002, litigations regarding the definition of an adequate remuneration and its practical application have multiplied. In particular, translators have been claiming the revision of contracts on the basis of section 32 giving them a right to an adequate remuneration¹²³.

¹¹¹ Cass. 1re civ., 20 Janv.2004: *JurisData* n° 2004-022041; CA Paris, 1re ch., 18 Janv. 2000: *D.* 2000, act. Jurisp. P. 203; Cass 1re civ., 15 Juill. 1999: *CCE* 1999, comm. 25, note Caron.

¹¹² CPI, L. 131-4 and art. 132-6(1).

¹¹³ LPI art. 46.

¹¹⁴ IVIR, 2004, p. 53.

¹¹⁵ LDA art. 25 and 26(2)(2).

¹¹⁶ LDA art. 17-20.

¹¹⁷ UrhG s. 11 and s.48.

¹¹⁸ UrhG s.32 Abs. 2 and 42.

¹¹⁹ UrhG, §32 (4).

¹²⁰ IVIR, 2004, p.51.

¹²¹ Interview with the *Deutscher Journalisten-Verband* (the German Journalists Union).

¹²² Interview with the *Börsenverein des Deutschen Buchhandels e.V* (Association of German Publishers).

¹²³ Federal Supreme Court Germany (BGH), File number I ZR 38/07, NJW 2010, 771; and Federal Supreme Court Germany (BGH), File number I ZR 19/09, GRUR 2011, 328. For more details see National Report – Germany in Annex I.

Talking to Addison¹²⁴ and Destructive Emotions¹²⁵

In these two cases, the *Oberlandesgericht* in München (Germany) held that translators who transferred unlimited rights of exploitation of their translation to a publisher can demand additional payment under certain circumstances. In both cases, a translator was paid a fixed fee (lump sum) per translated page. In addition to that, there was a provision on profit sharing: if a certain amount of texts were sold, the translator should get an additional payment of less than 1 % of the book's net price. The translator sued for higher remuneration according to s. 32 I 3, s. 32 II 2 UrhG, since he did not accept the contractual price as "adequate remuneration".

The court held in both cases that the translator could claim an additional payment of 0,8% of the net price on hard cover books and 0,4% of the net price on paperback books, starting from the 5000th book sold. However, this claim could be increased or reduced under certain circumstances, for example if the fee was unreasonably high in the first place. In addition to that, according to the first judgment, translators could claim half of the net revenue, which the publisher gained from transferring his rights to third parties. This amount was reduced by the second judgment to 20% of the foreign-language author's interest in the net revenue and limited to the publisher's revenue.

In Sweden, there is no general rule on the remuneration of authors, although there are specific rules for certain cases, notably the rental of sound and video recordings,¹²⁶ resale rights for works of art,¹²⁷ private copy levies,¹²⁸ use of compulsory licences¹²⁹ and collective licences.¹³⁰

There are no rules in the UK on the remuneration of authors and only a consideration is necessary according to UK contract law. The payment of one pound is considered sufficient.

2.1.4.3. *Best seller clause*

In order to ensure that authors can participate in the success of their work, certain countries give them the right to ask for modification of the remuneration clauses of their contracts in case they feel that the transferee is gaining a disproportionate advantage through the exploitation of their rights as compared to the negotiated payment. This is possible in Belgium¹³¹, Germany¹³², Hungary¹³³, Poland¹³⁴ and Spain¹³⁵. Such a revision is generally only permitted if the author has received a lump sum payment.¹³⁶

¹²⁴ BGH, Judgement from 7. 10. 2009 - I ZR 38/07 (OLG München).

¹²⁵ BGH, Judgement from 20. 1. 2011 - I ZR 19/09 (OLG München).

¹²⁶ URL, art. 29.

¹²⁷ URL, art. 26 n, o, p.

¹²⁸ URL, art. 26 k, l, m.

¹²⁹ URL, 17, 18, 26a.

¹³⁰ URL, art. 42^a (3 and 4).

¹³¹ LDA, art. 26(2)(2).

¹³² UrhG, s.32a.

¹³³ HCA, art. 48.

¹³⁴ UPAPP, art. 44.

¹³⁵ LPI, art. 47

¹³⁶ IVIR, 2002, pp. 33-34.

These so-called “best seller clauses” should in principle benefit the author, but in practice these clauses are not very useful, as judges are often reluctant to modify contracts and prefer to respect the principle of contractual freedom of the parties as they wish to avoid creating legal uncertainties. Another factor that works against actual application of these clauses is the fact that authors are hesitant to start legal proceedings before the courts, as they are afraid of damaging their relations with the transferee.

There are differences between the countries concerning when and how the author can exercise her rights. For example, in France the author may ask for a revision of the contract if she suffered a loss of more than 7/12 of the compensation to which she was entitled and if the loss was the result of either a burdensome contract or an insufficient advance estimate of the proceeds of the work.¹³⁷ In Poland, the author can ask for a modification of her remuneration even if the discrepancy of remuneration already existed at the time the contract was concluded,¹³⁸ and in Belgium, mandatory clauses are inserted in publishing¹³⁹ and performance contracts,¹⁴⁰ granting a right of modification which may not be waived in advance (this is possible only from the moment that the conditions to exert this right have been fulfilled).¹⁴¹ Finally, in Spain, this right can only be exercised within the ten years following the transfer of the right.¹⁴²

MONITORING THE EXPLOITATION OF THE WORK

A key aspect for those contracts that foresee proportional remuneration is the monitoring or reporting system. While creators in different fields ask for more transparency in monitoring systems, transferees – and also some creators' associations – seem to be happy with the system in place. In this regard, it is worth referring to the provisions applicable in some Member States detailing reporting and monitoring obligations (see below sections 1.9.3 and 1.9.4). Also, the recent agreement adopted in France for the book sector imposes on the publisher an obligation of reporting to the author at least once a year for the whole duration of the contract (see below, section 3, and Chapter III section 1). The failure to sufficiently comply with this obligation allows the author to terminate the contract. The accounting reports can be sent to the author or made available on a dedicated and secure online site.

Again in France, the representatives of both publishers and writers have put in place what is called “instance de liaison” – a mechanism that has as its main purpose to address contractual problems in the field of publishing contracts. In this context, two associations of authors and editors have published a document on reporting (*reddition de comptes*) that summarises the main principles contained in the copyright law and in the sectorial Code of Practices.¹⁴³

2.1.5. Obligations of the parties

A small number of countries have introduced in their legislation a set of general obligations for the contracting parties, for example, to ensure that the transferee carries

¹³⁷ CPI, L. 131-5.

¹³⁸ KC, art. 44.

¹³⁹ LDA, art. 25 and seq.

¹⁴⁰ LDA, art. 31 and 32.

¹⁴¹ IVIR, 2002, p.56.

¹⁴² LPI, art. 47.

¹⁴³ Document available at http://www.sqdl.org/phocadownload/Reddition_des_comptes.pdf.

out their obligations and effectively exploits the rights of the author. Most countries have only laid down specific obligations for transferees of certain specific types of contracts.

Belgium,¹⁴⁴ Poland¹⁴⁵ and Spain¹⁴⁶ have such a general obligation in their legislation affecting all types of contracts. The transferee must exploit the rights, otherwise the author can ask for the termination of the contract (see below Chapter III, section 2). Such a clause also aims to protect the author against disrespectful professional practices.

France, Germany, Hungary, Sweden and the UK do not have such a general obligation in their legislation. In Germany, however, if the transferee does not exploit the rights of the author, the latter may revoke the exploitation rights.¹⁴⁷

France, Poland and Sweden¹⁴⁸ have rules for certain types of contracts such as performance contracts, publishing contracts as well as audio-visual contracts (see section 1.9 below).

2.1.6. Interpretation of contracts

Contractual clauses are not always clear. If parties do not agree on the exact meaning of certain clauses or in the case of doubt, they will have to be interpreted and clarified by the courts.

In Belgium,¹⁴⁹ France,¹⁵⁰ Hungary,¹⁵¹ Poland,¹⁵² and Spain¹⁵³ the contractual provisions are to be interpreted in favour of the author and against the transferee (the "*in dubio pro autore*" principle). According to this principle, any right or mode of exploitation not appearing in the contract is presumed not to be covered by the transfer.¹⁵⁴ Such a principle creates more legal certainty for the authors and limits the transfer of their rights.

These interpretation rules are mandatory and are applied restrictively to all contracts in Belgium, France and Spain.

Hungary¹⁵⁵ and Poland¹⁵⁶ have interpretation rules for specific cases where contracts are not clear. For example, in Hungary a licence to produce a work shall, in case of doubt,

¹⁴⁴ LDA, art. 3.

¹⁴⁵ UPAPP, art 54 and 55.

¹⁴⁶ LPI, art. 48.2. The Supreme Court has confirmed the obligation of an audiovisual producer to proceed to the exploitation of the work within seven years, although the contract was silent on that point (STS 2/3/1992).

¹⁴⁷ UrhG, s.41 Abs. 1.

¹⁴⁸ These rules are non-mandatory and parties can deviate by contract.

¹⁴⁹ LDA, art. 3(1)(3).

¹⁵⁰ According to CPI, L. 122-7, al 4 and the Cour de Cassation's case law: Cass. 1re.civ., 30 Sept. 2010: *CCE*: 2010; comm: 199, note Caron, "Transfers of rights are limited to the exploitation modes, scope, destinations, geographical scope and length stipulated in the contracts. In case of unclear stipulations and doubt as to the parties' will, the field of exploitation of the rights assigned will be limited according to the letter of the contract. The interpretation rule is imperative and the parties cannot decide otherwise".

¹⁵¹ HCA, art. 42(3).

¹⁵² KC, art. 49(1) and 65.

¹⁵³ Art.43.1 and 2 and art. 76.

¹⁵⁴ B. VANBRABANT, A. STROWEL, "Copyright licensing: a European view", in *Research Handbook on Intellectual Property Licensing*, Edward Elgar Publishing Limited, 2013. Available at: <http://www.loyensloeffnews.be/wp-content/uploads/2013/03/B.-Vanbrabant-and-A.-Strowel-Copyright-licensing-a-European-view-in-Research-Handbook-on-Intellectual-Property-Licensing-2013-Edward-Elgar-Publishing-Limited.pdf>, p. 40.

¹⁵⁴ HCA, art. 47(4).

¹⁵⁵ HCA, art. 47(4).

¹⁵⁶ UPAPP, art. 65.

include distribution of the reproduced copies of the work. In Poland, in case of doubt, the law favours a licence contract if the form of the contract is not clear.

Germany also has interpretation rules that favour the author and follows the so-called "purpose-of-transfer" rule ("*Zweckübertragungslehre*"),¹⁵⁷ according to which "if the types of use to which the exploitation right extends have not been specifically designated when the right was granted, the scope of the exploitation right shall be determined in accordance with the purpose envisaged in making the grant". Thus, uses not envisaged by the parties at the time the contract was concluded will remain outside the scope of contract and the author will not have transferred her rights. In practice, these interpretation rules have led transferees to be very careful when formulating the rights transferred by the author to ensure that they are wide enough to cover different types of exploitation modes.¹⁵⁸

Until recently Sweden had also interpreted contractual clauses in favour of the author in virtue of the so called specification principle¹⁵⁹, but in 2010 the Supreme Court did not apply it and interpreted extensively the agreement between a creator and a transferee by invoking customary practices for the interpretation of the copyright contract.¹⁶⁰ The decision was criticised by legal scholars.¹⁶¹

The UK differs from other countries, as its copyright law does not impose any rule on the interpretation of contractual provisions and the general principles of contract law apply (see below, section 2).¹⁶²

2.1.7. Termination of contract

Some countries provide for a possibility for the author to regain her rights from the person to whom they have been transferred under different circumstances (lack of exploitation, exploitation against the author's interests, lapse of time, etc.). Reversing assigned rights to the author after a fixed period could be very beneficial for the creators. This possibility of reversion has been included in the recent Term of Protection Directive (Article 3.2a) as a way to promote the exploitation of the works after 50 years. A review of the existing legal framework for early termination of contracts by authors is presented below in Chapter III, section 2.

2.1.8. Transfer of contracts

Author's rights are assets that can be traded by natural persons or legal entities. They can, for example, be sold or sublicensed to a third party. A number of countries limit the possibilities to transfer contracts to third parties. Such rules provide authors with the possibility to halt the licensing of their rights to a third party if they feel that they will not be remunerated according to the terms set in the original contract and/or that their moral rights will not be respected.

¹⁵⁷ UrhG, s.31 Abs. 5.

¹⁵⁸ IVIR, 2004, p. 44.

¹⁵⁹ The "specification principle" is an interpretation rule developed by the legal doctrine and applied by the courts. It imposes a restrictive interpretation of the scope of the copyright transfer, so that it is limited to what follows expressly from the agreement.

¹⁶⁰ Supreme Court, case NJA 2010 s. 559 (Evert Taube)

¹⁶¹ See comments on the judgment by J. Rosén, EU-domstolens och svensk rättspraxis. Upphovsrätt och närstående rättigheter 2003-2012, SvJT, 2013, 545 ff., 585-588; G. Karnell, Kommentar till Högsta domstolens dom den 23 november 2010 (NJA 2010 s. 559) (Evert Taube), NIR 2011, 316-320.

¹⁶² See *Ray v Classic FM* [1998] FSR 622 (ChD) referring to *BP Refinery* (1977) which sets out conditions to imply terms in a contract.

The transfer of exclusive licensing agreements requires the consent of the author in Germany,¹⁶³ Hungary,¹⁶⁴ Poland,¹⁶⁵ Spain¹⁶⁶ and Sweden,¹⁶⁷ unless an agreement has been made to the contrary. In Germany, the author's consent is also required if only parts of the rights of the author are transferred.¹⁶⁸ The German and Hungarian laws also take the interest of the transferee into account and the author is not allowed to refuse her consent if this would be contrary to the principle of good faith.

A transfer without the approval of the author is possible in Germany,¹⁶⁹ Hungary,¹⁷⁰ Spain¹⁷¹ and Sweden¹⁷² if the copyright is part of a business activity and it is transferred together with the business activity or part of it (e.g. change in ownership or liquidation of a company). In Hungary¹⁷³ and Sweden¹⁷⁴ the initial transferee remains jointly liable together with the new transferee for exploitation of the licensing contract.

In Belgium and France, there are no general rules on the transfer of contracts. However, in both States, the consent of the author is required for the transfer of publishing contracts and performance contracts. In addition, in Belgium, the law lays down the order of the possible transferees for audiovisual contracts in case of bankruptcy of the producer or liquidation of the producer's company.

The UK has no rules limiting the possibility to transfer assigned rights or to sublicense rights to a third party.

2.1.9. Specific contracts

A number of Member States have specific rules for works created under employment (section 1.9.1) and for commissioned works (section 1.9.2). In general, the rules for works created under employment are less favourable towards the author and give employers more rights to exploit the works created by their employees.

In addition to these two specific types of contracts covering all types of works, the copyright laws of a number of EU Member States also lay down more specific contractual provisions for a certain type of copyright contracts covering more specific types of works. This is the case in particular for publishing contracts (section 1.9.3) and audio-visual contracts (section 1.9.4), where the rights and obligations of the author and transferee have been detailed more precisely in the law.

2.1.9.1. Works created under employment

In the last decade, specific rules have been adopted in a number of EU Member States dealing with copyright in employment contracts.

¹⁶³ UrhG, s.34 (1).

¹⁶⁴ HCA, art. 46(1).

¹⁶⁵ KC 67 (3).

¹⁶⁶ LPI art.49, as confirmed by the Spanish Supreme Court (*STS 1662/2005*).

¹⁶⁷ URL, art. 28.

¹⁶⁸ UrhG, s.35 Abs. 1.

¹⁶⁹ UrhG, s.34 (3).

¹⁷⁰ HCA, art. 46(1).

¹⁷¹ LPI, art. 49.

¹⁷² URL, art. 28, b.

¹⁷³ HCA, art. 46(3).

¹⁷⁴ URL, art.28.

In Belgium, France, and Sweden, no exceptions have been made to the general rule according to which the author's rights initially belong to the author of a work and an employment contract does not imply the automatic transfer of rights to the employer.

In France, it must be noted that despite the strict formulation of the law on works created under employment,¹⁷⁵ the courts have ruled in favour of employers. As reported by Guibault and Hugenholtz, the *Cour de Cassation*¹⁷⁶ read in the employment contract "an implicit transfer in favour of the employer of the rights in the works that the employee creates in the course of his employment, to the extent needed to conduct the employer's business. It ruled that an enterprise exploiting a work under its name accomplishes acts of possession which, in absence of any contrary claim on the part of the natural person having created the work, are of such a nature as to raise the presumption, in relation to infringing third parties, that the enterprise is the owner of the author's incorporeal property right on these works, whatever their qualification".

The economic rights in works created by an author under an employment contract in Belgium may be transferred to the employer only on the condition that the transfer of such rights is explicitly agreed upon and that the creation of the work falls within the scope of the contract.¹⁷⁷

In Germany, the wording of s. 43 UrhG has been interpreted so as to admit implied grants in employment contracts, so that it is understood that the employee is required to transfer the exploitation rights to the employer if the work is created within the specific exercise of her duties.¹⁷⁸

In Sweden, the legal doctrine uses a vague rule of thumb to determine if the author has transferred her rights to the employer: in the absence of an agreement to the contrary, the employer, as the legal successor, obtains the economic rights once the work is handed over. Works produced as a part of an employee's task are in these cases allowed to be used by employers within the purposes of their activities and to the extent that could have been foreseen when the work was created; work alterations are permitted only to the extent necessary for the purposes for which the work was created under the employment relationship.¹⁷⁹

In Spain, there is a presumption of transfer of the rights of the employee to the employer if nothing has been stipulated in a contract.¹⁸⁰ The remuneration is understood to be included in the salary, unless agreed otherwise.¹⁸¹ Spanish case law permits the creator to ask for a revision of her contract if there is a clear disproportion between the benefits received by the employer and the salary of the creator.¹⁸²

¹⁷⁵ CPI, L. 111-1 and L. 131-3-1. According to Article L. 111-1, in particular: *L'auteur d'une oeuvre de l'esprit jouit sur cette oeuvre, du seul fait de sa création, d'un droit de propriété incorporelle exclusif et opposable à tous. (...). L'existence ou la conclusion d'un contrat de louage d'ouvrage ou de service par l'auteur d'une oeuvre de l'esprit n'emporte pas dérogation à la jouissance du droit reconnu par le premier alinéa, sous réserve des exceptions prévues par le présent code. Sous les mêmes réserves, il n'est pas non plus dérogé à la jouissance de ce même droit lorsque l'auteur de l'oeuvre de l'esprit est un agent de l'Etat, d'une collectivité territoriale, d'un établissement public à caractère administratif, d'une autorité administrative indépendante dotée de la personnalité morale ou de la Banque de France.*

¹⁷⁶ IVIR, 2004, p. 61, mentioning *Société Aréo*, Cass. Civ. 1^{ère}, 24 March 1993, RIDA 1993/158, p. 200, *Société Temopare*, Cass. Civ. 1^{ère}, 28 March 1995, RIDA 1995/165, p.327.

¹⁷⁷ IVIR, 2002, p.30.

¹⁷⁸ Regional Court of Cologne (LG), File number 12 O 416/06. See also National Report for Germany in Annex I.

¹⁷⁹ Governmental Bill 1988/89:85, p. 21

¹⁸⁰ LPI art. 51 (1 - 3).

¹⁸¹ J. M. RODRIGUEZ TAPIA, in R. BERCOVITZ (ed.), 2007, p. 842.

¹⁸² Decision Supreme Court (STS 2601/2001).

The other countries reviewed are less favourable towards the author and benefit the employer more. Hungary,¹⁸³ Poland¹⁸⁴ and the UK¹⁸⁵ have specific rules for works created under employment: unless otherwise stipulated in the employment contract, the employer becomes the owner of the rights in the works created by the employee. In Hungary, authors have more options to receive remuneration from the exploitation of their rights by the employer. For example, they are entitled to an appropriate remuneration if the employer authorises a third party to use the work or assigns the economic rights to a third party.

The rules in the UK are more limited in scope, as they are not applicable to all works: they only apply to literary, dramatic, musical and artistic works and films made by employees. Not covered are broadcasts, sound recordings and typographical arrangements of published editions.¹⁸⁶ Parties can derogate this rule by contract. The following indicators are used in the UK to determine if the employer is the owner of the rights: the contractual scope of employment, level of responsibility, creation in work time, using work resources (equipment) and the financial risks taken by the employee.¹⁸⁷

2.1.9.2. Commission contracts

In some cases, a work can be created at the request of a commissioner. To what extent this implies the transfer of exploitation rights will depend entirely on national legislation. The general rule is that the author owns the rights, unless there is a contract assigning or licensing the rights to the commissioner. Exceptions may apply for particular contracts, as is notably the case in Hungary, where, in virtue of the specific regime applicable to advertising, the economic rights are assigned to the commissioner.¹⁸⁸ The contract needs to include a minimum number of elements for it to be valid¹⁸⁹, such as the exploitation modes, geographical territory and duration of the use of the work as well as the remuneration to the author.

2.1.9.3. Edition/publishing contracts

Apart from Poland and the UK, most countries have extensive rules on publishing contracts, outlining the obligations of both the author and the publisher in their copyright laws. This is in particular the case for Belgium, France, Spain and Sweden.¹⁹⁰ Discussions are currently underway in France to review the copyright legislation to adapt it to the digital publishing economy and digital books (see Chapter III, section 1 on digital exploitation of rights). Germany has a separate law dealing with publishing contracts.¹⁹¹ Among others, the provisions in the legislations of most Member States may concern specific obligations both for authors and publishers, remuneration rules and reporting obligations.

¹⁸³ HCA, art. 30.

¹⁸⁴ KC, art. 12.

¹⁸⁵ CDPA, s. 11 (2).

¹⁸⁶ CDPA, s. 11(2) states that for works made 'by an employee in the course of his employment, his employer is the first owner'.

¹⁸⁷ M. KRETSCHMER, Est. DERCLAYE, M. FAVALE, R. WATT, 2010, p. 59.

¹⁸⁸ HCA, art. 63.

¹⁸⁹ HCA, art. 63 (2).

¹⁹⁰ The provisions do not apply to contributions to newspapers or periodicals.

¹⁹¹ *Verlagsgesetz* ("VerlG") covering the commitment of the author to grant the publisher all rights to distribute and exploit the work economically and the obligation of the publisher to publish the work.

Publishers have the obligation to exploit the works, covering among other things the publishing, distribution and marketing of works, in Belgium,¹⁹² France,¹⁹³ Germany,¹⁹⁴ Hungary¹⁹⁵ and Sweden.¹⁹⁶ In France, this obligation is very favourable towards the author as the publisher must *permanently exploit and disseminate (exploitation permanente et suivie)* the work, whatever its success may be, and must promote the work in accordance with the practice of the industry.

Belgium,¹⁹⁷ France¹⁹⁸ and Spain¹⁹⁹ require the quantity of copies of first printing to be mentioned in the contract, although this is not needed in France if a minimum royalty will be paid to the author. In Belgium and Spain, the contract must also stipulate the delay for the publishing (in absence, the term will be determined in accordance with professional practices in Belgium,²⁰⁰ while in Spain the delay may not exceed two years).²⁰¹ In Spain, contracts also have to specify the languages, advance royalties and/or publishing modalities.²⁰²

There are various additional provisions for the remuneration of the author in the national copyright legislations. In France, the author has a right to receive a proportional remuneration – for printed work this will be based on actual selling price, excluding taxes, of books, magazines, newspapers and other publications. In France, the court declared a publishing contract void because it stated that the author would receive a remuneration of 0% for the first 1000 copies sold,²⁰³ as the remuneration was considered to be an essential element of the publishing contract. For digital books, the law of 26 May 2011 has recently introduced the principle of “fair and equitable remuneration” of the authors. There are however specific exceptions that permit the payment of a lump sum.²⁰⁴ In Belgium, the gross revenue of the publisher is used as a basis to calculate the proportional remuneration, unless parties decide otherwise. Contrary to the situation in France, parties may decide that no financial remuneration will be received and that the counterpart to the transfer of rights will be the exploitation risk undertaken by the publisher.²⁰⁵ In Hungary, the contracting parties must set the remuneration; case law has determined that the publisher has to pay the remuneration to the author even if the sale of the books is not profitable.²⁰⁶

The reporting obligations are carefully laid out in the French,²⁰⁷ Belgian²⁰⁸ and Swedish²⁰⁹ legislation to ensure more transparency between the contracting parties. National legislation on such obligations ensures that authors are informed of the revenues generated by the publishers from the exploitation of their works and can evaluate if, among others, the remuneration they receive from the publishers is still adequate. In

¹⁹² LDA, art. 26(1).

¹⁹³ CPI, L. 132-1 and seq.

¹⁹⁴ VerIG, s. 1.

¹⁹⁵ HCA, art. 56-57.

¹⁹⁶ URL, art. 33.

¹⁹⁷ LDA, art. 25 and seq.

¹⁹⁸ CPI, L. 132-10.

¹⁹⁹ LPI, art. 60.

²⁰⁰ LDA, art. 25.

²⁰¹ LPI, art.60.

²⁰² LPI, art. 62.

²⁰³ Editions Arlea v. Bourgeix en Société des Gens de Lettres de France , CA Paris (4ème ch.), 12 February 2003, RIDA 2003/197, p.307 mentioned by IVIR, 2004, p. 52.

²⁰⁴ CPI, L. 132-6.

²⁰⁵ BERENBOOM, 2005

²⁰⁶ See especially: BH1992.633; BH1992.755; BH1998.477.

²⁰⁷ CPI, L. 132-13.

²⁰⁸ LDA, art.28.

²⁰⁹ URL, art. 35.

practice, the remuneration can increase after a certain number of copies of the works have been sold and/or if the works are being reprinted. In Belgium, the publisher needs to provide the author with the accounts of the revenue from the exploitation of the work, the quantity sold and in stock and the rights transferred for each mode of exploitation of the work. Reporting obligations have been further detailed in France through the Framework Agreement reached by the *Conseil permanent des écrivains* and the *Syndicat national de l'édition* (see below, section 3).

The author has the right to rescind the contract in a number of cases in Belgium, France, Spain and Sweden. In Sweden, she can do so based on passivity by the publisher - if the work has not been published within two years, or four years in the case of a musical work.²¹⁰ In France²¹¹ and Spain the author can terminate the contract if the publisher destroys the remaining copies of the edition and fails to publish out-of-print works. In France, such possibility is also given to the author in case of lack of publication. In Spain, the author can also do so for the language versions in which the work has not been published²¹² and in Belgium if the publisher does not make copies of out-of-commerce works on the request of the author.²¹³

In Belgium and France, the transfer of the contract by the publisher requires the permission of the author. This rule does not apply in case of sale of the publishing company. In case of bankruptcy of the publisher, the author is allowed to terminate the contract in Belgium.

2.1.9.4. Audio-visual contracts

In most of the countries analysed, there exists a presumption of transfer of rights to the film producer. Accordingly, unless otherwise agreed, authors of audiovisual works are presumed to have assigned their "exclusive exploitation" rights to the film producer. At the national level, these rights can cover the rental and lending right; the fixation right; the broadcasting and communication to the public right; and the distribution right. A presumption of transfer has been incorporated into the *acquis communautaire* through the Rental and Lending Rights Directive that allows Member States to introduce a parallel presumption as regards rental rights only.²¹⁴ In this case, the author retains the right to obtain an equitable remuneration. This remuneration right is unwaivable and its administration can be entrusted to a collecting society representing the authors. Such an unwaivable right does not always exist however in relation to the more overreaching presumptions in place in the different Member States.

The presumption of transfer favours the concentration of rights in the producers' hands. This specific regime applicable to audiovisual production contracts was not perceived by lawmakers as a possible threat to the authors.²¹⁵ A number of economic and practical factors justified the need for the producer to have all the rights in order to ensure the exploitation of the work, including the high costs of the film production, the fact that the producer undertakes the economic risk of the production of the work, as well as the fact that for each film a great number of authors are involved in the production, making it more convenient for film producers to have the rights in order to exploit the film effectively.

²¹⁰ URL, art. 38.

²¹¹ CPI, L. 132-17(1 and 2).

²¹² LPI, art. 62.2 and 3.

²¹³ Automatic reversion is foreseen by LDA, art. 26 (1).

²¹⁴ Art. 3 (5 and 6) of Rental and lending rights Directive.

²¹⁵ A. LUCAS, H.-J. LUCAS, A. and A. LUCAS-SCHLOETTER, 2012.

To limit the scope of the presumption of transfer, several countries have excluded a number of the rights or works. Musical works are also excluded in most countries. In Belgium and Hungary,²¹⁶ the transfer does not cover private copy remuneration.²¹⁷ In France it does not apply to graphic and theatrical rights of the audiovisual work itself and in the UK to the renting rights for film directors and authors of screenplays, dialogue or music specifically created for the film – renting rights for authors of literary, musical, dramatic and artistic works are, however, included in the transfer.²¹⁸ In Germany, the presumption of transfer does not apply to authors of pre-existing works, such as novels or screenplays²¹⁹ - they have the right to use their works for other cinematographic purposes after the expiration of ten years from the conclusion of the contract.²²⁰

In addition to the presumption of transfer of rights, there are also some other rules in the Member States that are specific to the audiovisual sector. They are outlined below.

Spain has introduced specific remuneration rights for authors for communication to the public and making available of their works. These rights are unique in the EU and ensure that authors can financially benefit from the exploitation of audiovisual works on line and other forms of communication to the public.²²¹ They are unwaivable and not transferable *inter vivos* and must be managed by a collecting society.

In Belgium, France and Spain, proportional remuneration is also applicable to audiovisual works. In France, decreasing tariffs paid by distributors to the producer can be taken into consideration when calculating the remuneration.²²² A Memorandum of Understanding (hereinafter MOU) was adopted on the remuneration of cinematographic and audiovisual works (see *infra* section 3 on collective agreements).²²³

The producer in Belgium and France has the obligation to exploit the work. In France, exploitation should take place "in accordance with the practices of the industry"²²⁴ - there is no stipulation of an obligation of "*exploitation permanente et suivie*" as in the case of publishing contracts. In Sweden, if the audio-visual work has not been produced within five years, the author may terminate the contract and keep the remuneration received, even if there is no fault on the part of the film producer.

In various countries the film producers have a reporting obligation. They have to annually inform the authors of the gross revenue for each mode of exploitation (Belgium,²²⁵ France,²²⁶ Hungary,²²⁷ Spain²²⁸). In France, a MOU exists on transparency instituting a

²¹⁶ HCA, art. 66(2).

²¹⁷ In relation to this point *vid. infra* Chapter III section 4 on the waivability of remuneration rights.

²¹⁸ ,CDPA s. 93A.

²¹⁹ UrhG, s.89(3).

²²⁰ IVIR, 2002, p.74.

²²¹ LPI, art. 90.

²²² CPI, L. 135-25.

²²³ "Memorandum of Understanding" of October 12, 1999, completed by Memorandum of Understanding of February 2, 2002, April 12, 2002 and February 17, 2004, on the remuneration of cinematographic and audiovisual works ratified by Decree of February 15, 2007, in application of art. L.132-25 of the Copyright Code, available at <http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000464153&dateTexte=&categorieLien=id>

²²⁴ Cass, 3 April 1974, *RIDA*, p. 124.

²²⁵ LDA, art. 36 (3).

²²⁶ CPI, L 132-28.

²²⁷ HCA, art. 66(5).

²²⁸ LPI art. 90.5.

process of random audits of ten audio-visual productions on yearly basis.²²⁹ The film producer has an obligation to conserve the matrix of the film in Belgium and France.

2.1.10. Conclusion

The comparative analysis of the rules that exist for copyright contracts in the eight EU Member States reviewed shows that there is no harmonisation across European borders. The national legal frameworks are very fragmented and many disparities exist in their application. On the one hand, countries like Belgium, Germany, France and Spain have detailed rules to protect authors in their contractual relations, and on the other hand, Member States such as Sweden and the UK provide transferees with a high degree of contractual freedom. Specific provisions in copyright laws either impose certain formalities to attract the attention of the author on what will be agreed upon or regulate the actual rights and obligations of the parties. Certain Member States have enacted specific interpretation rules in favour of authors.

In most countries, authors can both assign and license their rights to a transferee. Assignments are not possible in Germany and Hungary (with some exceptions), due to the monist approach emphasizing the intimate relationship between the author and her work. In practice, however, there are great similarities between assignment and exclusive licensing contracts.

Not all countries require contracts to be in a written form, a requirement that can assist authors to be better informed of the scope and conditions of a contract. There are huge differences among the Member States varying from rules concerning only specific types of contracts or sectors, to no rules at all. Courts can declare agreements to be void if they are not in writing in some countries.

A number of Member States have introduced mandatory contractual provisions in their laws to ensure that contracts determine more precisely the scope and terms of the rights transferred (i.e. category of rights, modes of exploitation, geographical scope, duration, etc.). These provisions strengthen the position of authors and avoid the signing of a blanket transfer of rights. There are strict provisions in Belgium, France, Poland and Spain and more lenient ones in Germany, Hungary, Sweden and the UK. The majority of the countries have rules limiting the transfer of rights on future works as well as for unknown forms of exploitation, although here again there are differences in terms of scope. Most recent developments in France and Germany include new rules to facilitate transfer of rights relating to unknown forms of exploitation while preserving authors' interests.

Rules limiting the assignment and/or waiving of moral rights can be found in all countries. With the exception of the UK, they cannot be entirely waived. In practice, more and more standard contracts are asking authors to waive a number of their moral rights, thus eroding the moral rights of authors.

The remuneration of the author is one of the most important features of a contract. Fair and clear rules can assist authors in obtaining an adequate remuneration for the exploitation of their works. With the exception of the UK, all countries have specific provisions, albeit with different remuneration systems. For example, Belgium, France and

²²⁹ "Memorandum of Understanding" of December 16, 2010 on transparency in the cinematographic industry, ratified by Decree of February 7, 2011 in application of art. L.132-25 of the Copyright Code.

Spain ensure that authors are associated with the success of their works and use the proportional remuneration system (unless lump sums are stipulated). However, traditional remuneration systems may not fit with the new business models that are based on advertising revenues and not on the distribution price of the book, for example²³⁰. Germany is the only country that has introduced the principle of “adequate remuneration” in its legislation, allowing authors to ask for the modification of their contract if they do not consider it to be fair. In most countries, there are also “best-seller” clauses allowing authors to ask for a revision of their contract in case they feel that the transferee is gaining a disproportionate advantage through the exploitation of their rights, but there are differences between the countries on when and how the authors can exercise their rights. Monitoring and reporting rules are identified as a key factor to ensure that adequate remuneration reaches the authors.

Only Belgium, Poland and Spain have a general legal obligation for the transferee to exploit the rights, in addition to specific obligations for specific contracts. These provisions must be seen as a guarantee to the effective exploitation of the work and as an incentive for both the creator and the transferee to conclude and execute the contract.

As regards the interpretation of contracts, Belgium, France, Hungary, Poland and Spain apply the “*in dubio pro autore*” principle, whereby contractual provisions are to be interpreted in favour of the author. Germany has codified the “purpose-of-transfer” rule, which looks at the uses envisaged by the parties at the time the rights were transferred.

Some countries provide the possibility for the author to automatically regain her rights under different circumstances. This possibility is further explored in Chapter III section 2 of the study.

A number of countries have specific rules for works created under employment such as Hungary, Poland and the UK. These rules tend to be less favourable towards the author, favouring the employers’ ownership of the works created by the employees.

Finally, all Member States have detailed rules dealing with publishing and audiovisual contracts. Germany even has a separate law for publishing contracts. Some countries have enacted reporting obligations for publishers: such a rule provides the author with a tool to be better informed of the success of her work and the gross revenue of the transferee for each mode of exploitation. As regards the audiovisual sector, Spain has introduced an unwaivable remuneration right for the communication to the public, including the making available right, to ensure that audiovisual authors receive remuneration for certain exploitations of their work.

2.2. Contractual Law

Copyright contracts are not negotiated in a legal vacuum. Irrespective of the specific protection granted to authors by copyright law, the general law of contracts will equally apply to contracts between creators and publishers or producers. Although the principle

²³⁰ In B. VANBRABANT, A. STROWEL, 2013, p. 33, “As we are moving toward forms of distribution where a direct payment, and thus a remuneration for the author, is not linked to the access of a particular work, some copyright rules intended to protect the author (and her remuneration right) seem outdated. [...] rules are still to be designed to ensure that creators are adequately remunerated in relation to new business models which are based on advertising revenues and do not subject the access to the works to a prior payment”.

of contractual freedom is undisputed in all the countries surveyed (and in all the EU Member States), it is indeed smoothed by general contractual rules such as the good faith principle. As general legal rules are not designed with the purpose to protect authors, their application might yield mixed results, sometimes favouring authors, sometimes protecting some legitimate interests of exploiters. Arguably, these general principles may have a more prominent role in the legal system where there are almost no specific protective rules in copyright law for authors, but this needs to be verified in practice.

Common general contractual law principles greatly determine the formation, performance, and interpretation of contracts and are deeply rooted in the Member States' legal systems, as confirmed by the European Principles of Contract Law (hereafter PECL)²³¹. They equally apply to copyright contracts where doctrines of good faith, fairness, equity, defect of consent, etc., might preventively inhibit unfair contracts and shape the courts' thinking process. These doctrines are studied in the next sections. Even in the UK, where there is no "good faith" doctrine, doctrines of "undue influence", "unconscionability" and "restraint of trade" may lead to setting aside contracts exploiting other's weaknesses and abusing a position of confidence²³². These principles are dealt with in the last sections of the present section.

Although these principles may, as we will see, lead to nullify or mitigate unreasonable clauses, the principle of freedom of contract will prevail in most cases. In the EU, it is unanimously recognised that parties to a contract are fully bound to what they have agreed upon. The fact that other principles of contract law only exceptionally lead to the modification or cancellation of contracts in courts is a point of primary importance to get a fair understanding of their actual role.

2.2.1. Good faith, Fairness, Equity, Usages

The principle of contractual freedom is "subject to the requirements of good faith and fair dealing", as confirmed by the Principles of European Contract Law²³³. Good faith is synonymous with sincerity, candour and loyalty²³⁴. It can specify certain contractual obligations, create new obligations in the contractual process, or influence the interpretation of contracts. According to the good faith principle, parties must refrain from acting with disloyalty.²³⁵ In Germany (and the Netherlands), in exceptional situations, good faith may even lead to setting aside contractual clauses whose performance would lead to an unacceptable result.²³⁶

Beyond the good faith principle and its implications, recourse to *usages*, as a complement to contractual obligations, deserves some attention too, since they may be beneficial to the authors. The usages may notably complement or specify the parties' obligations. Direct references to the professional usages are particularly numerous in the French Copyright Law. The modalities of the obligation of exploitation in publishing and audiovisual contracts are mainly set by reference to the usages. In many cases, the

²³¹ PECL are a compilation of uniform legal principles, initiated by the European Parliament and the Commission; O. LANDO, H. BEALE, *The principles of European contract law, I. Performance, non-performance and remedies, Commission on European contract Law*, Dordrecht, Nijhoff, 1995.

²³² G. D'AGOSTINO, *Copyright, Contracts, Creators*, New Media, New Rules, Edward Elgar Pub, 2010, p. 130 and Prof. E. DERCLAYE, *Response to the Questionnaire on UK Law*, quoting MACKENDRICK.

²³³ Art. 1: 102.

²³⁴ IVIR, 2002, p. 15, quoting HESSELINK.

²³⁵ M. MARKELLOU, *Le contrat d'exploitation d'auteur*, Bruxelles, Larcier, 2012, p. 328, quoting RAULT.

²³⁶ Art. 6:2 Dutch Civil Code, S. 242 German Civil Code, IVIR, 2002, p. 13.

Belgian Copyright Law also directly refers to the professional usages to specify an obligation.²³⁷ Interestingly, the Belgian copyright law calls on the "honest professional practices" to specify the obligation of exploitation of the transferee.

Good faith is a source of obligations for the parties to a contract. For example, in Belgium, where the Copyright Law provides for the reporting of the gross revenue of the exploitation of the work by the publisher to the author, the good faith principle commands the reporting of the costs as well, as this is necessary to assess the profits generated, thereby triggering the application of the best-seller clause²³⁸. Good faith also rules the negotiation process and may lead to the liability of the party who has not acted in good faith in the negotiation²³⁹. Parties are notably required to inform their negotiating partner of decisive facts. According to the PECL²⁴⁰, when determining whether good faith requires that a party disclose particular information, regard should be had to whether a party has a special expertise. In copyright contracts, this expertise will usually be with the publisher or the producer. An example is the obligation of the professional publisher to inform the author of the conditions of the market of the work before the contract is concluded, as this may have consequences on the author's demands in the negotiation.

Good faith may further determine contractual obligations. In France, the Court of Paris ruled²⁴¹, with regard to a publishing contract, that beyond the letter of the contract, the parties also had to comply with the requirements of equity and usages. The publisher was therefore held liable for having first undertaken a secondary mode of exploitation of the author's work (that should have come after other exploitations) whereas the publisher has the obligation to execute the contract in the common interest of both parties. The court came to this conclusion even if the contract contained no mention as to the chronology of the different exploitation forms. The Court has also declared that the publisher had acted wrongfully because he had not complied with an obligation of information enshrined in the practices and the Code of Practices in general literature (*Code des usages en littérature générale*)²⁴². In Spain, the Supreme Court²⁴³ confirmed the obligation of an audiovisual producer to proceed to the exploitation of the work within seven years, although the contract was silent on that point²⁴⁴. In Sweden as well, the general clause of fairness and equity has notably led to the substantial shortening of a long-term agreement for future delivery of works, applying the good faith principle in consideration of the inferior contractual position of the author²⁴⁵.

It must be noted however that, contrary to certain protective rules specific to copyright matters, whose enforcement can only be requested by the author (ex. mandatory contract stipulations, see Chapter II section 1), application of the good faith principle may be requested by either party. A recent French *Cour de cassation* decision dealt with a situation where a photographer authorised his press-agency employer to keep on exploiting his archived pictures, after the end of his employment contract in 1995. Later,

²³⁷ See the reference to the usages in the publishing contracts provisions of the LDA concerning the obligation of exploitation, the best-seller clause, the determination of the delay for the publishing of a work; see also the provisions on the communication to the public contract at section 9 d; see the section on the remuneration of audio-visual authors at section 9e.

²³⁸ M. MARKELLOU, 2012, p. 324.

²³⁹ In some states, this doctrine is named "*Culpa in contrahendo*".

²⁴⁰ Principles of European Contract Law, art. 4: 107.

²⁴¹ Paris, 4^e ch. 12 February 2003 CCE 2003, comm n° 57, note CARON ; Civ. 1st, 30 May 2012, *Propr. Intell.* 2012, n°44, obs. BRUGUIERE.

²⁴² Code of practices of general literature of December 15, 1980, by the Permanent Writers Council and the Publishers Unions (see Part III).

²⁴³ STS 2/3/1992.

²⁴⁴ R. BERCOVITZ RODRÍGUEZ-CANO, 1992, p. 193-202.

²⁴⁵ Svea District Court, 24 April 1989, *NIR 1989*, s 394.

the photographer found that some pictures were published on the press-agency website, although no authorisation had been given for their digitisation or their website publication. The *Cour de cassation* ruled however that the authorisation to digitise and post the picture on the Internet may be implied by the authorisation given to exploit the picture. It relied on the good faith and fairness principles to come to such ruling. In such a case, the good faith principle was invoked by the publisher in order to neutralise some specific protection established by the French copyright law such as the mandatory stipulation of the modes of exploitation, the prohibition to transfer rights on unknown and unforeseen forms of exploitation, and the strict and *pro autore* interpretation principle. Those protections have been bypassed by the good faith principle, to extend the scope of the contract beyond what was foreseen, in a detrimental way for the author. In a similar way, usages may as well not be favourable for the author. In France, a very low remuneration has been declared justified according to specific practices of the industry concerned²⁴⁶.

In many European countries, the principle of good faith may also influence the interpretation of the contract when the will of the parties is unclear. When the common intention of the parties is ambiguous, the contract has to be given the meaning that reasonable persons would give thereto²⁴⁷. However, in France, the *Cour de Cassation* insists that when a contract is clear, its wording cannot be disregarded to bring about a more reasonable result²⁴⁸.

2.2.2. Rules of interpretation

Where facing an unclear term and parties diverging as to its meaning, courts have to interpret contracts. As we have seen earlier, many national copyright laws stipulate a strict and *in dubio pro autore* interpretation rule in the field of copyright. General contract law also offers compass for the jurisdictions to interpret an unclear contract, notably referring to the common will of the parties, professional usages, reciprocity of interests, social norms, purpose of the contract, good faith principle. It must be taken into account however that in some States (namely, Germany, France and Belgium), courts commonly hold that an unambiguous contract does not have to be interpreted. This implies that interpretation rules have a limited utility to “correct” unreasonable terms.

Often, courts will first try to identify the common intention of the parties instead of relying on a mere literal reading of the contract. For example, in France, in the absence of a legal obligation to exploit in the case of representation contracts, the jurisdiction may nevertheless imply a contractual obligation to exploit from the contractual clauses or from the behaviour of the transferee²⁴⁹. The usages may contribute to make the meaning of some terms clearer. In Belgium, in a case where the scope of the authorisation given to the commissioner to exploit some pictures was unclear and disputed, one decision has preferred a narrow understanding of such scope notably invoking usages. According to such usages in the press sector, in the case of commissioned pictures and remuneration of the photographer by royalties (not fees), only a right to use (not a transfer of author’s rights) was given by the photographer to the press agency²⁵⁰. An interpretation

²⁴⁶ M. VIVANT and J.-M. BRUGUIERE cite the example of scientific publishing where a very low remuneration is usual for first prints (M. VIVANT, J.-M. BRUGUIERE, *Droit d’auteur et droits voisins*, Paris, Dalloz, 2010, n° 677).

²⁴⁷ Principles of European Contract Law, art. 5 :101(3).

²⁴⁸ Cass. 15 April 1872 ; IVIR, 2002, p. 14.

²⁴⁹ A. LUCAS, H.-J. LUCAS and A. LUCAS-SCHLOETTER, *Traité de la propriété littéraire et artistique*, Paris, LexisNexis, 4^{ème} édition, 2012. n° 775.

²⁵⁰ Bruxelles, 19 April 1995, *I.R.D.I.*, 1996, p. 215.

favourable to the party which has committed itself to an obligation may also be stipulated by the law. According to this rule, between two possible meanings, the one that is more favourable to the author will be preferred, since she is the party who has committed herself to transfer rights to the exploiter. Hungary has a similar rule according to which a waiver of right cannot be construed broadly.

Some rules of interpretation may also lead to interpreting contracts so that, between two possible meanings, the one that is consistent with the law will be preferred. In Hungary, concerning an author's contract that was unclear as to its exclusive or non-exclusive nature, the Supreme Court²⁵¹ held that the transfer was non-exclusive. The other interpretation of the contract (exclusive contract) would have resulted in the contract being inconsistent with the rule according to which exclusive transfer must be explicit. The Court therefore preferred an interpretation that made the contract consistent with that rule. In another case, the County Court of Pest²⁵² held a contract to be a mere licence, as assignments (which are a much broader transfer of rights) are prohibited by the copyright law.

Another common rule of interpretation is the *contra proferentem* rule. According to this rule, where the contract is a standard contract imposed by one of the parties on the other as a take-it-or-leave-it contract, if the contract is unclear, it is interpreted against the party who has written it. The *contra proferentem* rule of interpretation is applicable in most countries investigated, including the UK, and acknowledged in the PECL²⁵³. It may be very relevant in copyright law as many authors' contracts are made of standard clauses.

Purpose-of-grant interpretation rule²⁵⁴ is also a rule considered to be favourable to authors. This rule exists both specifically in the context of copyright law (as examined in section 1.6) and as a general principle of contractual law (examined here). In the UK common law, while there is no such rule of interpretation specific to copyright, in general law the purpose of the contract may lead the jurisdiction to limit the rights transferred. An example is the *Ray v Classic FM* case²⁵⁵ where it was held that Mr Ray, the expert engaged by the radio station Classic FM to create catalogues of music²⁵⁶, had granted an implied licence on the catalogues to Classic FM for the radio to use them. This licence was however said by the jurisdiction to be limited to the use of the catalogues for broadcasting in the UK, and Mr Ray's copyright was therefore infringed where copies were made for exploiting his database abroad²⁵⁷.

However, the outcome of the interpretation process may also not be favourable to the author. General rules of interpretation may conflict with copyright rules that would have led to a more beneficial outcome for authors. In Poland, for instance, copyright law stipulates that the modes of exploitation must be mentioned in the contract. However, in the absence of such explicit mention, some argue that the transfer is not void as the scope of the contract may be "reconstructed" thanks to general rules of interpretation; thus, transfer may be deduced from the circumstances, the rules of social relations,

²⁵¹ Decision *BH2006.1*.

²⁵² Decision no. *21.P.22.998/2006/24*.

²⁵³ Principles of European Contract Law, art. 5:103.

²⁵⁴ According to the purpose-of-grant rule, if the exploitation rights have not been specifically designated in the contract, the scope of the transfer will be limited according to what is necessary for the exploitation undertaken by the transferee.

²⁵⁵ *Ray v Classic FM* [1998] FSR 622 (ChD) referring to *BP Refinery* (1977).

²⁵⁶ Note that such catalogues of music may be protected by intellectual property according to the European rules on the legal protection of databases (Protection of Databases Directive).

²⁵⁷ Prof. E. DERCLAYE, Response to the Questionnaire related to the UK Law.

established customs or purpose of the agreement²⁵⁸. This option is less favourable to the author than considering that rights are not transferred for fields not mentioned in the contract. In Belgium and Sweden as well, even if copyright law includes the *in dubio pro autore* principle, thanks to rules of interpretation of general contractual law some scholars argue that one may conclude that more rights have been transferred than those that would be transferred should the protective strict interpretation rule be observed²⁵⁹. In Belgium for instance, a court construed an unclear scope of contract broadly by making reference to the common intention of the parties as revealed by their behaviour²⁶⁰.

2.2.3. Doctrine of defect of consent and other conditions for the formation of a contract

The doctrine of defect of consent considers that the “quality” of the consent given by the contracting parties may possibly lead to the invalidity of a contract in case of a fundamental “defect” of consent. A defect exists, for instance, if the consent to an essential element of a contract is lacking (e.g. if the work that is the subject-matter of the contract or the remuneration are not specified) or when the contract is submitted to the unilateral will of one of the parties (e.g. a clause in a publishing contract stating that the contract will enter into effect when the publisher decides so – “*condition purement potestative*”). A defect may also consist in a mistake committed by one of the parties (e.g. the author thought the contract was related to a work, while it is indeed related to another work), or a “fraud” committed by a party to obtain the consent of the other (e.g. the publisher threatens the author to blacklist him in the whole publishing sector unless he signs the contract as it is, or lies to him to obtain his consent, for instance by untruthfully promising that he will publish a former, unpublished novel, to obtain his agreement on a lesser remuneration for the publication of the author’s later novel).

France provides many examples of application of these doctrines, as it has been reported to us. For instance, the absence of a remuneration stipulated in the contract²⁶¹ or the stipulation of an insignificant remuneration (remuneration of zero per cent of the royalty for the first 1000 copies sold) led to the nullity of a publishing contract, since remuneration, which was said to consist in an essential element of the contract, was lacking²⁶². In a decision of the *Cour de Cassation*²⁶³, a publishing contract was declared void because it provided that the publication of the work was submitted to the publisher’s exclusive appreciation of its suitability for the expectations of the public. This clause was held to be a “*condition purement potestative*”, according to which the very object of the contract (the publishing) was conditioned exclusively to the publisher’s will. This could not be considered as a contract as there was no actual commitment for the publisher. The court of Paris ruled that concealing the price of the transfer to a sub-licensee to the author - price on the basis of which the author has accepted the transfer and his

²⁵⁸ Prof. M. BARCZEWSKI, Response to the Questionnaire on Polish Law, quoting T. TARGOSZ and K. WLODARSKA – DZIURZYNSKA.

²⁵⁹ For Belgium, see A. CRUQUENAIRE, *L’interprétation des contrats en droit d’auteur*, Bruxelles, Larcier, 2007, p. 233, for Sweden, see Prof. A.BAKARDJIEVA and A.HAMMAREN, Responses to the Questionnaire on Swedish Law, quoting Nordell.

²⁶⁰ Bruxelles, 29 April 2003, Marco Beelen c. Lightning Records, *A&M*, 2003, p. 374, quoted by A. CRUQUENAIRE, 2007, p. 149.

²⁶¹ TGI Paris, 2 May 1969: *D.* 1969, jurispr. p. 630.

²⁶² TGI Paris, 30 November 1999, *CEE* 2001, comm. 87, note CARON.

²⁶³ Court of Cassation. 1st civ. 28 January. 2003: *D.*, 2003, p. 559 ; *Propri. intell.* 2003, p. 165, obs. SIRINELLI; Court of Appeal, Paris, 1st ch. 25 April 1989: *RIDA* 1/1990, p.314, where the Appeal Court ruled on a clause in a publishing contract stipulating the right for the publisher to appreciate if the manuscript suits the public and the goals fixed.

remuneration - was a fraud (*dol*). The consent of the author being vitiated, the contract was declared void²⁶⁴. The exploitation of the author's economic dependence is likely to vitiate the consent of the author (when the author is also the transferee's employee, for instance) even though the application of economic dependence as a defect of consent rarely takes place due to strict conditions. Indeed, the influence exerted must be abusive, and the reality of the threat of a considerable and present evil must be proven: mere economic dependence is not enough²⁶⁵.

2.2.4. Legal provisions on unfair terms

Legal provisions on unfair terms acknowledge the existence of uneven bargaining positions and the fact that non-negotiated contracts often result in unfair terms to the weaker party. The European Directive on unfair terms²⁶⁶ is a prominent example of legal protection of the weaker party in contractual relationships, here the consumer vis-à-vis the professional. Inspired from the good faith principle, this Directive prohibits non-negotiated clauses that cause a significant imbalance to the detriment of the consumer. Interestingly, it contains a black-list of terms considered unfair, which eases its enforcement.

The Directive on unfair terms and its national transpositions will not apply to copyright contracts entered into by authors, as authors are acting as professionals when they contract with exploiters²⁶⁷. However, in a very marginal decision, a French court has applied the unfair terms provisions to a contract where the author was also a consumer²⁶⁸. The case concerned authors of commentaries on Amazon's website who are "consumers" of Amazon's services as well. In order to challenge the transfer of copyright to the digital content provider in application of its standard terms of use, a consumers' association relied on the unfair terms logic and not on copyright rules.

In spite of the non-application of the Directive to author's contracts, unfairness is nevertheless addressed through other provisions: good faith and equity principles (see above), or, in the UK, the doctrines of unconscionability and restraint of trade (see sections below).

In addition, some countries have unfair terms regulations that are not limited to consumer contracts and may therefore apply to unfair author's contracts. Germany, Sweden, Hungary (and the Netherlands) have such specific provisions.

Hungary has general contract law provisions targeting grossly unfair differences between the value of a service and the counter-part promised in a contract. However, the Supreme Court ruled that the good faith principle may prevent a party, such as an author, from invoking the imbalance lying in the contract if, at the time of contracting, he was aware of this flaw²⁶⁹. Again, good faith is a double-edged sword.

²⁶⁴ TGI Paris, 2 June 1988, *RIDA* 1989, p.198.

²⁶⁵ See for example, Court of Cassation, 3 April 2002, *CEE* 2002, comm. 80, note CARON: in this case, the influence had not been established before the Court of Appeal.

²⁶⁶ Council Directive 93/13/EEC of 5 April 1993 on Unfair terms in Consumer contracts.

²⁶⁷ *IVIR*, 2002, p. 19. The directive only applies to consumer, defined as « any natural person who, in contracts covered by this Directive, is acting for purposes which are outside his trade, business or profession ».

²⁶⁸ *UFC-Que-Choisir/Amazon.com et autres*, TGI Paris, 28 October 2008.

²⁶⁹ Supreme Court, case *BH2011.343*.

In Germany, there are general terms and conditions provisions targeting unfair terms²⁷⁰ which are not limited to consumer contracts. These rules can be invoked in professional relationships to invalidate a general term that causes an undue advantage to a party without adequate consideration of the other party. The hypothesis of a standard clause imposed by the transferee in an author's contract may obviously be addressed by this regulation. However, the regulation does not allow the assessment of the subject matter of the contract (the main provisions), the control of the jurisdiction being limited to what departs from the rules of law (excluding what is purely contractual). As an example, the remuneration itself could not be controlled by the courts through this regulation.

The regulation has for example led to the invalidation of a clause granting a broadcaster the power to conclude a licensing contract in the name of the author with yet to be determined exploiters²⁷¹. A full transfer of rights was also on one occasion considered void, as copyright law provides that author's rights are inalienable²⁷². A provision allowing a publisher not to mention the photographer's name was declared void as well. Although related to a producer instead of an author, a clause from a broadcaster preventing the producer from exploiting the work on the basis of a transfer of the right to broadcast the work was said to be disproportionate given the purpose of the contract²⁷³. Interestingly, some jurisdictions have also sanctioned buy-out contracts (see Chapter III section 3) on the ground of these general contract law provisions²⁷⁴. One decision invalidated lump-sum clauses that were the counterpart to the transfer of broad rights, which overreached the purpose of the contract. The lump-sum clause was said by the court to be inconsistent with the principle of participation of the authors to the use of their work, thus causing an undue advantage to the transferee in view of this principle of copyright law. Beyond the scope of the present study, this regulation was also applied to standard clauses from collecting societies applicable to their members²⁷⁵. However, in spite of these forward looking developments for the balancing of authors' contracts, the Federal Supreme Court has a restrictive approach on this matter, insisting that the freedom of contract is almost unlimited²⁷⁶ and notably considering that remuneration cannot be reviewed through these regulations²⁷⁷. The potential of this regulation is therefore limited.

Sweden has two sets of provisions regarding unfair contracts. General Contract Law provides for the nullity or modification of unfair contracts²⁷⁸. In assessing if a contract is unfair, particular attention is paid to the inferior bargaining position that one party held in the contractual relationship. This rule has led to the substantial shortening of a long-term agreement for future delivery of visual-arts works, in consideration of the inferior position of the creator. However, a publishing contract that did not mention any duration nor provided any possibility of termination to the authors was held to be valid in consideration of the customary practice in the publishing sector. The provision is also useless in situations where the transferred rights turn out to be of disproportionately higher value than what could have been foreseen when the contract was concluded. It is also to be noted that, all in all, these provisions have only occasionally been applied to copyright contracts in spite of the will of the lawmaker in this sense.

²⁷⁰ S. 305-307 BGB (German Civil Code).

²⁷¹ IVIR, 2002, p. 17 referring to BGH GRUR 1987, 45, p.47.

²⁷² OLG Frankfurt am Main, 8 December 1983, GRUR 1984, pp. 515-516.

²⁷³ OLG Düsseldorf, 23 October 2001, ZUM 2002/3, p. 221.

²⁷⁴ In Germany, see file number 5 U 113/09, GRUR-RR 2011, 293; file number 6 U 4127/10, GRUR-RR 2011,44.

²⁷⁵ BGH, 13 December 2001, I ZR 41/99.

²⁷⁶ IVIR, 2002, p. 17, referring to BGH GRUR 1987, 45, p.48.

²⁷⁷ File number I ZR 73/10, ZUM 2012, 793.

²⁷⁸ Art. 36.

The other set of Swedish provisions, the Act on Contract Terms between Traders, enables businessmen and business organisations to ask that a term be declared void when contrary to trade practices. Professional organisations representing authors are entitled to represent authors in such judicial actions and, in this case, the injunction has an effect for all authors concerned by the incriminated contract. These regulations notably enabled KLYS, an umbrella organisation for collaboration between artists, to sue TV4 AB, a broadcaster, to have it cease and desist from imposing the transfer of their publishing rights by artists in contracts for commissioned works.²⁷⁹ The Court however found that this could not be regarded as contrary to trade practices. This regulation doubtlessly provides for interesting legal mechanisms regarding the issue under examination here. In addition to targeting unfair terms between professional, it also addresses an important enforcement issue in authors' contracts by entitling collective organisations of authors to sue for enforcement of its provisions. This is a noteworthy tool as many authors refrain from going to court to defend their interests as they fear being blacklisted by publishers and producers. However, the market-based approach may fail to address the weak bargaining position of authors; as such an approach may not specifically take into account the weak bargaining position of one party.

The logic of unfair terms in contracts, well known in consumer law, has thus sometimes spilled over in copyright contracts and could have many advantages, as it can rebalance unfairness in contracts between authors, who are generally a weaker party like consumers, and producers or publishers, and could introduce some level of collective enforcement by associations representing authors. Standard contractual practices could be challenged in courts by collective action to ban some unfair terms from copyright contracts.

2.2.5. Undue influence, unconscionability, restraint of trade

In the UK, contracts may also be declared void if a party exploits the other's poverty, ignorance or lack of advice, or if one party is in a position of domination on the other, resulting in a manifestly disadvantageous contract. The UK doctrines of undue influence, unconscionability and restraint of trade may contribute to target unfair contracts. It must be underlined however that these approaches are not widely used and remain an exceptional remedy²⁸⁰.

Some versions of these doctrines also exist in continental countries.

2.2.5.1. Undue influence

According to the "undue influence" doctrine, UK courts can set aside a contract where a "person in a position of domination has used that position to obtain unfair advantage for himself and so caused injury to the person relying on his authority or aid"²⁸¹. The resulting "manifestly disadvantageous transaction" is voidable.

In the *O'Sullivan v Management Agency*²⁸² case, "a young and then unknown composer (Gilbert O'Sullivan) entered into an exclusive management agreement with the defendant. O'Sullivan entered into publishing agreements with the defendant as a result. He later sought to have a declaration that these contracts were void and unenforceable

²⁷⁹ MD 2006:30 SKAP v TV4.

²⁸⁰ IVIR, 2002, p. 14, referring to BROWNSWORD.

²⁸¹ *National Westminster v Morgan*, 1985.

²⁸² *O'Sullivan v Management Agency* [1985] 3 All ER 351, [1985] Q.B. 428 (CA).

on the ground that there had been undue influence. The court of appeal held that the defendant was in a fiduciary position and thus the agreements were presumed to have been obtained by undue influence. Although there was no pressure on O’Sullivan to execute the agreements, that did not matter. Since ‘the fiduciary relationship existed, the onus was upon those asserting the validity of the contracts to show that they were the consequence of the free exercise of O’Sullivan’s will in the light of full information regarding the transaction. That has not been done. He had no independent advice about these matters at all’²⁸³. In its assessment of the case, the court was influenced by the fact that the royalty paid was less than that paid to other “unknown” artists²⁸⁴.

2.2.5.2. Restraint of trade

The “restraint of trade” doctrine may also be implemented in a way that protects vulnerable authors. According to this doctrine, everyone should be able to practice her trade and parties should be protected against unjustified, unconscionable (unreasonable) contracts. The doctrine can work against contracts that unreasonably and with no justification restrict the right of a party to practice his trade. This doctrine may lead the jurisdiction to sanction unbalanced author’s contracts that transfer broad rights to publishers whose obligations are rather limited.

In *Schroeder Music Publishing v Macaulay*²⁸⁵, the House of Lords invalidated an unfair and unreasonable agreement between a songwriter and a publisher since it was an unreasonable restraint of trade. Macaulay, a young and unknown songwriter, had entered into an exclusive *five year agreement* with the publisher where he had assigned the copyright for the *whole world for every work* created by him during the period of the agreement. The five years period would be extended to 10 years if his royalties exceeded £5,000. The publisher had *no obligation* to exploit any of Macaulay’s works. Moreover, the publisher could terminate the agreement at any time on one month’s notice but Macaulay could not. Last but not least, he could also assign Macaulay’s rights under the agreement but Macaulay could not without the publisher’s prior consent²⁸⁶.

Some scholars are also arguing that the restraint of trade doctrine could be applied in continental states as well, notably as to artists’ contracts with excessive duration.²⁸⁷

2.2.5.3. Unconscionability

Through this doctrine, UK courts have sometimes held contracts to be void since there was disparity between parties or unfairness in bargaining. To reach a finding of unconscionability, there must be a serious disadvantage to the other contracting party: one party must exploit his counterpart's weakness (such as due to poverty, ignorance or lack of advice) and the resulting transaction must be overreaching and oppressive.²⁸⁸

In *Clifford Davis Management v WEA Records* case²⁸⁹, the Court set aside a contract similar to that in the Macaulay case but on a slightly broader basis – i.e. *oppressive and unfair contract* between parties of *unequal bargaining power* (contract between a songwriter and his manager). One of the factors the court used was unconscionability.

²⁸³ Prof. E. DERCLAYE, Response to the Questionnaire on UK Law.

²⁸⁴ *Idem*

²⁸⁵ *Schroeder Music Publishing v Macaulay* [1974] 3 All ER 616 (HL).

²⁸⁶ Prof. E. DERCLAYE, Response to the Questionnaire on UK Law.

²⁸⁷ In Spain notably see I. GARROTE, "El artículo 1.563 del Código Civil y los límites temporales del contrato discográfico", pe.i (Revista de Propiedad Intelectual), núm. 33, 2009, pp. 39-81.

²⁸⁸ G. D'AGOSTINO, 2010, p. 188, quoting BEATSON.

²⁸⁹ *Clifford Davis Management v WEA Records*, [1975] 1 AllER 237.

The Court held that "there was such inequality of bargaining power that the agreement should not be enforced."²⁹⁰

2.2.6. Revision of contract given unforeseen circumstances

Some national provisions or case law enable a party to require a court to amend a contract if it turns out to be unbalanced due to the emergence of unforeseen circumstances that arose after the contract was concluded.

In France and Belgium, where the revision of the contract for unforeseen circumstances (*théorie de l'imprévision*) is not admitted, some academics however argue that it may be implemented as an application of the good faith principle, as a consequence of the necessary protection of authors²⁹¹.

No case law specific to copyright has been reported, however. Revision of contracts can only exceptionally be claimed as this constitutes an encroachment to the prominent principle according to which parties are bound by contracts they have entered into. It must notably be put forward that a party cannot be admitted to invoke circumstances they could have foreseen at the time of contracting in order to have the contract adapted according to such circumstances. This makes the usefulness of this contractual principle rather limited for our concern. It is for instance uncertain whether the appearance of new digital services is unforeseeable and the doctrine could be invoked to adapt contracts signed after the emergence of the Internet. Specific copyright best-seller legal provisions certainly provide for a more effective tool and contribute to explain the limited formal recourse to general law provisions.

2.2.7. Conclusion

The analysis of general principles of contract law has confirmed that the issue of unbalanced positions of authors and transferees in the contractual process could to some extent be corrected by recourse to rules of contract law aiming at regulating and balancing contractual relationships. Good faith, fairness, equity, defect of consent, etc., are relevant rebalancing doctrines or corrective measures. However, the unspecific character of general rules of contract law makes them insufficient to effectively target the weak position of authors when contracting. Moreover, as such rules are not designed to specifically protect the author, their application by case law to authors' contracts is not frequent and may be inconsistent with an author-protective approach, or may even tamper with the specific protective rules of copyright law. Their application being subject to conditions designed for all kinds of sectors and contractors, general rules of contract law sometimes fail to take into due consideration the weak bargaining position of the author. Their unspecific objectives imply that the court's ruling is open to a very broad appreciation of the facts. This also makes the reliability of those rules shaky, considering our goal. More specifically, these rules also fail to adequately address the peculiarities of authors' contractual position (as is for instance the case for the regulation protecting consumers based on a market approach).

As a conclusion, it may be stated that general contractual principles might be of some help but will not be tailored to address the authors' need of protection. Specific protective rules, that take adequate consideration of the contractual position of authors, are

²⁹⁰ Prof. E. DERCLAYE, Response to the Questionnaire on UK Law, quoting G. D'AGOSTINO, p. 189.

²⁹¹ M. VIVANT and J.-M. BRUGUIERE, 2010, n°677; N. BLANC, *Les contrats du droit d'auteur à l'épreuve de la distinction des contrats nommés et innommés*, Paris, Dalloz, 2010, p. 422.

needed. Such rules, being in line with the principles of general contract law, will better contribute to achieve the principles of contract law: freedom of contract and the equality of parties to a contract, which is necessary to enable authors' contracts to play their economic role in full.

That being said, some inspiration could be found in general principles of law, such as rules of usages when authors have participated to their drafting, or in consumer protection, such as the regulation of unfair contract terms or the recourse to a collective enforcement and action to help authors to challenge unfair copyright transfers or contracts. Specific provisions such as those governing unfair terms or class actions may serve as models for a more balanced legal framework that effectively takes into account the different bargaining powers of contracting parties. Swedish legislation constitutes a good example where the rationale behind Consumer Law has been applied to non-consumer relations and where professional organisations are entitled to represent authors before the courts. In a context where adhesion contracts are increasingly common and where authors are very reluctant to bring legal actions, class actions could also be considered as a means to ensure compliance with the law. Furthermore, collective organisations often refer to alternative dispute resolution systems and mediation procedures to solve contractual conflicts. In France for example, the representatives of both publishers and writers have put in place an "*instance de liaison*", a kind of expert group that purports to address contractual problems in the field of publishing contracts²⁹². Alternative dispute resolution systems allow authors and transferees to solve problems without huge investments in terms of time and resources. Another key dimension of collective action is addressed in the following section.

2.3. The protection of authors in practice: collective agreements

2.3.1. Collective agreements: a way to reinforce authors' position

Collective negotiation has a particular role in preserving authors' interests. Authors take part in professional bodies that represent and facilitate the dialogue with their counterparts: exploiters' representatives. All over Europe there exist national associations that, with more or less success, enter into negotiations with exploiters' associations to frame their business relation and to stipulate the conditions under which the exploitation of the work should be undertaken. Depending on the country, those representatives can be professional associations, trade unions, guilds or even, in some cases, collective management organisations (hereinafter "CMOs")²⁹³. Because the author is considered as occupying a position of weakness in the negotiation with the exploiter, collective negotiations between representatives of authors on the one hand, and representatives of exploiters on the other, may be a means to reach an equilibrium.

Collective agreements are the outcome of these collective negotiations. Such agreements can concern employment conditions, formal obligations applicable to the author and/or to the exploiter, and even, in some cases, remuneration rates. The legal basis and the effects of collective negotiations depend entirely on national legislation - there is no European harmonisation in this regard - and legal traditions. Therefore, in the eight countries considered, collective negotiations cover different realities. While in some countries, notably in France, the existing framework contracts may have an extended

²⁹² <http://www.sne.fr/editeurs/editeur-et-auteur/principes-de-la-reddition-des-comptes.html>.

²⁹³ See for example the French framework agreement signed on transparency in the cinematographic industry agreed upon in December 2010, reproduced in Annex III.

effect for all the agents in the sector (see below), other countries work more with model contracts that are proposed by organisations or agreed upon by representatives of authors and representatives of exploiters and are never binding. Sometimes these model contracts become a standard that is used even by those who are not members of the adhering organisations.

Furthermore, collective agreements may allow authors and exploiters to have recourse to standard contracts drawn up according to common rules agreed upon by both parties without having to draft specific contracts for each specific situation. In broad terms, the very use of collective agreements is to provide common principles that apply in those cultural sectors.

2.3.2. Collective agreements to ensure “adequate remuneration”: the case of Germany

The German model is based on a deep-rooted collective negotiations tradition: collective negotiations are generally accepted as legitimate tools to regulate economic and social relations²⁹⁴. As already mentioned in section 1, the *Bundestag* passed in 2002 a law to strengthen the contractual position of authors and performing artists by granting them a right to “an adequate remuneration” (section 32 of UrhG).

Later on, section 36 UrhG stipulates that “authors’ associations together with associations of users of works or individual users of works shall establish joint remuneration rules”: such rules may be used to determine whether remuneration is adequate in regard to section 32. This rule was introduced in order to strengthen the collective bargaining power of authors²⁹⁵. Representatives of authors on the one hand and representatives of exploiters (the term employed is “user” of the work) on the other are encouraged to agree joint remuneration rules to define how an adequate remuneration shall be defined and calculated. The originality of section 36 is that it is modelled on the provisions applicable to collective agreements in labour law²⁹⁶. Such a model follows the American example, where groups of authors and groups of exploiters can negotiate collective agreements, also known as Guild Agreements that regulate the conclusion of exploitation contracts²⁹⁷. Furthermore, the remuneration agreed in collective agreements is presumed to be fair according to s. 32 Abs. 2 S. 1 UrhG. As specified by s. 36 Abs. 2 UrhG the relevant associations must be (1) representative, which means they have to represent a large number of creators, (2) independent, i.e. only creators and not users of works are members of the association and finally (3) empowered by their members to establish remuneration agreements. S. 36 Abs. 1 S. 2 UrhG determines that these agreements shall take account of the circumstances of the respective area of regulation, especially the structure and size of the users. In order to

²⁹⁴ The *Tarifvertragsgesetz* (Collective Agreement Act) formalises the right for employees and freelancers to gather and negotiate with employers or exploiters’ representatives on collective labour agreements. Freelancers are also able to negotiate collectively: for example, German journalists’ representatives have signed and agreed collective agreements, joint remuneration rules, model contracts and memoranda of understanding with representatives of publishers. In this precise case, a different agreement is applicable for employees (*Gemeinsame Vergütungsregeln für freie hauptberufliche Journalistinnen und Journalisten*, 1. August 2010, 8 p.) and for freelancers (*Tarifvertrag für arbeitnehmerähnliche freie Journalistinnen und Journalisten an Tageszeitungen*, 29 Januar 2010, 8 p.). For freelancers, agreements are simply defining common remuneration standards. Many other agreements may be found in other cultural sectors in Germany: for example, in the audiovisual sector, screenwriters’ guilds have signed agreements with broadcasters regarding remuneration terms and conditions, and so did the producers’ representatives with the broadcasters regarding the terms of trade.

²⁹⁵ Prof. T. HOEREN, Response to the questionnaire on German Law.

²⁹⁶ Interview with a representative of the German Publishers Association.

²⁹⁷ IVIR, 2002, p. 91.

reach an agreement, the parties can either negotiate directly or turn to an arbitration board.²⁹⁸

To our knowledge, only few agreements have been signed on the basis of the new provisions. The first agreement concerns the publishing sector and in particular the conditions of remuneration of authors of fictional works in German²⁹⁹. The document clearly states that any remuneration rates that would be below the ones acknowledged in the agreement shall not be considered as adequate under section 32 of the UrhG³⁰⁰. The agreement only applies to works of fiction; it details very precise ranges of percentage of remuneration according to the number of copies sold (at the net retail price); and establishes the conditions of exploitation applicable to neighbouring rights, the terms of the advances paid to the author, the rightful use of new modes of exploitation of fictional works, etc. The agreement is in fact a replica of previous agreements that already existed in this sector.³⁰¹ In the audiovisual sector the German Director's Guild (BVR) has also concluded an agreement with the private broadcaster Pro7/Sat1 Deutschland establishing minimum fees and the participation of the author in the benefits generated by the work through success related fees. The agreement applicable to fictional programmes, TV series and theatrical feature films will be retroactive to 2002³⁰². In November 2012, the German public broadcaster ZDF was obliged by the Court of Munich to negotiate with the German Director's Guild (BVR) in order to agree on common rules for adequate remuneration on the basis of section 32.

2.3.3. Coping with new exploitations: the French Framework Contract on e-publishing

France also has a legal tradition of encouraging collective agreements, usually referred to as framework agreements (*accord-cadre* or *protocole d'accord-cadre*) in the copyright sectors. Art. L. 132-25, which is exclusively dedicated to the audiovisual sector, allows a collective agreement agreed upon by representatives of producers and of authors in the audiovisual sector regarding the remuneration of the authors to be made mandatory upon the totality of the agents of a defined sector by a simple *arrêté* (order) of the French Minister in charge of Culture³⁰³. Three agreements have been validated under this provision:

- The 15th of February 2007, a decree made compulsory a Memorandum of Understanding on the remuneration of cinematographic and audiovisual works, adopted on the basis of art. L. 132-25, in particular regarding pay-per-view VOD³⁰⁴. The initial agreement was signed in 1999.

²⁹⁸ One of the explanations given to understand the encouragement made to stakeholders to agree on common rules, through collective agreements or joint remuneration rules, is that stakeholders are deemed to know better the practices and the adequate remuneration that should apply in contractual relationships. Prof. T. HOEREN, Response to the questionnaire on German Law.

²⁹⁹ *Gemeinsame Vergütungsregeln für Autoren belletristischer Werke in deutscher Sprache* (Joint remuneration rules on the remuneration of authors for works of fiction in German) <http://www.boersenverein.de/sixcms/media.php/976/Verg%FCtungsregeln%20f%FCr%20belletristische%20Autoren.pdf>. The agreement was signed by the German Association of Authors (*Verband deutscher Schriftsteller*, part of the *Vereinigten Dienstleistungsgewerkschaft Ver.Di*) on the one hand, and the German Publishers Association (*Börsenverein des Deutschen Buchhandels e.V.*) on the other.

³⁰⁰ *Idem*, p.1.

³⁰¹ As pointed out by the German Publishers Association, Interview.

³⁰² FERA, Newsletter October 2013, p. 3.

³⁰³ C. CARON, *Droit d'auteur et droits voisins*, LexisNexis, 2013, p. 383.

³⁰⁴ "Memorandum of Understanding" of October 12, 1999, completed by "Memorandum of Understanding" of February 2, 2002, April 12, 2002 and February 17, 2004, on the remuneration of cinematographic and audiovisual works ratified by Decree of February 15, 2007, in application of art. L.132-25 of the Copyright Code; reproduced in Annex III.

- The 7th of February 2011, a decree made compulsory a Memorandum of Understanding regarding transparency in the cinematographic industry agreed upon in December 2010³⁰⁵.
- The 6th of May 2013, a decree, later on modified by another decree on the 9th of July 2013, made compulsory a Memorandum of Understanding dedicated to contractual relations between scriptwriters and fiction producers.

For all the other sectors, a similar provision does not exist. However, collective agreements are a common practice, although they may not have this extended effect unless a new legislative act is introduced to this end.

Facing the complexities related to the development of digital modes of exploitation for the book sector, the Minister of Culture mandated representatives of publishers and authors to negotiate on the conditions for digital rights' transferring and exploitation in the book sector. After some frustrated attempts, Professor Sirinelli was appointed to mediate in the negotiation. The Framework Agreement of March 21, 2013, on publishing contracts in the book industry, of the Permanent Council of Writers (*Conseil national des écrivains*) and the National Union of Publishers (*Syndicat national de l'édition*) represents a very interesting example of collective bargaining that is confirmed by the lawmakers. The Agreement contains two kinds of provisions, one of which is more flexible to be modified, so as to cope with the developments of the sector: the Code of Practices. The Ministry of Culture plans to introduce new legislation to extend its application to the whole sector.

In a nutshell the Agreement, reproduced in Annex III, establishes a new definition of the publishing contract. According to key provisions of the text, digital rights will be addressed in a specific part of the publishing contracts. The Agreement specifies the permanent obligation of exploitation (*exploitation permanente et suivie*), to be applied both to print and digital exploitation, while the Code of Practices further defines the modalities of mandatory exploitation. In case of non-compliance with exploitation obligations, the author will be entitled to gain her rights back (reversion right). The modalities of the remuneration have to be defined taking into account the characteristics of the digital exploitation: for example, the remuneration must take into account the advertisement's revenues and the Code of Practices will determine how to remunerate the author in case of monthly access fees to be paid by consumers. Given the uncertainties as to the future digital business models, the Agreement stipulates the possibility for both parties to review the remuneration of the contract in case of modification of the economic conditions of the book sector. A detailed reporting obligation is stipulated for the publisher both for print and digital modes of exploitation. Finally, the Agreement gives the possibility to terminate the contract if no exploitation has been undertaken for two years.

2.3.4. Conclusion

Whether legal provisions are strict or loose, one can acknowledge that contractual relationships can be balanced (mainly or partly) through collective actions. Collective bargaining agreements are indeed, according to legal scholars, a relevant means to solve key issues at hand when dealing with copyright contracts: "the conclusion of collective agreements between representatives of authors [...] on the one hand and publishers,

³⁰⁵ "Memorandum of Understanding" of December 16, 2010 on transparency in the cinematographic industry, ratified by Decree of February 7, 2011 in application of art. L.132-25 of the Copyright Code; reproduced in Annex III.

broadcasters or producers on the other, tends to provide the most satisfactory solution for all parties involved [...]. Consequently, collective bargaining offers perhaps the only guarantee that the interests of authors [...] will be duly taken into account³⁰⁶. Such a conclusion is shared by many representatives of authors at the European and national levels, arguing that collective agreements are, in many cases, the only means to ensure that essential aspects of the authors' rights are covered and protected, as they may never be altered without consulting the authors³⁰⁷.

Last but not least, collective organisations have a key role in raising awareness. Most of the entities contacted in our survey provide information to their members, some of them even provide training on legal issues and negotiating tactics as well as standard contracts their members may follow to carry out negotiations³⁰⁸. This function is no doubt a key one. Authors all over Europe lack legal skills and knowledge about the legal framework and this may be one of the causes of why they enter into contracts without being fully aware of what they are signing.

All in all, collective agreements should be concluded in full compliance with the existing legal framework. It has been argued that certain agreements may be against competition rules, in particular those fixing remuneration rates³⁰⁹. Although this issue requires an in-depth analysis of the applicable competition rules in each Member State and possibly at the European level, one could argue that this does not seem to be the case in some Member States, notably in Germany, where the lawmaker has included specific provisions to come up with an adequate remuneration through collective agreements. This collective dimension certainly exists in relation to the user contracts managed by CMOs all over Europe. In other countries, for example Canada, amendments to competition law have been enacted to facilitate collective bargaining in the copyright sectors. On the other hand, as the French example shows, collective agreements may be very relevant even if they do not deal with remuneration rules.

³⁰⁶ IVIR, 2002, p. 142.

³⁰⁷ For example, the European Parliament's Report on the online distribution of audiovisual works in the European Union (2011/2313(INI), 25 July 2012, Rapporteur: Jean-Marie Cavada), para. 50, maintains that the best means of guaranteeing decent remuneration for rights-holders is by offering a choice, as preferred, among collective bargaining agreements (including agreed standard contracts), extended collective licences and collective management organisations.

³⁰⁸ Model contracts proposed by authors' organisations seem to be seldom used in practice.

³⁰⁹ L. BENTLY, *Between a Rock and a Hard Place*, The Institute of Employment Rights, 2002. Available at <http://www.creatorsrights.org.uk/media/between.pdf>, p. 47. See also A. MISSINGHAM, *Status Quo: An exploration of the status of composers, performers and songwriters in the UK's creative economy*, Musicians Union & The British Academy of Composers and Songwriters, 2006, p. 38; and also Creators' Rights Alliance's Manifesto, section 5. Available at: <http://www.creatorsrights.org.uk/index.php?user=1§ion=manifesto+for+creators&subsect=&page=index&media=0>.

3. SELECTED ISSUES

3.1. Digital exploitation

3.1.1. Introduction

Many Member States apply a strict rule to the scope of the transfer of rights, which can only comprise the rights expressly specified in the contract (see above Chapter II, section 1.3). The duration of contract in time is thus likely to raise the issue of new modes of exploitation that were not foreseen at the time of its conclusion but that could have significant value both for the author and for the transferee.

3.1.2. The uncertain ownership of digital rights

The question has arisen particularly with the advent of digital technologies and Internet. In many European countries, depending on the applicable legislation, the right to digital forms of exploitation, also called "digital rights" (such as online posting, making available for downloading or streaming, video-on-demand, webcasting or simulcasting), in principle, could not have been included in transfer of rights dating back before the Internet. As a consequence, the author would have kept those rights and should enter in a new agreement with her producer or publisher for the latter to acquire such right. In the news sector³¹⁰, some court decisions have confirmed that a new authorisation was needed for the publisher to make print content available on line. However, in many instances, the ownership of the digital rights remains equivocal, given the non-existence of relevant case-law and depending on the wording of contracts.

The uncertainty of the ownership of these digital rights has an impact on copyright clearance (as the owner of the right that needs to be cleared is uncertain) and on the remuneration of the creators (as they cannot claim remuneration on new modes of exploitation from the exploiter if the rights have not been transferred).

Such uncertainty as to the ownership of the digital rights could hamper the development of new digital content services, as transferees have sometimes adopted practices that are not in line with the objective of copyright law to associate authors to the exploitation of their work. For instance, in the book sector in the United Kingdom, France and Spain, the practice has been reported³¹¹ of merely sending a letter to authors to obtain their signature to extend their pre-internet contract to digital uses, or to merely inform them of such extension. The release of works as e-books without informing their authors has also taken place. When comprehensive assignments of economic rights (buy-out contract) had been signed, transferees might consider that all rights, including digital rights, were duly acquired. When a percentage royalty is stipulated, it may be that the transferee will just apply it to the revenues from the digital uses. In both cases, although one might argue that the digital rights are remunerated, authors have not agreed upon the remuneration provided in consideration of the digital exploitation made of their works.

³¹⁰ See box in 1.3.

³¹¹ European Writers Council's response to the survey undertaken for the present study.

3.1.2.1. *Digital rights not adequately addressed by post-internet contracts*

This uncertain situation has not vanished with more recent post-Internet contracts. Clauses transferring digital rights in most exploitation contracts are drafted in very general terms³¹². The remuneration foreseen is also rarely specific to digital uses. In many instances, it may be that digital rights are not really discussed, but automatically transferred. Even though digital rights are now part of all contractual deals, all modalities of exploitation might not have been foreseen and the modes of calculation of remuneration are difficult to determine exactly and fairly in rapidly evolving business models. Digital markets, along with consumers' digital habits, remain limited at the present time³¹³. The digital market is therefore likely to develop significantly in the future. The dynamic character of the digital landscape might disrupt the traditional modes and rates of remuneration when financial streams and the respective margins of profit of content providers, producers or publishers differ from the margins and benefits generated by the sale of tangible copies. The dynamism of the digital landscape conflicts with long-lasting and stable contracts. At the time of contracting, it is not possible to know what type of digital exploitation will be made during the whole length of the contract, what will be the services and the revenues that they will generate.

To cope with the uncertainty of the future, exploiters try to obtain the widest possible rights to avoid future new contractual negotiation and transaction costs. As to the authors, they are consequently under pressure to sign global transfer of their digital rights and accept remuneration schemes that will apply to services that do not yet exist. Models based on a monthly subscription, customer-based access tariffs and ad-supported models might make per-unit remuneration models obsolete or insufficient to enable the author to participate in the economic value of her creation. Contracts agreed upon ten years ago for musical works might have already foreseen transfer of digital rights and remuneration for making musical works available on-line, but they might not have considered all the consequences of the new business models of streaming and subscription-based services such as Deezer or Spotify. It is therefore tricky to negotiate rights and remuneration for long-lasting contracts. The balance achieved in the sharing of revenue may be broken at any time by new digital uses. The uncertainty and difficulty also exist on the side of exploiters, for they might be cautious in determining remuneration for digital uses that might radically change, depending on a change of platforms, consumers' demands, business models, whose profitability is also uncertain.

This uncertainty also appeared in the interviews we conducted. The instability and the limited development of digital markets probably contribute to explaining why we received only limited information on digital aspects of authors' contracts. In some sectors, authors have argued that their remuneration should follow the higher margins that digital exploitation provides, in their view, to publishers and producers. However, the repartition of benefits and revenues from digital exploitation compared to traditional exploitation is difficult to draw with certainty. Revenues, profits and financial flows in digital content services are not yet clear, due to the instability of business models and consumption patterns. This makes definitive decisions on the sharing of the added value premature.

³¹² An example of broad clauses could be the following (related to photographs): "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 (including [...] computing file, network, network of network, web, intranet and internet, distribution, by analogical terrestrial television system, television, satellite, distribution per telephone, modem, cable, fiber optics, without limitation of this list)". (PYRAMIDE, "Whose Rights?", 2009; Available at: http://www.finnfoto.fi/wp-content/uploads/2009/10/rights_artwork.pdf).

³¹³ For example, in Germany and France, the e-book's market share amounts to 2% of the book sector, whereas in the US, since 2011 Amazon sells more e-books than print books.

AN UNPREDICTABLE DIGITAL LANDSCAPE

In the *book sector*, the transposition of a remuneration scheme based on tangible copies to downloaded e-books should also include emerging models where the consumer pays a monthly fee to read a number of books. The remuneration schemes might therefore deserve more diversity. As to revenues and profits, they are still uncertain. Variable production costs may be lower for e-books but important fixed costs for digitisation must be taken into account (producing, making available and adapting e-books to new devices and technologies): they add to production costs for the print edition but do not replace them. In the *press sector* as well, the question is much debated: how to associate journalists to the profits arising from the publication of their articles on the press agencies' websites which, although accessed for free, contribute to the revenues of the news agency (through advertisement or attracting free users to paying services or subscription)? The *music sector* is now facing an increasing trend of music listening on smartphones and the advent of streaming services enabling users to get a subscription to a constant music flow, which might substitute download-to-own services³¹⁴. Streaming services such as Deezer or Spotify present different flows of revenues. Globally, with the many music access services based on subscriptions, traditional remuneration schemes focused on the price of the work are outdated. Revenues to artists depend not only on the royalty-rate agreed upon but on the fact that listeners have a subscription or not and the global price they pay (or not) to access to the digital music service, as well³¹⁵. As to consumers' habits, they are still in the process of developing and changes are yet to come. Recently, Spotify stated that the service's revenues have risen importantly in 2013, along with the total royalties paid to artists (in the US the average paid per stream to artists amounts to 0,0015 USD)³¹⁶. So the digital market for music remains very volatile, even if it has been the first one to be affected by the internet and digitally developed. As to revenues, although digital music has a growing share in the global recorded music sector, the total value of the latter sector is still diminishing³¹⁷. This partial compensation may contribute to make authors feel that their remuneration does not follow the development of the digital economy.

3.1.3. Existing legal and contractual approaches to associate authors to the digital exploitation of their works

The participation of authors to the digital exploitation of their works implies the need to obtain their informed consent to the transfer of their digital rights in exchange for a fair share in the economic value yielded by digital exploitation. Some national copyright protective measures apply and contractual practices have been developed to that end. This section will assess legal provisions aiming at ensuring that the author is made fully aware of the scope of the contract, providing for specific contractual terms for digital exploitation, stipulating revision clauses, aiming at informing authors of financial facts related to the exploitation, stipulating obligations of exploitation and the possibility of

³¹⁴ P. WAELBROECK, P. ASTOR, C. WAIGNIER, "Engagement 8 - Partage des données relatives à l'économie du secteur et état actuel du partage de la valeur", Report for the Hadopi, September 2011, p.18.

³¹⁵ See for example (about Spotify) http://www.lemonde.fr/technologies/article/2013/12/03/spotify-verse-un-demi-centime-d-euro-par-chanson-ecoutee-aux-artistes_3524817_651865.html#xtor=AL-32280270

³¹⁶ <http://www.spotifyartists.com/welcome-to-spotify-for-artists/>

³¹⁷ PRS for music, Adding up the UK music industry 2011, 2011. Available at: <http://www.prsformusic.com/aboutus/corporateresources/reportsandpublications/addinguptheindustry2011/Documents/Economic%20Insight%2011%20Dec.pdf>.

right reversal, as well as the results of collective bargaining. Lastly, we will take a look at alternative remuneration systems consisting in having remuneration directly paid by the content service providers.

3.1.3.1. The foreseeability of the modes of exploitation

In order to make the exploitation and remuneration foreseeable for the authors at the time of contracting, some Member States of the EU require the explicit stipulation of the “modes of exploitation” in authors’ contracts (see Chapter II, section 1.3). In addition, some countries also prevent the transfer of rights on future or unknown forms of exploitation or make such transfer subject to strict conditions (*idem*).

A mode of exploitation may be defined as a concrete and independent use of the work, economically and technically³¹⁸. Examples of modes of exploitation are: the right to make original copies of the works (mainly to sell them), the right to communicate the work in movies, or the right to communicate the work on TV. The rationale behind the mandatory stipulation of the modes of exploitation in the contract and the prohibition of transfer of unknown forms of exploitation is to make authors aware of the rights they transfer, so as to enable them to discuss their remuneration accordingly. With the ambition to make a compromise between the foreseeability of the modes of exploitation for the authors, and some flexibility for the transferee who would not be willing to make a new contract each time a new exploitation mode appears, some countries authorise transfer of unknown forms of exploitation but submit it to remuneration (France), or/and provide the author with the right to opt-out to such new forms of exploitation (Germany) (as examined above, in Chapter I, 1.3.5).

The added value of such legal provisions in the digital context has been shown by some case law (see insert below).

³¹⁸ This definition is adapted from the German *Bundesgerichtshof* definition (5 June 1985, *GEMA- Vermutung I: GRUR* 1986, p. 62, quoted by A. LUCAS, H.-J. LUCAS and A. LUCAS-SCHLOETTER, 2012, p. 588).

THE FORESEEABILITY OF THE EXPLOITATION IN THE PRESS SECTOR

In Belgium³¹⁹, Sweden³²⁰, and France³²¹, cases involved press agencies (transferees) that had published articles, pictures and poems on their website or through a content service. Regarding authors' contracts that had been signed before the emergence of digital services, the courts held that transferees had no right to undertake digital exploitation because digital rights could not have been knowingly transferred. To come to this conclusion, the courts noted that the public and the publication, given the ubiquity of the Internet, made the service different from the traditional role of the press. Digital exploitation enabled new commercial exploitation well beyond this traditional role of the press agency. In the Belgian case, where the author's articles were aggregated with articles from other press agencies, it was also considered that the editorial line was different. The courts therefore held that such digital services were substantially different from the print edition foreseen in the contracts and that no authorisation for such exploitation had therefore been given to the press agencies. The fact that the digital exploitation was not resulting in any additional remuneration for the authors while it was a lucrative business for the publishers was also put forward by the courts.

However, the provisions aiming at strictly limiting the assignment of rights to foreseeable modes of exploitation have limits. In France, where such provisions exist, in a recent case³²² the French *Cour de Cassation* ruled that a contract including the transfer of rights for the making and exploitation of "phonograms" for commerce also authorised a digital music service of downloading (on the FNAC website, in that case). On-line services were not considered as a new mode of exploitation of the phonograms, which would require a new contract.

This illustrates the fact that it is not always certain whether a contract includes an existing or future digital service or not. This will notably depend on the precise drafting of the rights that are transferred in the contract, and on its interpretation by the courts, thus varying from country to country. Nowadays, standard clauses in authors' contracts automatically include digital rights, with precisions such as "downloading" or "streaming". This may make it impossible for the authors to argue afterwards that a given digital service was not covered by the contract. But it is nevertheless uncertain if such standard stipulations are enough to make the author aware of what she agrees upon, as new services may emerge and disrupt the balance achieved in the contract.

3.1.3.2. Contractual clauses and negotiation specific to digital uses

As stated before, contracts specifying a separate remuneration for digital uses are rare. In France, the recent Agreement SNE/CNE on digital publishing (see above Chapter II, section 3 and Annex III) may contribute to favour some negotiation and clauses dedicated to digital uses, as it notably requires that contractual provisions on digital exploitation be stipulated in a distinct part of the contract.

³¹⁹*Central Station v. AGJPB*, Civ. Bruxelles, prés., 16 October 1996, *A&M*, 1996, p. 426 and Bruxelles, 28 October 1997, *A&M* 1997, p. 383. Note that at the time of this case-law, the contractual stipulation of the mode of exploitation foreseen was not mandatory in Belgian law.

³²⁰*ALIS v SvD*, Svea District Court, Svea HovR, decision of 10.12.2002, case T 820-02 .

³²¹*AFP/ Pierre A*, Court of Appeal of Paris, 9 June 2009, available at http://www.legalis.net/spip.php?page=jurisprudence-decision&id_article=2670 .

³²²*SPEDIDAM / FNAC*, Court of Cassation, 11 September 2013.

Specific royalty rates have been reported in the book sector in some Member States. In France for example, where the author's remuneration consists in a percentage royalty calculated on the public price of the book, a higher royalty percentage is sometimes stipulated for e-books, for the author to have an equivalent remuneration per copy sold to the print edition when the digital book is cheaper than the print book. In Sweden and Spain as well, different percentages apply to different forms of exploitation. In the audiovisual sector, specific royalty rates may be stipulated, depending on specific costs.

It must be underlined however that specific contractual terms for digital rights are not in themselves a guarantee that genuine bilateral negotiation takes place. The necessary maturity of the digital market as well as availability of information on the flows of revenues generated by digital services may be a prerequisite to specific contractual terms. Transparency and understanding of the financial flows may be indispensable to more specific contractual discussion on digital rights.

3.1.3.3. Revision of the contract and best-seller clauses

Some Member States have established the right for one or both parties to claim a *revision of the contract* in case of economic changes in the sector. Such possibility of revision might prevent the exploiter from trying to reserve the largest transfer of rights from the beginning, with no certainty as to whether and how he will exploit such rights. The author could also rely on the revision of the contract to try and negotiate remuneration when the digital model of exploitation can be established with more certainty as to its value and the revenues it might produce.

In France, the recent Agreement between authors and book publishers provides that any party to a publishing contract may request a review of the remuneration. The Agreement specifies that this possibility applies to counter or correct discrepancies between the contractually-determined remuneration and the evolution of the digital business models in the publishing sector. Parties may call upon a commission of conciliation in case the negotiation process does not succeed. In Germany, the author has the right to claim for an adequate remuneration, notably when the transferee gains disproportionate advantages compared to the negotiated payment and when the transferee plans to undertake a mode of exploitation that was not initially foreseen in the contract. This may address the issue of a contractual remuneration that would be inconsistent with the effective digital exploitation of the work³²³.

Best-seller legal clauses (see Chapter II, section 1.4) that purport to replace the contractually agreed lump sum by a proportional remuneration of the author, should her work be successful on the market, may also trigger an adaptation of the remuneration to the digital developments occurring since the conclusion of the contract.

However, although revision clauses provide a valuable solution to the unpredictability of digital modes of exploitation, they are inapt at solving the more general issue of uneven bargaining powers (except when the author has gained in power in the case of commercial success), as new contractual terms remain to be negotiated. A conciliation commission, with representatives of both authors and transferees, as is proposed in the French example, may help rebalance the bargaining powers in case of unsuccessful

³²³ However, the absence of implementation of these provisions to the digital hypothesis at the present time prevents us from drawing definite conclusions as to the effectiveness of these provisions regarding the digital challenge.

attempts of revision. Because a new remuneration has to be negotiated, revision clauses imply new transaction costs for the parties.

3.1.3.4. Transparency and reporting obligation

Some countries have established reporting obligations for the exploiters in order to enable authors to monitor and follow the exploitation of their works, and check whether the remuneration they receive is correct (see supra Chapter II, section 1.9). In France, the recent agreement between writers and publishers in the book sector establishing a revision clause to adapt contracts to digital exploitation also provides for a very extensive reporting obligation. At least once a year, the publisher, irrespective of its size, must inform the authors of facts and figures on the exploitation: copies made and sold, royalties paid, rights transferred to sub-transferees. A specific part must address the digital exploitation and report the revenue from each and every digital mode of exploitation, individually.

This extensive reporting obligation has a specific value in the digital context. The availability of information on the digital uses is of primary importance in the digital sector, to follow the evolution of the latter and to adapt contracts if necessary. It should help the authors to be precisely aware of the possible digital exploitation, the new services offering the work, and the revenues generated by such exploitation. As information is power, informed users can better claim their due remuneration, remind their publishers of their obligation of exploitation or decide to opt for a revision of their contract. However, complete information to help achieve such goals would imply that financial information from the digital content providers is made available. A balance between transparency and business confidentiality must be struck.

3.1.3.5. Obligation of exploitation, limitation of transfer in time and the sanction of rights reversal

Submitting the acquisition of rights by the publisher/producer to an obligation to exploit the rights acquired may force the exploiters to be more cautious when defining the scope of the contract, instead of trying to draft the broadest possible scopes. If the transferee has the legal obligation to exploit the rights transferred, one may expect that she limits her acquisition according to her real exploitation intentions or that she strives to find exploitation means for all rights she has obtained from the author. This would provide a chance to move away from the tendency to draft wide standard contracts and limit the uncertainty as to the ownership of rights. At the same time, such a provision may foster the development of the digital economy.

Although some countries' copyright laws already provide for an obligation of exploitation, it does not generally apply to each right transferred. In France for instance, the existing obligation of exploitation applies solely to the publishing of the book in print copies. No digital publishing is required to satisfy the obligation of exploitation. Therefore, it is a standard practice to provide for a transfer of digital rights, even without any certainty that there will be exploitation in digital form.

The recent agreement between publishers and authors in the book sector intends to tackle that inefficient obligation of exploitation by imposing that exploitation be ensured for each possible mode of exploitation, in print copies or in digital ones. The print edition will therefore not be sufficient in itself to comply with the obligation of exploitation required by Copyright Law. In the case digital exploitation is not undertaken, the author

is entitled to get her digital rights back (reversion rights), and to transfer them to another publisher. The transfer contract of the traditional print rights is, in such a case, maintained, so long as the print exploitation is undertaken. The same is true if the book is only exploited as an e-book and not in print copies, but the rights to print and distribute tangible copies have been transferred to the publisher. This is a positive element as the author may not be willing to end the print publishing contract that is being executed in a satisfactory way. Such a solution actually divides the exploitation obligation in sub-obligations for each form of exploitation and aims at giving some force to the contractual bargain as no transfer of right could occur without its effective exploitation.

Given the uncertain and dynamic context of digital exploitation, a limitation in time of the exploitation contracts may also confer some protection to authors against a lack of digital exploitation by the transferee or a determination of the remuneration that has become inadequate or unfair. When the term of a contract is over, a new contract should be agreed upon. This allows the author to contract with another exploiter. Time limits may be considered as a kind of reversal clause.

The Swedish Copyright law provides an example of a combination of the two provisions (obligation of exploitation and time limit). It limits the transfer of the right to communicate a work to the public or to perform the work publicly (with the exclusion of cinematographic rights) to a period of maximum three years. Parties may nevertheless explicitly agree upon a longer period, but the author is granted back her rights (reversion right) if the transferee does not exercise them. This provision is limited to exclusive transfers.

Rights reversal provides a very effective solution to the non-performance of the transferee's obligations. In case of non-exploitation (where an obligation to exploit is stipulated), the author may regain her rights without having to go through a long, costly and uncertain judicial procedure. Rights reversal is automatic. This is especially important in contracts based on a relationship of trust, such as the publishing contracts in the book sector.

Adverse effects of reversion of rights must however be considered. Regaining their rights, either because of non-exploitation by the transferee or in virtue of a time limit, may be advantageous for the authors who have another good publishing option or are successful enough to find one. However, it may be useless for the author who has no other choice than staying with that publisher or producer. Such provision must not result in a good opportunity for the transferee to get rid of contracts he is not willing to execute or whose remuneration he is not willing to review. In the case that the author has no alternative, he must be given the right to claim for a revision of his remuneration, if it is no longer adequate, or to require the exploitation to be undertaken in case it is not. As to time limits, only the author should be entitled to invoke them to avoid them being detrimental to the party whose rights they were supposed to protect.

3.1.3.6. Remuneration fixed by collective bargaining

A common means to restore the bargaining power is collective bargaining, as seen in Chapter II, section 3. Some collective agreements notably reassess the right to remuneration for digital uses and set the amounts (see section on collective bargaining). There are some noteworthy agreements in the press sector, notably the broadcasting sector.

COLLECTIVE AGREEMENTS ON DIGITAL REMUNERATION IN THE PRESS SECTOR

In the press sector, where works are mainly created on demand and remunerated by a press agency, according to an employment contract or a commission contract, some collective agreements between the authors and the press agencies provide that the remuneration paid (salary or fee) is the counter-part for the first use of the work, and fix the remuneration due for subsequent uses (website edition, archives, databases, additional publication in further edition...), among which some may be digital uses. In France, for instance, an Agreement between the journalists' unions and the press agencies' federation³²⁴ stipulates the amount due by press agencies concerned to their employed journalists for further uses of the works in addition to the main use for which the work has been demanded. In Germany, a collective agreement between journalists' trade unions and public broadcasters stipulates that journalists shall receive a 4.5% additional remuneration for the digital uses of the works. In Sweden, after a hot debate to decide whether exploitation of works in digital editions of newspapers or in television webcasting constitutes new exploitation requiring an authorisation of journalists, in 1997, an Agreement was signed with trade unions that stipulates an additional annual copyright compensation of 1200 Swedish crowns per permanently employed journalist at the newspapers that have an electronic edition. In the UK, in addition to the Writers' Guild, the Personal Managers' Association and the BBC have signed an agreement under which all writers' contracts will provide for royalties for all commercial online uses. However, the amount of the remuneration is not fixed by the agreement. As to non-commercial uses such as the iPlayer catch-up service and the planned "online archive" on-demand service³²⁵, it is foreseen that they will be remunerated collectively. The BBC will make lump-sum payments, the amount of which is to be negotiated via collective bargaining.

3.1.3.7. Remuneration fixed and managed by CMOs

In order to ensure that remuneration is paid to authors, in some European countries, notably Spain and France, some remuneration is to be paid directly by digital content providers to CMOs. The CMOs set the tariffs that services like iTunes, and international and national TV digital services as well, have to pay to put films or documentaries on-line (for downloading, viewing, etc., for free or for paying services). The fees collected are then redistributed to authors. In Spain this is conceived as a "right to remuneration" for authors of audiovisual works, notably for the making available of their works on the Internet. This "right to remuneration" is unwaivable and must be enforced independently of what has been established in the contract with the producer. In France, a Memorandum of Understanding between the CMO for audiovisual authors and associations representing producers³²⁶ stipulates a "minimum remuneration" to be paid by on-line providers of Video-on-demand and pay-per-view TV. 1,75% of the public price for cinematographic and audio-visual works must be paid to the SACD (audiovisual authors' CMO), which redistributes these amounts to the authors. Even if this provision is included in what is a mere Memorandum of Understanding between authors' and producers' associations, a Decree has made its provisions applicable to the whole sector.

³²⁴ Agreement of November 26, 2013, on author's rights.

³²⁵ Those services provide access to programs that have already been broadcasted.

³²⁶ "Memorandum of understanding" of 12 October 1999, on the remuneration of authors' cinematographic and audio-visual works (Decree of 15 February 2007).

The above mentioned systems are promising as to the responses they bring to many challenges of the digital era (unpredictability, enforceability, uneven bargaining power of creators and exploiters), while at the same time being respectful of the producer's interests. The remuneration to be paid by the content providers is fixed or negotiated by the CMOs, which avoids the problem of uneven bargaining power when negotiating authors' remuneration. The remuneration so determined is directly due to the author (through the CMO), whatever the provisions on remuneration of her contract with the publisher. On the other hand, parties remain entitled to stipulate any remuneration that would come in addition to the collectively negotiated one.

These remunerations are effectively paid as they are mandatorily managed by CMOs. This avoids the enforcement problem that may arise when the payment is not managed by CMOs and is submitted to the action of the author. They are calculated on the basis of the exploitation by the content digital provider, not on the basis of the profit made by the producer. This amount is therefore not influenced by the producer's profit (it is not calculated on the producer's revenue) and the author is sure to have this remuneration directly paid by the final provider. This is an important advantage in particular as digital content providers increasingly operate on a global and cross-border basis and may have greater bargaining power than some producers. Totally detached from the author/producer contract, this system is also a response to the unpredictability issue as it focuses directly on the content actually offered by the digital content providers to the public. The system also seems respectful of the producers' rights and interests since authorisations to sell the content on-line must be obtained from the producers. However, a drawback of this approach is that it would make membership of a CMO necessary for the author to get the remuneration –unless otherwise stipulated by the law–, which is in conflict with the freedom of association.

European audiovisual CMOs have requested an unwaivable right to remuneration for the making available of the works of the artists they represent, similar to the one that exists in Spain³²⁷. Such a right is particularly relevant in the audiovisual sector where there is a presumption of transfer of rights to the producer, along with a common practice of paying lump-sums to authors. This petition has been echoed by the European Parliament that in 2012 called for an unwaivable right to remuneration for audiovisual authors and performers³²⁸ (see Chapter III, section 3). The SAA (Society of Audiovisual Authors), representing the interests of the CMOs and their members at the European level, notably advocates such unwaivable rights to remuneration for the making available of audiovisual works³²⁹.

3.1.4. Conclusion

Given the evolving nature of the digital landscape, new forms of protection of authors when contracting are needed to make sure they do not miss the digital opportunity. At the same time, such protections must take into account the challenges that such a dynamic sector implies for transferees. The solutions reported above help us to draw up general principles for adapting authors' protection to the digital challenge. However, although much change is yet to come in the digital landscape, this situation may be temporary as business models and digital services may be stable one day. At present it

³²⁷ SAA, FERA, FSE, "An End to Buyouts in Europe", Joint Statement, 10/04/2012, available on <http://www.saa-authors.eu/fr/news/61/>.

³²⁸ See European Parliament's Report on the online distribution of audiovisual works in the European Union, cited above, para. 48.

³²⁹ SAA, "Audiovisual Authors' rights and remuneration in Europe", *SAA White Paper*, 2011, p. 26.

may therefore be more efficient to create industry practices that take into account the current instability in the digital sector than changing legislation in the long term.

The usages in the industry may evolve towards more flexible contracts, when needed. The role to be played by professional associations in this digital transition is therefore central. Discussions between stakeholders at the European level should be encouraged, given the EU's willingness to foster trans-border digital markets and to allow the exchange of good practices and experience. The European Parliament could lay the groundwork for such European dialogue to flourish.

Taking into account the unavoidable changes that will occur; the practice of evolving contracts may help them to stay in line with the economic landscape. Authors' contracts could potentially extend to uses that do not exist at the time of their conclusion, but such contracts would then work as a framework for uses that do not yet exist. When new business models appear or big economic changes occur in the sector, authors and transferees should have the possibility to discuss anew how to apply the contract to the new circumstances, while making sure that the remuneration remains adequate. Exploiters would then likely refrain from signing wide scope contracts as they would enjoy some flexibility to cope with the evolutions of the digital market. Given that new discussions would need to take place to adapt the contract to new modes of exploitation, this process would be consistent even with the copyright law of countries where explicit mention of the modes of exploitation is required or contracting on unknown forms of exploitation is prohibited. As to the remuneration of digital rights, professional associations may be encouraged to define adequate, non-mandatory remuneration rates in the digital sector. Parties could refer to them to avoid long and difficult discussions. Negotiations involving both authors' and exploiters' representatives leading to collective agreements as to (mandatory or not) remuneration rates may gain additional credibility.

Information on economic flows is essential for the parties to deal with digital rights in an informed-manner. Information should be provided regularly to authors as to the characteristics and profitability of the modes of exploitation. In some hypotheses, providing such information may even cut short discussions on the sharing of revenue where new modes of exploitation are not profitable. The monitoring of the digital sector, including its revenues streams, is also a key aspect for the lawmaker to assess the need and effectiveness of the regulation. Large scale surveys to assess the profitability of digital modes of exploitation could bring a soft solution to address the continuously evolving digital sector and to monitoring its development. The EU could rely on already existing Commission's monitoring projects of the digital markets³³⁰.

The collective management of digital rights may also represent an alternative option. Consisting in the direct payment by digital content providers of remuneration to CMOs (and through them, to authors), it may provide a remunerative solution, notably where effective negotiation between authors and publishers/producers (or their representatives) is not possible. This is particularly relevant with regard to exploitation modes that have not been specifically discussed with the publisher/producer and are therefore not subject to a specific remuneration – as it is often the case in relation to digital rights. However, the relevance of such collective management must be questioned once digital rights are or become a primary mode of exploitation.

³³⁰ On the monitoring of digital markets by the European Commission see <http://ec.europa.eu/digital-agenda/en/digital-single-market-analysis-and-data>.

3.2. Rights reversion

3.2.1. Reversion in Europe

Copyright contracts are often concluded for a long period of time, sometimes even for the whole copyright term. For different reasons, transferees may not be interested in exploiting a work or certain rights anymore. They may even be in the position of not being able to do so, due for instance to financial problems. Consequently, many works may remain underexploited³³¹. Under these circumstances, creators may wish to have their rights back to proceed to the exploitation of their works. Rights *reversion* refers to the opportunity for the artist to regain ownership of works that have been transferred to the transferee.

Member States have introduced in their legislation relevant provisions on reversion or earlier termination of contracts. These provisions may vary a lot from one country to another. 'Use it or lose it' provisions are currently in force in some EU Member States for authors' rights (Belgium, Germany and Spain among those surveyed in the present study, and additionally Austria, Luxemburg, Nordic Countries and Portugal)³³². These provisions may apply to all kinds of copyright contracts or only to specific kinds of contracts, such as publishing contracts and film contracts (Belgium, Spain, Sweden).

One of the most common provisions deals with the lack of exploitation of the work³³³. Authors have an unwaivable right, in Germany and Hungary, to revoke the exploitation rights if the transferee does not exploit the rights transferred³³⁴. Some differences exist between the time limits and procedures set to exercise this right. In Germany the author cannot exercise her 'revocation' right before the expiration of two years from the transfer of the exploitation right³³⁵; the same happens in Hungary for long term contracts³³⁶. In Sweden, it is explicitly stated that in the case of termination for lack of exploitation, remuneration obtained by the author is kept by her and in case damage occurs she has to be additionally compensated³³⁷. In Germany, however, the author is required to indemnify the person affected by the revocation if and to the extent required by equity³³⁸.

Exploitation contrary to the artist's wishes can also be a case for early contract termination; for example, in case of sublicensing without the author's consent³³⁹ or exploitation against the author's "fundamental interests"³⁴⁰. In Germany for instance, authors are entitled to terminate the contract earlier if the work no longer reflects their convictions³⁴¹ or if the rightholder does not exercise the right or only does so

³³¹ M. KRETSCHMER, *Copyright Term Reversion and the "Use It Or Lose It" Principle*, International Journal of Music Business Research, April 2012.

³³² Commission Staff Working Document, *Impact Assessment on the legal and Economic Situation of Performers and Record Producers in the European Union*, {COM(2008) 464 final}, Brussels, 16.7.2008

³³³ German Copyright Law (s.41 UrhG), Hungarian Copyright Act (art. 51-54 HCA), Polish Copyright Act (54 § 2, 57 and PCA), Swedish Copyright Act (Arts. 33, 35, 40 URL), Belgian Law on Copyright and Neighbouring Rights (art. 26, § 1 LDA).

³³⁴ UrhG, s.41 Abs. 4, HCA art. 51 (4).

³³⁵ UrhG, s.41 Abs.1 and 2.

³³⁶ HCA, art. 51(2).

³³⁷ URL Arts. 33, 35, 40.

³³⁸ UrhG s.41.

³³⁹ Spain, LPI art. 68 (1) d).

³⁴⁰ J. BARTA (ed.), *System Prawa Prywatnego. Prawoautorskie*, C.H.BECK-InstitutNaukPrawnych PAN, Warszawa 2007.

³⁴¹ UrhG, s.42.

insufficiently and this significantly impairs the author's legitimate interests³⁴². In these two cases, the author will have to compensate the transferee if and insofar this is fair and equitable³⁴³. A similar system applies in Poland³⁴⁴.

Under Spanish legislation, the publishing contract is automatically extinguished ten years after the signature if remuneration has been fixed in the form of flat fee³⁴⁵.

Many countries also allow authors to recover their rights in the case of transferee bankruptcy³⁴⁶ or when the relations among shareholders of the legal entity exploiting the rights have substantially changed³⁴⁷.

Article L. 121-4 of the French CPI includes two very specific provisions on the right to withdraw from an agreement or change the work: *droit de retrait* and *droit de repentir*. Such rights form part of the moral rights of authors and are not as such a contractual protection of the author, but might have the same result as the reversion right known in other legislations. They enable an author to depart from the terms of an assignment agreement for intellectual, aesthetic or moral reasons³⁴⁸. The rights to withdrawal (*droit de retrait*) and modification (*droit de repentir*) give the author the ability to correct or retract a work even after publication.

In other countries, such as the UK, there are no specific provisions in the Copyright Law regarding reversion³⁴⁹, but authors may terminate the contract in application of Contract Law. Common reasons for earlier contract termination are the bankruptcy of one party, restraint of trade, undue influence³⁵⁰ and breach of licence terms³⁵¹. In any case, parties can include in the transfer agreement an automatic reversion of rights clause³⁵².

The reversion principle is not uniformly known or applied in all Member States. However, it has made its entry in the *acquis communautaire* through the Term of Protection Directive. This directive has created a new unwaivable right for music performers allowing them to terminate the contract if, 50 years after the publication of the phonogram, the record producer does not effectively exploit the sound recording³⁵³. This

³⁴² UrhG, s.41 Abs. 1.

³⁴³ UrhG, s.41 (6), 42 (3).

³⁴⁴ KC art. 56 (3).

³⁴⁵ Rule of expiration, LPI art.69.

³⁴⁶ See for example LPI art. 68 1) f).

³⁴⁷ UrhG, s.34 (3).

³⁴⁸ E. FORTUNET, *The author's moral right to withdraw a work (droit de repentir): a French perspective*, Journal of Intellectual Property Law & Practice, 2011.

³⁴⁹ However, under UK Law there are provisions which state that heirs can revert rights twenty-five years after the death of an author (British Reversionary Rights (BRR), United Kingdom Copyright Act of 1911).

³⁵⁰ In *Schroeder Music Publishing Co. v. Macaulay* [1974], 3 All ER 616, an extended term without an obligation on the publisher to exploit was held to be 'in restraint of trade'. See also *Zang Tumb Tuum (ZTT) v. Johnson (Frankie Goes to Hollywood)* [1993], EMLR 61; *Panayiotou (George Michael) v. Sony Music Entertainment* [1994], EMLR 2. In addition, contracts concluded under 'undue influence' are void: *O'Sullivan v. Management Agency* [1985] 3 All ER 351; *Elton John v. James* [1991], FSR 397. 'Restraint of trade' and 'undue influence' are both general doctrines applying to all contracts (see Chapter II, section 2).

³⁵¹ L. BENTLY, Br. SHERMAN, *Intellectual Property Law*, OXFORD University Press, 2009, p. 279- 289

³⁵² *Crosstown Music Co 1 LLC v Rive Droite Music Ltd* [210] EWCA Civ 1222.

³⁵³ According to new art. 3.2a of the Term of Protection Directive (as introduced by Directive 2011/77/EU): "If, 50 years after the phonogram was lawfully published or, failing such publication, 50 years after it was lawfully communicated to the public, 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, the performer may terminate the contract by which the performer has transferred or assigned his rights in the fixation of his performance to a phonogram producer (hereinafter a "contract on transfer or assignment"). The right to terminate the contract on transfer or assignment may be exercised if the producer, within a year from the notification by the performer of his intention to terminate the contract on transfer or assignment pursuant to

reversion of rights in case of a lack of exploitation aims at making performers benefit from the 20-years extension of their rights. As suggested in the Commission's Impact Assessment, this provision intends to have a positive effect on performers so they could re-release their fixations through another record company (or do it themselves) if the original company does not publish or release the record³⁵⁴. However, one may argue that making this right effective only 50 years after the publication of the phonogram is a small compensation for the 20 years extension put forward by the Directive. Furthermore, such a provision might question the obligation to exploit of the record producer or lead to the conclusion that such obligations have a deadline of half a century to be fulfilled. A similar provision does not exist yet in the *acquis communautaire* in respect of authors' rights.

3.2.2. "Recapture Rights" in the USA

The US Copyright Act (section 203) grants writers, composers and recording artists an unwaivable right to terminate the contracts and to recapture their rights once a period of time has lapsed. Accordingly, termination of contracts which cover the right of "publication" (including release of records) must be made within a five-year period beginning either thirty-five years from the date of publication, or forty years from the date of execution of the contract (grant of rights)³⁵⁵.

Rights reversion does not apply to all agreements. "Works for hire" do not fall in the scope of the provision, and the termination does not apply to derivative works authorised and created prior to termination; for the latter it is implied for example that in case a contract between a writer and a publisher ends, the author has no right to terminate the contract of a derivative arising from her work, as for instance a film. Grants by will and grants made by persons other than the author(s) may not be terminated either.

In order to enforce this right, an advance notice must be given to the grantee, signed by the number and proportion of owners of termination interests or by the authorised agents and served not less than two or more than ten years before that the effective date of the termination. The Act provides for termination of the grant also for joint authorships. As suggested by Fischer, this is a very important provision because many musical works may have more than one author.³⁵⁶

Provisions on rights reversion have become effective only in 2013, when the 30 years deadline for authors published in 1978 expired. It is still uncertain how many of these

the previous sentence, fails to carry out both of the acts of exploitation referred to in that sentence. This right to terminate may not be waived by the performer. Where a phonogram contains the fixation of the performances of a plurality of performers, they may terminate their contracts on transfer or assignment in accordance with applicable national law. If the contract on transfer or assignment is terminated pursuant to this paragraph, the rights of the phonogram producer in the phonogram shall expire."

³⁵⁴ EC, Commission Staff working document, Impact Assessment on the legal and economic situation of performers and record producers in the European Union, SEC(2008) 2288, Brussels, 16.7.2008, available at http://ec.europa.eu/internal_market/copyright/docs/term/ia_term_en.pdf.

³⁵⁵ Thus, for someone who signed a deal in 1978 for a book published or a record released (publication) in the same year, this period starts on January 1, 2013. On the other hand, for someone who signed a deal in 1978 for a work released in 1980, the window opens on January 1, 2015. Additionally, Section 304(c) governs older works: in the case of any copyright subsisting in either its first or renewal term on January 1, 1978, Section 304 (c) provides for termination of the exclusive or nonexclusive grant of a transfer or license of the renewal copyright (or any right under it) executed before January 1, 1978. Termination may be exercised at any time during a five-year period beginning at the end of fifty-six years from the date copyright was originally secured. See L. BENTLY, J.C. GINSBURG, "The Sole Right...Shall Return to the Authors": *Anglo-American Authors' Reversion Rights, From the Statute of Anne to Contemporary U.S. Copyright*, Columbia Public Law & Legal Theory Working Papers, Paper 9190, 2010, p.68- 83.

³⁵⁶ A. FISCHER, *Avoiding termination: How The Music Industry should deal with the Imminent battle over Copyright Termination Rights*, Student Scholarship, 2013. Available at: http://scholarship.shu.edu/student_scholarship/343.

works are eligible for this termination as in the United States works are often commissioned on a "work for hire" basis or as under employment contracts which are immune from termination. The impact remains also unknown as regards the industry side, which, according to some commentators, is more and more dependent on their back-dated catalogues of works³⁵⁷.

In the recent case *Scorpio Music, et al. v. Willis*, the Court held that Mr Willis had the right, in 2013, to recapture his interests in the copyright of 33 songs he co-authored³⁵⁸. The publishers challenged the two years notice sent by Mr Willis to enforce his right and claimed that, due to co-authorship, the latter had no right to terminate the grant himself but should have filed a multilateral termination notice with the rest of the authors (Village People). The Court, though, found that he had granted his rights separately therefore he had standing for claiming the rights back. Furthermore, the Court found that, "upon termination, Mr Willis would get back what he transferred – his undivided interest in the whole".

3.2.3. Conclusion

Provisions on reversion or early termination of contracts give the author the possibility to recuperate her rights under different circumstances. They aim at restoring the balance of copyright contracts in particular when the transferee does not, or cannot, properly proceed to the exploitation of the work or when the contract has been signed many years before, as in the case of the US provision and the Term of Protection Directive.

At first sight, reversion right is a principle that should work in favour of the authors and their interests, as they may automatically depart for several reasons from an agreement that is no longer efficient or desired. However, reversion is a radical derogation to the principle of binding contract and contractual freedom, which should be handled with care. Adverse effects of reversion of rights must also be considered. Regaining their rights, either because of non-exploitation by the transferee or in virtue of a time limit, may be advantageous for authors who have another good exploitation option. As already suggested in the section about digital exploitation, the very existence of reversion rights should not be construed as eroding the transferees' obligation to exploit the work, when such obligation exists.

³⁵⁷ L. ROCHTER, *Record Industry Braces for Artists' Battles Over Song Rights*, N.Y. TIMES, 2011. As suggested by Johnson, artists might be threatened by the collapse of the existing structure, as the publishers and producers are also the ones who help them reach their audience; in J. JOHNSON, *Application of the Copyright Termination Provision to the Music Industry: Sound Recordings Should Constitute Works Made for Hire*, University of Miami Law Review, 2013. Doubts also exist as regards the distribution channels for reverted works; see A. FISCHER, 2013. For further reflections on the impact on music publishers see L. A. ALTER, *Protecting Your Musical Copyrights*, Wixen Music Publishing, Inc, 2012.

³⁵⁸ *Scorpio Music, et al. v. Willis*, 11 Civ. 1557 (BTM), 2012 WL 1598043 (S.D.Ca. May 7, 2012) cited in WIPO Magazine, *Navigating US Copyright Termination Rights*, 4/2012, available at: http://www.wipo.int/wipo_magazine/en/2012/04/article_0005.html#1.

3.3. The imbalance as to the scope of the waiving and the envisaged exploitation

3.3.1. Far-reaching assignments

Inattention, inexperience or simply pressure on young, and not so young, authors, makes them sign transfers that go far beyond what is strictly necessary for the exploitation of the work. Very often, authors give away all their rights³⁵⁹. Although practices vary a lot from a sector to another and within each sector in relation to the different categories of works, transfers “for the full term of copyright” are still very common³⁶⁰. Authors’ associations or CMOs interviewed for the present study even reported on transfers in relation to the “whole universe”³⁶¹. Additionally, a well-established practice is to transfer rights in relation to future or unknown exploitation modalities even in those countries where legislation prohibits it –e.g. Spain. Transfers of future works also take place very often. And exclusive assignments are often required even if this is not always justified or compensated³⁶².

As suggested by the Hungarian expert for this study, Prof. Peter Mezei, “in practice publishers are sometimes eager to claim a “right” for themselves to unilaterally modify the content of the work without any right of adaptation and without any prior, written or even oral permission from the author”. And he continues: “contracts may even include a right for the publisher to unilaterally publish an abbreviated, electronic version of the book without any previous control and permission by the author.”³⁶³ Writers’ representatives have even reported examples of clauses where the transferee asked for remuneration for the selling of rights that were not in the scope of the contract³⁶⁴. Also in the music sector, contracts may require that rights for every song written by the musician in the future shall be transferred to the publisher, even though the contract had an original term of 2 years. Similar practices take place in the UK, even if the assignment of future works is often limited to the duration of the agreement³⁶⁵. Music authors have also expressed their serious concern in relation to the music commissioned for films or TV production. More and more music commissioners are asking composers to assign their publishing rights to the publishing brand of the audiovisual producer. These practices have been fiercely denounced by authors’ associations³⁶⁶.

³⁵⁹ See clauses reproduced in Commission pour la relance de la politique culturelles, *‘Livre Blanc pour la relance de la politique culturelle’*, 2007, available at <http://www.crpc.free.fr/C.R.P.C/page8/files/Livre%20Blanc%20CPI.pdf> concerning the transfer of rights on photographs, p. 148 and p. 151.

³⁶⁰ According the information collected in the survey, the newest contracts in the music publishing sector seem to have a limited duration that ranges from 15/25 years in the UK to 3 years in the case of the standardised single song collective agreement applicable in Sweden. In the audio-visual sector, full term or long periods are common (25, 30 years). Contracts for shorter periods are less and less common; F. BENHAMOU and S. PELTIER, “III. Économies des droits d’auteurs: La télévision”, 2007, available at <http://www.culture.gouv.fr/deps>. Other circumstances may also have an influence on the duration of the transfer: e.g. co-financed productions entail usually limited terms. A majority of book publishing contracts refer to the full term of the copyright, the exception being Spain or Sweden, where they normally last until the end of the fifth year after publishing, while the period for e-books is limited to 3-5 years in Sweden. As regards e-publishing see above section 1.

³⁶¹ See clauses reproduced in Commission pour la relance de la politique culturelles, 2007, p. 150.

³⁶² Contribution of ADAGP, the French CMO for visual arts (*Société des Auteurs dans les Arts graphiques et plastiques*), to the survey.

³⁶³ Prof. P. MEZEI, Response to the Questionnaire on Hungarian Law.

³⁶⁴ The original clause reads “Income from the sale of rights not covered by this Agreement shall be divided between the Author and the Publisher in proportions agreed by the parties hereto”; information provided by the EWC (European Writers Council).

³⁶⁵ Prof. E. DERCLAYE, Response to the Questionnaire on UK Law.

³⁶⁶ See for example PYRAMIDE, 2009; Creators Alliance, Creators’ Right Manifesto, p. 12; Fair Trade for Creators Campaign on <http://www.change.org/petitions/fair-trade-for-creators>.

Transferees have their own reasons to pursue this policy. They wish to secure all the rights, to retain full control on the copyright, to be sure they recoup or maximise their investments. "Rights follow the risk" is the common expression used by the industry to justify such all-encompassing transfer of rights. However, excessive assignments often deprive authors of control over the use of the work, participation to the benefits generated by the use of the work and/or the possibility of undertaking an exploitation that is not pursued by the transferee.

ASSIGNMENTS OF RIGHTS FOR SCIENTIFIC PUBLICATIONS

In some cases, one may even argue that the use of overreaching contract clauses responds more to a professional custom or practice than to a real need of the industry. This is probably the case in scientific publishing, where authors are usually required to assign all their rights, for all territories, in all languages and for the whole duration of copyright, even though this is only to publish one article in one national journal once and in one language. Assignments are also often preferred over licensing for scientific articles, even though a mere licence would be sufficient for publishers to publish the scientific journal and include its contents in scientific databases.

This all-encompassing transfer, worsened by its duration equivalent to that of copyright, makes the bargain particularly unbalanced for scientific authors who are generally not remunerated for publication in scientific journals. Such authors are deprived of their copyright in their work with no remuneration or any other form of compensation (other than some copies of the publication).

It also runs counter to the EU policy on open access to scientific publications resulting from publicly-funded research. In its Recommendation of July 2012 on access to and preservation of scientific information³⁶⁷, the European Commission recommends that Member States encourage researchers to retain their copyright while granting licences to publishers, notably to entitle researchers to make their works available in open access, in parallel to publication in scientific journals.

National research-funding bodies, as well as the European Research Council, equally impose that the researchers they fund publish their results in open access 6 or 12 months after their first publication in scientific journals. This obligation of open access publication would however run counter to the contract researchers generally sign with scientific publishers for an exclusive transfer to copyright to their benefit.

A comprehensive transfer of all exclusive rights to the publisher, even though it is a common practice in scientific publishing, is not needed, as few scientific publishers will exploit the article in many forms or in many languages. Generally, the publisher should only be authorised to publish the article in the journal and to include it in relevant databases, as well as sublicensing such right to the exploiters of such databases. That should not prevent the author from keeping her copyright and complying with her open access obligations towards her research-funding institutions.

³⁶⁷ Commission Recommendation on access to and preservation of scientific information, Brussels, 17.7.2012, C(2012) 4890 final.

The problem of far-reaching contracts is particularly acute as regards the online environment: exploiters may want to be sure they have all the rights they need to cope with exploitations facilitated by unknown technical developments.

In order to prevent authors from signing what could be compared to a blanket assignment, there exist in copyright laws different provisions requiring written contracts or a detailed specification of the scope of the contract – as regards the use, duration or place – even under penalty of nullity (see *supra* section 1). However, this requirement has turned into the practice of concluding contracts with a very detailed list of the rights and exploitation modalities transferred by the creators. The list may be so comprehensive as to cover all the imaginable rights, in full compliance with the law but with the effect of a wide transfer that in some case goes beyond what is absolutely required for the exploitation of the work.³⁶⁸

Certain countries have introduced in their national law the so-called “purpose of grant rule” (see above Chapter II, section 1.6)³⁶⁹. As stated in the German *Freelens* case, – where the court considered that the licence to publish photos in a print edition did not include the right to publish them in the CD-ROM version of the magazine – the purpose of this rule “expresses the notion that the copyright powers tend to remain with the author as far as possible”³⁷⁰. Ambiguous transfers must be interpreted as only referring to the rights that are absolutely necessary to fulfil the purpose of the contract. But once again, this rule is fully effective only when the contract is not clear enough as regards its scope and when authors dare to bring an action before the court. And authors are particularly reluctant to undertake legal actions, either because they do not have the means to do it or because they are afraid of being included in a black list³⁷¹ so that they risk being unable to publish or produce works for certain undertakings.

Other kinds of substantive provisions aim to accommodate the interest of authors and the eagerness of the industry to acquire all the rights, including those concerning future and unknown forms of exploitation. In Germany, since 2008, the author is entitled to demand an adequate remuneration for exploitation modalities that were not known at the time of signature of the contract instead of challenging the transfer of the rights. Agreements on unknown types of exploitation have to be in a written form and the author has the right to revoke the transfer of the right(s) within the period of three months after the other party informs her about the new form of exploitation. The author may not exercise this right contrary to the principle of good faith if her work is part of an entity of works that is being exploited. The provision has been however subject to criticism: the German visual authors association VG Bild-Kunst considers that the new system deprives authors of the only way they had to negotiate additional remuneration for new forms of exploitation³⁷². Also, France permits the transfer of rights for unknown forms of exploitation if participation of the creator in the profits from this exploitation has been expressly laid down in the contract. These provisions provide certainty to the transferee and at the same time ensure a separate remuneration of the author for this unexpected exploitation. However, they do not solve the issue of overreaching transfers concerning unexpected forms of exploitations that are not needed by the exploiter.

³⁶⁸ Clauses of this kind may be found in PYRAMIDE, 2009, p. 18 et seq.

³⁶⁹ Vid. G. D’AGOSTINO, 2010, p. 125 and 167-168.

³⁷⁰ BGH, Decision of July 5, 2001, cited in G. D’AGOSTINO, 2010, p. 125 and 167-168.

³⁷¹ G. D’AGOSTINO, 2010, p. 27.

³⁷² VG Bild-Kunst’s contribution to the survey.

3.3.2. The problem of the so-called buy-out contracts

A particular case of “excessive” contracts are certain kinds of so called buy-out contracts. Despite specific provisions favouring the use of proportional remuneration, authors are more and more often transferring their rights in exchange for a lump sum³⁷³. The practice of buy-out contracts has spread in recent years, especially as regards commission contracts and in certain sectors. In the audiovisual sector, directors and screenwriters very often transfer all their rights to the producer in exchange of a lump sum for writing or/and directing the film at a very early stage of the project development.³⁷⁴ In music, buy-out contracts, although not the rule, have become more and more common, notably in relation to music used in brand and corporate communications³⁷⁵. Sometimes, buy-outs represent a tempting incentive for young musicians who need cash in a highly competitive world with many new composers and a more limited number of clients³⁷⁶. Even in the field of visual arts this practice appears to be very common³⁷⁷. However, the lump sum that is originally agreed upon does not necessarily take into account the subsequent use of the work. The most pernicious buy-out contracts can even require the author to “sell” all the rights and, in the case that this is not possible (e.g. if rights are mandatorily managed by a CMO), to report to the exploiter on the royalties collected so that the latter can ask for the corresponding amounts from the author³⁷⁸. Fortunately this example is an exception. In any case, the principle of the creator being remunerated according the effective exploitation of the work seems to be broken in almost all buy-out contracts.

Scholars discussing the economic rationale behind buy-outs argue that they are not necessarily the most efficient solution for copyright contracts. Kretschmer considers that both royalty and fixed payments, including upfronts, must be present and that non-linear royalties (ex. best seller clauses) would be more optimal than linear ones³⁷⁹. While transferees argue that payments in the form of royalties or more specifically payments *per use* would entail huge transaction costs, associations representing the interests of creators defend the principle that authors should be allowed to participate in the success of the work. This is in fact the claim of European audiovisual associations in their Joint statement “An end to buy-outs in Europe”³⁸⁰.

³⁷³ In the book sector, however, proportionality seems to be the most common method of establishing the remuneration for writers. Publishing contracts often include a royalty ladder giving the author a higher royalty if the book sells well. Journalists or translators, however, often sign buy-out contracts.

³⁷⁴ SAA, “Audiovisual Authors’ rights and remuneration in Europe”, *SAA Wither Paper*, 2011, p. 13. Although buy-outs are particularly common in the audiovisual sector, other modalities to pay for the rights do also exist. Thus, screen writers and film directors may also be entitled to participate in the exploitation of the film through a fixed royalty percentage after recoupment of the financing. In some countries, such as the UK, a collective licensing scheme has been put in place in virtue of which directors receive a royalty for the secondary use of their work in television. However this system is not in place for feature films (movies or motion pictures). According to Director UK, directors of British independent films are extremely vulnerable to negotiating tactics and are often pressured to defer their fees to keep projects on course.

³⁷⁵ As suggested by German Composers Club in their response to the survey.

³⁷⁶ In their contribution to the survey, the Swedish Society of Composers, Songwriters & Authors insisted on this point and acknowledged the existence of more and more users who refuse to pay licenses claiming that they are using royalty free music. Also in Germany, GEMA-free clauses are a common requirement.

³⁷⁷ As acknowledged by the Swedish CMO for Visual Arts BUS (*Bildkonst Upphovsrätt i Sverige*), contribution to the survey.

³⁷⁸ Example provided by David Kavanagh in the Seminar “Fair remuneration for Creators – Trialogue with Creators, Employers and the European Institutions”, organised by UNI-Mei and FSE in Brussels, 7th November 2013.

³⁷⁹ M. KRETSCHMER, EST. DERCLAYE, M. FAVALE, R. WATT, 2010, p. 24.

³⁸⁰ SAA, FERA, FSE, 10/04/2012; Vid. also FERA’s *Directors’ contract guidelines*: “buy-outs are not acceptable. A director’s rights may be transferred singly, in groups, or all at once, but each right or group of rights, its method of transfer, term and payment should be specified in the contract”, p. 31; also vid. CREATORS ALLIANCE, “Creators’ Right Manifesto”, p. 14 et seq. available at:

The legality of buy-out contracts has been discussed by the courts although unfortunately there is no well-established jurisprudence. In Germany, the Higher Regional Court of Hamburg considered a buy-out clause to be void, in application of existing legislation on general terms and provisions, in virtue of which the scope of the transfer of rights departed from the contract's purpose without an adequate consideration of the other party³⁸¹, while other courts, and notably the Federal Supreme Court, have refrained from entering into such analysis and adopted a much more restrictive approach³⁸².

The issue of authors' remuneration is at the very heart of copyright contracts. As we have seen in Chapter II, section 1.4, different provisions have been put in place in order to ensure a fair remuneration to the author and to avoid buy-out contracts³⁸³ - from requirements to provide adequate (e.g. Germany) or proportional (e.g. Spain) remuneration, to best seller clauses (e.g. France) or the need to specify remuneration as regards each mode of exploitation (Belgium, Poland). However, many of these rules are not mandatory, contain numerous exceptions or are simply not respected.

More drastically, in order to ensure that audiovisual authors participate in the exploitation of the work and that they are not trapped in "all rights included" production contracts, the Spanish legislators have introduced an unwaivable remuneration right for the communication to the public, including the making available, mandatorily managed by a collecting society and paid by the user³⁸⁴. This right is particularly relevant, taking into account the legal presumption of transfer in audiovisual production contracts and the common practice of buy-out contracts in this field. European collective societies have indeed requested to have this unwaivable right for making works available at the European level³⁸⁵. This petition has been echoed by the European Parliament, that in 2012 called for an unwaivable right to remuneration for audiovisual authors and performers concerning all forms of exploitation of their works, including ongoing remuneration where they have transferred their exclusive 'making available' right to a producer.³⁸⁶ The issue has also attracted the attention of the European Commission that has launched a tender for a Study on the remuneration of authors and performers for the use of their works and the fixations of their performances. The study will undertake an evaluation of actual levels of remuneration (payment) in the on-line and off-line environment in ten European countries.

Finally, it is worth noting that the issue of buy-out contracts has been addressed by the European lawmaker in the Term of Protection Directive. This piece of legislation includes

<http://www.creatorsrights.org.uk/index.php?user=1§ion=manifesto+for+creators&subsect=&page=index&media=0>

³⁸¹ File number 5 U 113/09, GRUR-RR 2011, 293. The decision dealt with a case in which the plaintiff, a collective management organisation for journalists, sold photos for a magazine to the defendant, a publisher. The parties disagreed on the effectiveness of several provisions in the General Terms and Conditions used by the defendant. The court evaluated every clause in question and determined whether they established an undue disadvantage for the plaintiff. The court held that a clause is likely to constitute an undue disadvantage if the scope of the transfer of rights departs from the contract's purpose without an adequate consideration of the other party. A general buy-out clause is therefore void. Information provided by Tomas Hoeren in his contribution to our experts' survey.

³⁸² File number, I ZR 73/10, ZUM 2012, 793.

³⁸³ See also D'AGOSTINO, 2010, p. 127.

³⁸⁴ Art. 90 LPI contains particular rules concerning the audiovisual authors' remuneration rights. As regards the communication to the public against entrance fee, audiovisual authors have the right to perceive a percentage of the benefits generated through public exhibition. For other modalities of communication to the public as well as in the case of the making available of the work, the law stipulates that authors are remunerated according to the tariffs established by relevant collecting society, the SGAE. More information on Spanish National Report Annex I.

³⁸⁵ SAA, FERA, FSE, Joint statement "An end to buy-outs in Europe".

³⁸⁶ Resolution on the Online distribution of Audiovisual works in the European Union, para. 48..

some provisions to the benefit of performers when they have entered into buy-out transfers so that they will be entitled to an annual supplementary payment after the 50th year of the term of protection³⁸⁷. In order to make this right, conceived as unwaivable and to be managed by collecting societies, effective, the phonogram producer must set aside the 20 % of the revenue derived from the use of the work. Once again one may consider this as a meagre compensation taking into account the long period of time after which the right will become effective, but the principle behind this rule – complete lump sum payments with additional remuneration proportional to the revenues generated by the exploitation of the work - deserves further consideration.

3.3.3. Conclusion

The contractual relationship reflects a compromise between the different interests at stake. Exploiters logically aim to maximise their, sometimes huge, investment and to do so they try to obtain enough rights, even those unimagined, to undertake the exploitation of the works. This may lead to excessive contracts, whose scope goes far beyond what is in fact necessary for the effective exploitation of the work. Exploiters could reasonably argue that the potential exploitation of work is not always certain, and that unpredictability of the demand and of technical developments requires them to conclude all-encompassing contracts. However, authors should see their rights preserved and be entitled to participate in the benefits generated by their work. One may even argue that excessive and/or buy-out contracts may create inefficiencies since rights remain underexploited and creators do not have enough incentive to create. Creative solutions, such as the regime for unknown forms of exploitation put forward in Germany or in France –both enabling the exploiter to undertake the exploitation if separate remuneration is provided to the author-, shortening the lifetime of contracts according to the characteristics of the sector, the standardisation of fair terms through collective agreements or model contracts, the introduction of remuneration rights accompanying exclusive rights, or complementing lumps sum payments through a royalty payment from a particular period of time, could then be put in place to ensure a certain flexibility to exploiters as well as enough guarantees for authors to come up with contracts that better balance their interests. The final section of the study includes some suggestions to that effect.

3.4. The contractual waiving of rights to remuneration

3.4.1. Introduction

Buy-out contracts may go so far as to include the assignment of so-called remuneration rights – as opposed to exclusive rights.

Authors benefit from the exclusive right to authorise or prohibit the exploitation of the work. Exclusive rights are part of the *acquis communautaire* recognised by the Copyright in the Information Society Directive and Rental and Lending Rights Directive. However, in certain cases exclusive rights may be replaced by a remuneration right: for instance, in relation to private copy (right to “fair compensation”) as well as rental and lending rights (right to “equitable remuneration”). In those cases, the author is not in a position to prohibit the use of the work, but is entitled to receive a fair compensation or an equitable remuneration. In this way, the lawmaker protects the authors’ right to be remunerated for the specific use of the works. Furthermore, in order to ensure creators’ participation

³⁸⁷ Art. 3.2b and 3.2c, as introduced by Directive 2011/77/EU.

in the exploitation of the work, the Rental and Lending Rights Directive stipulates that the remuneration right due to authors for the transfer of the exclusive rental rights to phonogram or film producers is unwaivable. The wording of the European provisions is not so clear regarding other remuneration rights such as those concerning private copying or the lending limitation.

The *Luksan* case has brought some light on the nature of remuneration rights. In this judgment³⁸⁸, the Court of Justice of the European Union laid down the principles of fair compensation so as to harmonise the interpretation of the European legal framework and to underline the unwaivable nature of the right to remuneration.³⁸⁹

3.4.2. The Luksan case

In this case opposing the scriptwriter/director of a documentary film, Mr Luksan, and the producer of the film, Mr Van der Let, the Court of Justice favoured European scriptwriters and directors, clarifying their exploitation rights and their right to fair compensation for private copying of the films they create. The Judgment was issued on 9th February 2012 on a reference for a preliminary ruling from an Austrian court.

The applicant (Mr Luksan, screenwriter and director) had granted to the defendant (Van der Let, film producer) all author's and neighbouring rights to the film with the exclusion of the right of making available to the public on digital networks, as well as the right to broadcast. The contract had no specific rules regarding remuneration but the applicant had transferred his rights to remuneration to a collecting society. The trailer of the film was made available on the Internet and the film on DVD. Luksan filed a case against Van der Let claiming that his exploitation rights had been infringed. Van der Let argued that the contractual rules were void due to the fact that the specific legal provisions providing for the original and direct allocation of the exploitation rights to the film producer³⁹⁰ prevail against the specific contractual provisions; therefore he should be granted all exploitation rights exclusively. Additionally, in respect of his statutory remuneration rights, Luksan asked for half of the private copy's remuneration provided for by law, against his defendant's argument that those rights to compensation belonged to him. The *Handelsgericht Wien*, having doubts about the compatibility of the Austrian Copyright Law with EU law, referred the case for a preliminary ruling to the CJEU. The Austrian Copyright Law, art. 38(1), provides for the "original and direct allocation of the exploitation of rights" to the film producer as well as for the possibility to grant by contract all statutory rights to remuneration to the film producer.³⁹¹

The Court judged that national laws which allocate the authors' exploitation rights exclusively to the producer contradict European law; thus it effectively banned national laws which foresee statutory assignment or compulsory transfer of authors' exploitation rights to the producer. The Court stated that European law can only tolerate a

³⁸⁸ CJEU, 9 February 2012, *Luksan*, C 277/10.

³⁸⁹ St. BARAZZA, "Authorship of cinematographic works and ownership of related rights: who holds the stage", *Journal of Intellectual Property Law and Practice*, Oxford University Press, 2012. In the same sense An. KUR, Th. DREIER, *European Intellectual Property Law: Text, Cases and Materials*, Edward Elgar Publishing Limited, 2013, p. 295.

³⁹⁰ Art. 38(1) Austrian Copyright Law, *Urheberrechtsgesetz*, BGBl. 111/1936.

³⁹¹ Art. 38(1) Austrian UrhG reads "[...] the exploitation rights in commercially produced cinematographic works shall belong to the owner of the film company (film producer). The film producer and the author shall each be entitled to one-half of the statutory claims to remuneration, unless such claims are non-renounceable and unless the film producer and the author have agreed otherwise. Copyrights subsisting in works used in creating the cinematographic work shall not be affected by this provision".

presumption of transfer “provided that such a presumption is not an irrefutable one precluding the authors from agreeing otherwise”³⁹².

In addition, and more in relation to the subject of this section, the Court examined the right to fair compensation payable to authors under the private copying exception³⁹³. The Court stated that there is no provision in the Copyright in the Information Society Directive that could lead to an interpretation according to which European Union legislation envisages the possibility of this right being waived by the person entitled to it.³⁹⁴ Thus, the CJEU ruled that the film director (Mr. Luksan), in his capacity as author, had to be granted *fair compensation*. The CJEU ruled that the film director must always benefit from a fair compensation for the use (under the private copying exception) of his work and that he must not be deprived of his right by the film producer. European Union law therefore precludes national legislation which would allow an author of cinematographic work to waive his right to fair compensation.

Even though the Court provided an answer only concerning the remuneration right for private copying, since the question referred to the court only concerned that particular right, its decision can be read as stating a general principle of unwaivability of remuneration rights, by grounding its reasoning in the rule of unwaivability of the right to remuneration for the transfer of rental rights laid down by the Rental and Lending Rights Directive (Article 5), and in the obligation to give effect to the principle of compensation for the harm occurred.

When looking at the national laws and in particular the applicable legislations in the countries analysed in this study, the nature of remuneration rights becomes clearer. In almost all the Member States covered by the study, remuneration rights are considered as unwaivable. This is the case in Belgium³⁹⁵, Germany³⁹⁶, Spain³⁹⁷ and Poland. In Hungary, remuneration collected by CMOs cannot be waived if the statute prohibits it; waiver is valid only if submitted to the association in writing³⁹⁸. In the UK the equitable remuneration for rental rights is not assignable³⁹⁹, although the remuneration can be made effective on a single payment or at the time of the transfer of the rental right⁴⁰⁰.

It seems that in certain countries, notably in the UK, there is a common practice of buying out remuneration rights, in particular rental rights, in audiovisual contracts. The

³⁹² According to T. APLIN, J. DAVIS, *An Introduction to Intellectual Property Law*, Intellectual Property Law: Text, Cases and Materials, Oxford University Press, 2nd edition, 2013, ‘This ruling also invokes the property right regarding intellectual property included in the Charter of Fundamental Rights’.

³⁹³ Art.5 (2) Copyright in the Information Society Directive.

³⁹⁴ The Court recalled a ruling in case C-462/09 *Stichting de Thuiskopie* which says that ‘unless it is to be deprived of all practical effect, art. 5(2)(b) of Copyright in the Information Society Directive imposes on a Member State which has introduced the private copying exception into its national law an obligation to achieve a certain result, in the sense that that State must ensure, within the framework of its powers, that the fair compensation intended to compensate the rightholders harmed for the prejudice sustained is actually recovered. Imposition on the Member States of such an obligation to achieve the result of recovery of the fair compensation for the rightholders proves conceptually irreconcilable with the possibility for a rightholder to waive that fair compensation” (§ 106). Case available at : <http://curia.europa.eu/juris/liste.jsf?language=en&jur=C,T,F&num=462/09&td=ALL>.

³⁹⁵ See for example arts. 24 and 55 LDA, on remuneration rights for the renting of audio-visual or musical works and private copying.

³⁹⁶ Under s.27 UrhG on the ‘equitable remuneration’ for rental and lending.

³⁹⁷ The following remuneration rights are explicitly qualified as unwaivable: renting, exhibition and making available remuneration rights of audiovisual authors; private copy remuneration was also considered as unwaivable but the provision has been suppressed by a recent Decree and no provisions has been enacted to cover this legal vacuum.

³⁹⁸ HCA art. 20; art. 23(3) and (6); art. 28.

³⁹⁹ CDP Section 93B.

⁴⁰⁰ CDP Section 93C.

German Collecting Society for Music, GEMA, has confirmed that authors are forced to cancel their CMO membership due to 'take it or leave it' contracts, thus waiving their remuneration rights. Also in France it seems that remuneration due to reprography is commonly waived, although this practice is in contradiction with the law⁴⁰¹.

3.4.3. Conclusion

Remuneration rights represent a means to ensure that authors are remunerated for certain exploitations that, for different reasons, escape from the realm of exclusive rights. As such, they are usually conceived as unwaivable rights. The Court of Justice has confirmed this principle as regards the private copy remuneration and has suggested that it is applicable to all remuneration rights. EU Member States should ensure that their national legal frameworks are consistent with this doctrine and that remuneration rights cannot be subject to any transfer.

3.5. Articulation between transfer of rights in audiovisual works and collective management

3.5.1. Contractual transfer of rights and collective management

Collective management organisations (CMOs) manage the rights of affiliated creators on their behalf. When authors belong to collective management societies and bring their copyrights to collective management, the question of the articulation of such situation with other transfer contracts is intricate as two transfers of rights seem to be overlapping: the mandate given to collective management societies on the one hand, and the assignment to the producer/publisher on the other hand. The latter should prevail over the affiliation to CMOs if based on a prior contract by virtue of the principle *nemo plus juris transferre potest quam ipse habet* (meaning that one cannot transfer more rights than one has). Conversely, when authors have delegated the management of their rights to a CMO, such delegation should limit their freedom to assign the same rights (that they do not own anymore) to anyone else. CMOs are rather attached to that rule of exclusivity of transfer of rights, which is usually reminded by affiliation contracts.

However, things are a bit more complicated. First, CMOs are entitled to manage a certain number of rights, and particularly remuneration rights that are not assigned to the producer or publisher. In some countries such remuneration rights are entrusted with CMOs by a legal obligation of mandatory collective management. This is the case of the cable right, as provided by the Satellite and Cable Directive⁴⁰², or of rights of remuneration for reprography and private copying in France. The collective management of such rights is then autonomous from the exploitation right ensured to the transferee. Affiliation contracts of CMOs' statutes or national legislations may also admit a parallel assignment of rights to producers in limited cases. Contracts with transferees might also provide that remunerations for some modes of exploitation will be collected by the CMOs and distributed to the authors.

This uncertainty as to the effects of parallel or successive assignment of some rights to a CMO or to a producer or publisher has a practical effect on the remuneration of the author, depending on the efficiency of the CMO or the transferee in collecting remuneration for some exploitations and distributing it to the author. One specific issue

⁴⁰¹ Commission pour la relance de la politique culturelles,, 2007, p.156.

⁴⁰² Satellite and Cable Directive, Article 9.

has recently arisen in some countries as to the remuneration of authors of audiovisual works.

3.5.2. Presumption of transfer of exploitation rights to the producer of an audiovisual work

One particular issue is the compatibility of collective management with the presumption of assignment of rights of exploitation to the producer in the case of audiovisual works that exists in many EU countries⁴⁰³. That solution ensures that the producer has all the rights needed for the exploitation, since an audiovisual work is a complex work, composed of many contributions made by a great number of rights holders (director, other co-authors, performers, etc.).

Given that this is only a presumption, it is subsidiary to the conclusion of a production contract that will generally determine precisely the transfer of rights to the producer and the related remuneration of authors. But it is of great help to producers who are dispensed from verifying whether they have been assigned all rights necessary and who can rely on that presumption against third parties in the exploitation of the film. The presumption also applies to the production of audiovisual broadcasts where the producer needs to get the rights over the numerous contributions (whether protected by copyright or related rights) to the TV show or program. This solution is not part of the *acquis communautaire* but only partially foreseen by it, as the Rental and Lending Directive (Article 3) allows Member States to provide for such a presumption of transfer of the rental right for performers and authors.

When filmmakers are members of a collective management organisation, that CMO might still exercise some of their rights against exploiters, whereas the producer, by virtue of the presumption of transfer of the exploitation rights, exercises the rights necessary to ensure the primary exploitation of the film. Generally, CMOs will intervene for remuneration rights (public lending, private copying, remuneration for rental) or for secondary exploitations (broadcasting, cable or satellite retransmissions)

Collective management societies have sometimes faced opposition of broadcasters or cable operators to pay them the required royalties for public transmission of the works, on the motive that the rights of remuneration have been transferred to the producers and could not be exercised by the societies in charge of audiovisual authors. Such secondary exploiters then use the presumption, which was never intended to their benefit, to their advantage to refuse the claim of CMOs on behalf of their authors. The ultimate effect of this refusal might be that audiovisual authors are deprived of remuneration for some modes of exploitation if the contract with the producer has not provided some share in their revenue in such cases or if the producer does not redistribute the sums they perceive from secondary exploitations to authors. In other cases, the cable or satellite operators argue that they have received, from the broadcasters, an "all-inclusive" right on the broadcasts they will retransmit and refer the CMOs to the latter⁴⁰⁴.

Depending on the legislation, the scope of the rights subject to this presumption of transfer might be more or less determined. In some countries (such as Hungary or

⁴⁰³ In the countries analysed for this study, the presumption exists in Belgium, France, Germany, Hungary, Poland, Spain and Sweden.

⁴⁰⁴ That argument was used in the *Airfield* case, but the EU Court of Justice left it to the appreciation of the national court. See, *Airfield*, 13 October 2011, Joined Cases C-431/09 and C-432/09, CJEU.

Germany), rights of remuneration and right of public retransmission are excluded. But in many other Member States, there is not much guidance as to the scope of the presumption, save for the rule of unwaivable rights to remuneration when applicable.

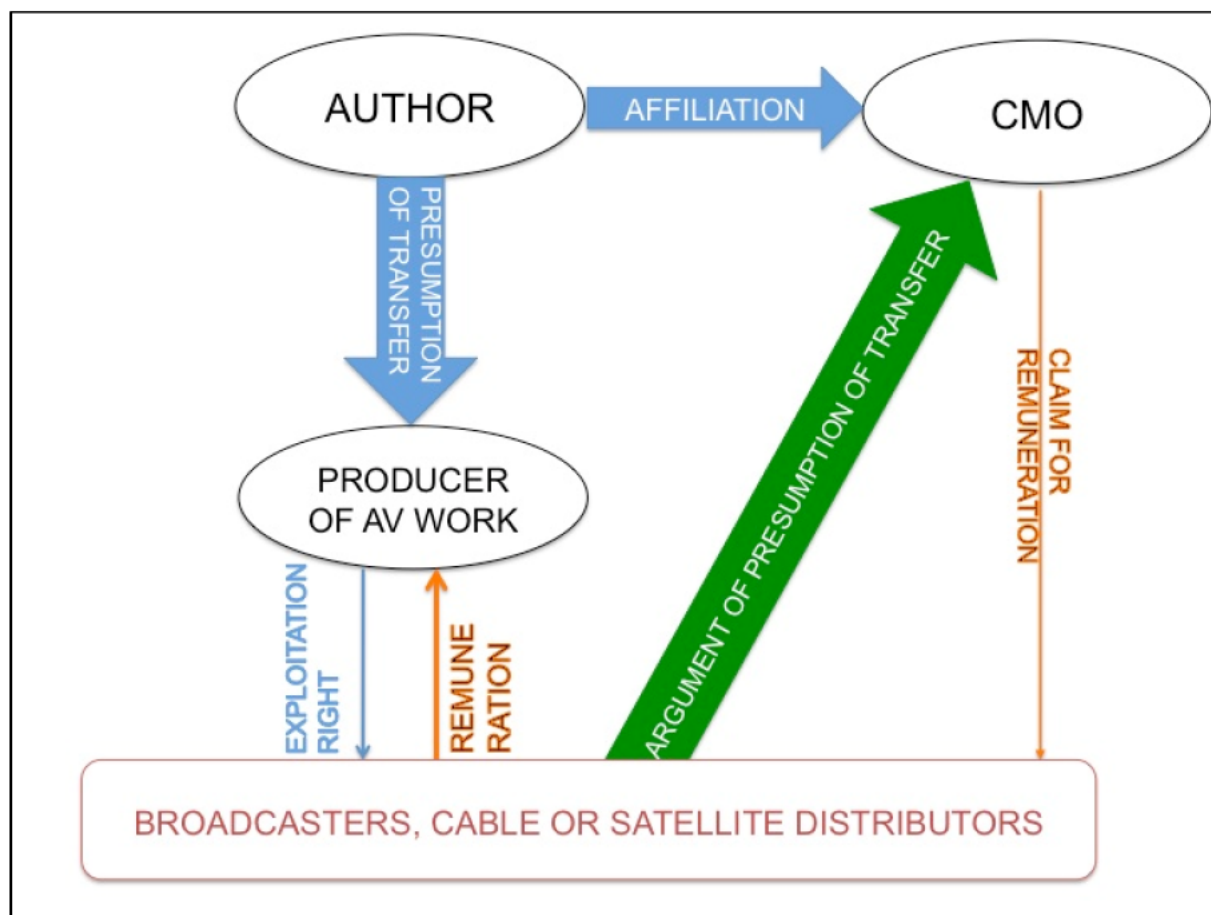
Admittedly, this conundrum could be solved by making the presumption of transfer prevail if the production of the audiovisual work is anterior to the affiliation to the collective organisation⁴⁰⁵. However, not all rights might be included in the scope of application of the presumption or in the scope of the contract transferring the rights, or the contract of production might acknowledge the intervention of the CMOs to manage some rights of remuneration. To defeat the argument of secondary exploiters, CMOs would then need to provide the contracts entered into between authors and producers that would prove that some rights have been left to collective management, which would be difficult by reason of the great number of contracts involved, and inconvenient, the CMOs not being a party to such contracts.

Moreover, this could also lead to unfair results for authors. The issue is particularly problematic for secondary exploitations of the audiovisual works for which the producer might not exercise or enforce the copyright in the film. One reason thereof is that the production contract entered into between the author and the producer aims at getting the rights to produce, create and release the film in its primary channels of diffusion. Other exploitations might occur many years after the production of the film, such as its broadcasting, cable or satellite communication. At that time the producer might be less interested in managing the revenues they still collect from such exploitations and in redistributing them to authors; or they may even not exist anymore. CMOs appear to be better equipped to ensure such management of remunerations in the long term.

This issue perfectly illustrates the interlaced web of contractual relationships that has been drawn in the introduction. The contract between the author and the producer transferring the rights does not bind the secondary exploiters or the CMOs. Nor does the presumption of transfer, which is a rule that does not substitute an actual transfer contract but the need to prove it, concern the CMO or the secondary exploiter. Yet, this transfer has significant consequences on the relationship between CMO and secondary exploiters, the former arguing that it still manages some rights that are outside the transfer to the producer, the latter relying on the presumption to sever all obligation of remuneration towards authors. The contract being the law of the parties, not of third parties (the CMO or the secondary exploiter), the author can only hope that the producer will get the due remunerations from the secondary exploiters and that she will get her share of those.

One can use again the figure appearing in the introduction to show the web of contractual relationships illustrating the difficulty to articulate the presumption of transfer and the intervention of CMO, as well as the location of secondary exploiters in that scheme:

⁴⁰⁵ S. NÉRISSON, *La légitimité de la gestion collective des droits des auteurs en France et en Allemagne*, Thèse, Université Paris I et Humboldt Universität Berlin, September 2011.



3.5.3. Existing legal or contractual approaches to maintain collective management

The Rental and Lending Rights Directive, which provides for a similar but more limited presumption of transfer of the rental right to the benefit of the producer of the audiovisual work, nevertheless insists on the right of the author to an adequate remuneration, which has been recently strengthened by the Court of Justice of the EU in the *Luksan* case⁴⁰⁶.

In the *Uradex* case related to the cable communication right, which is subject to a mandatory collective management, the CJEU held that this does not preclude assignment of the retransmission right on the basis of a contract or by virtue of a legal presumption⁴⁰⁷. The judgement reads as follows: "the Directive does not prevent an author, artist, performer or producer from losing, pursuant to a national provision such as Article 36(1) of the Law, his status of 'rightholder' of that right within the meaning of Article 9(2) of the Directive, with the consequential severance of all legal links existing under that provision between him and the collecting society"⁴⁰⁸. This decision seems to indicate that the assignment would always prevail over the affiliation to collective management. However, the question that was submitted to the Court related to the specific right of retransmission by cable, which was concerned by the presumption of transfer. The answer is not necessarily equally relevant when it comes to a general presumption of transfer of all rights necessary to exploit the audiovisual rights, whose

⁴⁰⁶ CJEU, 9 February 2012, *Luksan*, C-277/10, §78.

⁴⁰⁷ CJEU, 1 June 2006, *Uradex*, C-169/05, §24.

⁴⁰⁸ *Idem*.

scope is less defined than for the retransmission right concerned in the *Uradex* CJEU decision.

A first question relates to the determination of the rights that are covered by the presumption of transfer. In Germany and France, the remuneration rights are excluded from the transfer⁴⁰⁹ by the case law⁴¹⁰ or doctrine⁴¹¹, which leaves them to collective management, if this is the choice of the author or the solution prescribed by the law. A similar solution results from the Hungarian Copyright Law, which submits the rights to remuneration for public lending and rental, retransmission by way of broadcasting and private copying to a compulsory collective management⁴¹².

The German approach is to consider that the exclusive rights that the producer gets through the presumption of transfer are those necessary to authorise or not the exploitation of the film, while the presumption of transfer does not affect legally granted claims for remuneration, e.g. the remuneration for rental and lending (s. 27 UrhG) or the obligatory remuneration (s. 54 UrhG). Such rights are not concerned by the presumption as they do not prevent the producer from exploiting the audiovisual work. Therefore, they can be managed by CMOs and secondary exploiters would have to acquire the rights of the producer as well as to pay the royalties for remuneration rights.

In France, some peaceful cohabitation of the presumption of transfer of the exploitation right to the producers and the collective management of the remuneration due to the author results from contractual practice. The SACD (a French CMO managing the rights in audiovisual works) has drafted model contracts that entitle its affiliates to assign their rights to the producer, despite the transfer of the same rights to the SACD, and has simultaneously agreed with producers through collective agreements that the management of some rights in audiovisual works, and mainly of remunerations of the author, will be reserved to the CMO⁴¹³. Producers also need to include in their contracts with secondary exploiters a clause recalling which rights or remunerations will be managed by the CMOs on behalf of their authors⁴¹⁴. This practice is confirmed by the case law that has stated that the affiliation to a CMO prevails over a subsequent contractual transfer of rights⁴¹⁵.

Spain has introduced an unwaivable right to remuneration for communication to the public and making available of an audiovisual work. Remuneration should be paid by the agent undertaking the public communication – e.g. the broadcaster, according to the tariffs established by the CMO SGAE that is in charge of managing such remuneration rights.⁴¹⁶

Belgium is currently considering how to better organise the presumption of transfer for audiovisual works. One proposition was to grant a remuneration right to authors, to be managed by a collective organisation, and to make this distribution of rights between the producer and the CMOs opposable to third parties, such as debtors of remunerations for

⁴⁰⁹ See NÉRISSON, 2011, p. 230-236.

⁴¹⁰ See the German case law mentioned in NÉRISSON, 2011, 236.

⁴¹¹ For France see B. PARISOT, « La présomption de cession des droits d'auteur dans le contrat de production audiovisuelle : réalité ou mythe ? », *D.*, 1992, Chr., XV, p. 76-77.

⁴¹² Article 66 (2). See Prof. P. MEZEI, Response to the Questionnaire on Hungarian Law.

⁴¹³ G. VERCKEN, « La pratique des clauses relatives à la gestion collective dans les contrats individuels portant sur les droits d'auteur », *Légipresse*, sept. 2002, p.108.

⁴¹⁴ B. MONTELS, *Les contrats de l'audiovisuel*, Litec, 2010.

⁴¹⁵ CA Paris, 25 November 2011. A different solution applies in Belgium, see Cass., 14 June 2010, *Uradex*, C.03.0286.F/2 .

⁴¹⁶ See Spanish Report in Annex I.

their exploitations of audiovisual works.

3.5.4. Conclusion

All these solutions have the effect to preserve some collective management intervention to secure the collection of remuneration for authors on some secondary modes of exploitation and remuneration rights. They do not erode the presumption of transfer to the producer who keeps all the rights necessary to produce and exploit the audiovisual works. They could even facilitate the management of rights by producers, who do not have to manage the remuneration of the authors and to subtract it from the royalties they collect from secondary exploiters. However, maintaining some collective management of authors' remuneration in parallel of the transfer of their exclusive rights to the producer of the audiovisual work should not increase the overall remuneration paid by secondary exploiters for the use of the work. In other words, secondary exploiters should not pay the remuneration of authors of audiovisual works twice, first to the producer on the grounds of the transfer of rights, secondly to the CMO. Any legal solution should hence ensure that producers do not claim some remuneration for the authors if that remuneration is actually managed by CMO on behalf of such authors.

The presumption of transfer of rights of exploitation over an audiovisual work exists in most Member States, even though it is not harmonised at the EU level, except partially for the presumption of transfer of the rental right to the producer. Introducing this presumption with a harmonised scope and a clarified relationship with the right for authors to get remuneration, despite this presumption of transfer, could be considered. The presumption of transfer of exclusive rights necessary for the producer to exploit the film does not prevent authors from managing, individually or through a collective management society, their rights to remuneration for exploitation by third parties.

In any case, introducing some unwaivable right of remuneration for some exploitations, to be paid by the user undertaking that exploitation, could better protect the authors.

What could also be important is the legal opposability of the different transfers of authors' rights to producers, to CMOs, and to third parties, without the need to produce each contract or act of transfer.

3.6. Dual licensing

3.6.1. The Issue

The dual licensing issue is related to that of the autonomy of authors as to the control of their works. It involves the question of the possibility given to authors who are members of a CMO to remain involved in the control and management of their rights, to some extent, and thus in the exploitation of their works. In music, audiovisual and visual arts sectors, membership in a CMO often implies the total transfer of the power to control the use of the works to the CMO. Many CMOs' statutes stipulate exclusive assignment of their members' rights to the CMO, resulting in its exclusive power to license all its members' works. Authors who are members of a CMO are therefore not able to authorise a third party to use their works. Their CMO membership therefore implies a serious limitation of their freedom to contract. Moreover, they are not allowed to use their own work without authorisation and payment to the CMO. The case mainly features the impossibility for authors to make their works available under an open content licence (such as a Creative

Commons licence – see hereunder), mainly on a non-commercial basis, without stepping out of the collective management system.

“Dual licensing” refers to the possibility for the author to authorise some uses of her work, simultaneously with her CMO membership and the power she has thus given to the CMO to manage and license her works. Although the issue has arisen regarding CMO membership, the consequences on the autonomy and the freedom of contract of the authors are similar in case of large assignment of rights to exploiters. Dual licensing consists in more flexibility given to authors to license their works. This is not a new policy challenge for the European Parliament, as a balance between the freedom of authors and right-holders to dispose of their works and the ability of the organisation to manage effectively the rights is one of the goals of one of the amendments voted by the Legal Affairs Committee of the European Parliament to the proposal of Directive on collective rights management.⁴¹⁷

CMOs mainly argue that the exclusivity of their mandate protects authors from requests to authorise uses for free. Given their weak bargaining power or their willingness to have their work used, they say, authors may be tempted to agree to unfavourable licensing conditions. They also sometimes put forward that non-commercial licences and gratuity is not compatible with their mission to generate revenue for their members. Another argument put forward by CMO is that their exclusive mandate protects their authors-members against the full transfer of their rights (buy-out contracts) as the rights under collective management are not transferable.⁴¹⁸

3.6.2. Some advantages of individual licensing

Since CMOs have the exclusive management of the rights transferred, membership in a CMO does not allow simultaneous individual licensing of authors’ rights. Therefore, the author willing to grant commercial or non-commercial licences on an individual basis has no choice but to opt-out of the collective management system. The issue is of great importance as it notably appears to be a limitation of authors’ freedom to contract. The possibility for authors to issue their own licences, while maintaining CMO membership, may also provide a response to several social and economic needs.

3.6.2.1. Self-promotion

With the advent of the Internet, authors are given new opportunities of self-promotion, on their own website or on authors’ collaborative websites, for instance. The extent to which an author has the possibility to undertake his own promotion is totally novel thanks to Internet. For example, websites such as YouTube or MySpace have a very large audience and provide authors with a new canal to the public. Yet, CMO membership prevents authors from making their work available on the Internet without paying fees to their CMO, even when the initiative is non-commercial and promotional.

⁴¹⁷ Amendment 54 proposes to introduce a new paragraph 2a in art. 5 reading: “Rightholders shall have the right to grant licences for the non-commercial uses of the rights, categories of rights or types of works and other subject matter of their choice. Collective management organisations shall inform their members of this right and of the conditions attaching thereto”; European Parliament, Committee on Legal Affairs, Rapporteur: Marielle Gallo, Report on the Proposal for a directive of the European Parliament and of the Council on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online uses in the internal market (COM(2012)0372 – C7 0183/2012 – 2012/0180(COD)).

⁴¹⁸ See ECSA, Declaration on collective management of authors’ rights and the necessity of the exclusive assignment of the performing right, 20 February 2013, Brussels

Although CMOs make a considerable effort in promoting arts and culture, it is naturally impossible for them to promote individual members, due to the large repertoires they manage. Therefore such promotional use (including a licence given by the author for such use) would not conflict with the CMO mandate, from a functional point of view. Self-promotion will also eventually be profitable for both authors and CMOs' revenues. Lastly, it would help to make the maximum use of the disintermediation possibilities provided by the Internet and fill the gap when authors have no contract with any publisher.

AN EXAMPLE OF SELF-PROMOTION BY AUTHORS

The Flickr photo-sharing platform⁴¹⁹ enables photographers to put their pictures on-line under an open content licence. This aims at giving them a new audience, including through the authorisation given by this licence to reuse the photos on other websites. Such open content approach is also implemented by some famous artists, such as Radiohead. In 2007, the band offered its latest album for free download on its website for months before it came back to a traditional paying model. The album was nevertheless one of the band's biggest commercial successes⁴²⁰.

3.6.2.2. The open source movement

Beyond the self-promotion opportunities provided by the Internet, the question of parallel individual licensing has been put forward by the open source movement. This movement, born with the culture of free software, proposes an alternative approach to the restrictive one that generally characterises traditional copyright management. The focus of open source licences is on authorisations. Where a classical management of copyright (notably CMOs') generally consists in prohibiting any use of the work unless it has been authorised by the right-holders or the CMO ("all rights reserved"), the main feature of open content licences is that large rights to use the work are given to the public by the author.

Open source licences were first generated in the software domain where they are widely used⁴²¹ (open source software). The GNU licence is probably the most famous in that domain. In that sector, open source licences notably enable the collective development of software as anyone is entitled to modify the software developed to correct it, to add new functionalities, etc., thus building new software on an existing one. This process is named under the "free software movement". In the non-software sectors (music, visual arts, audiovisual, etc.) the Creative Commons licence is very widespread⁴²². A work under a Creative Commons may be used, reproduced, communicated to the public, distributed. Sometimes modifications of the work are also allowed, which enable to use a Creative Commons to create a new work. Those uses are allowed at no cost. Creative Commons (and most open source/access licences) are nevertheless not a waiving of the work in the public domain. While authorising large uses of her work, the author retains some control on it: mention of her name is most of the time mandatory and commercial uses of the work may be prohibited. Some free content licences also require that the redistribution of the (modified) work shall be made subject to identical conditions.

⁴¹⁹ See <http://www.flickr.com/>

⁴²⁰ <http://en.wikipedia.org/wiki/Radiohead>

⁴²¹ See <http://www.gnu.org/>

⁴²² See <http://creativecommons.org/>

Open source/open access licences contribute to the constitution of the public domain when the latter is defined from a functional point of view as open⁴²³. Through such licences, anyone can access and use the work, in a similar way to works that are not protected by copyright. The public domain has both social and economic values: namely it provides access to cultural heritage and enables low cost access to information, but also provides building blocks for the creation of new knowledge or creation⁴²⁴. In spite of the numerous advantages that CMO membership provides to authors and to cultural advancement, it is regrettable when CMOs prevent the adoption of such an alternative approach of copyright by authors, given the social and economic advantages provided by a large accessibility and use of works.

3.6.2.3. *Collaborating in creation*

The Internet has fostered artists' communities and has fully enabled collaborative creation processes. Open source licences make such creative processes easier as they authorise anyone to use and modify works they relate to for the creation of new ones. The potential of communities for collective creation had already been enjoyed by the free software community and has delivered (and is still delivering) numerous well-known open source software to society. Due to its "all rights reserved" logic and the prevention of parallel open source licensing by their members, CMOs membership is likely to hamper the very wide-scope collaborative creation that the Internet and communities enable.

FREE LICENCE : AN EXAMPLE OF COLLABORATIVE WORKS

Wikipedia is the epitome of a collaborative project where authors' inputs can be put together thanks to free content licences. Due to the gratuity and the large authorisations of use and modification that open content licences implemented by the website provide, authors of Wikipedia can add their input to others' or modify them, allowing the user-generated collective encyclopaedia to exist.

3.6.2.4. *Some compromises to make CMO membership compatible with open licensing*

Some initiatives aim at granting authors some control and freedom to contract as to their works, while not waiving the benefits of CMO membership.

More flexible practices

Some CMOs, notably in the visual arts, have a more permissive approach, authorising the streaming of their members' works on their own non-commercial⁴²⁵ websites for promotional purposes. Others submit the authorisation for their members to license their works to third parties to prior verification that the decision of the author is free and independent. In such cases, individual commercial licensing may even be allowed⁴²⁶.

⁴²³ See V.L. BENABOU & S.DUSOLLIER, "Draw me a public domain", in P.TORREMANS (ed.), *Copyright Law: A Handbook of Contemporary Research*, Edward Elgar Publishing, 2007, p. 161. and the Public Domain Manifesto, produced by the European project Communia (see <<http://www.publicdomainmanifesto.org>>). A stricter or *structural* definition of the public domain refers to material, ideas, etc, that are not protected by copyright, notably because the length of protection has expired.

⁴²⁴ S. DUSOLLIER, *Scoping study on copyright and related rights and the public domain*, WIPO, May 2010, p. 13, quoting Samuelson.

⁴²⁵ GEMA in Germany (although not yet implemented), Artisjus in Hungary, SGAE in Spain, STIM in Sweden.

⁴²⁶ DACS in UK, Kunstbild in Germany, EVA (Europe).

Such a policy is more consistent with a flexible approach. However, it is undeniable that a system of individual derogation given to an author may only be limited for practical reasons.

The transfer to CMOs is also sometimes limited to certain rights (broadcasting or cable rights for instance). Some CMOs give their members the possibility to exclude specified modes of exploitation from the CMO's mandate (on-line exploitation for instance). This may not be totally satisfactory however as a member may be willing to exclude some classes of uses from the CMO competence, while not waiving all the benefits linked to the membership for a whole exclusive right.

THE CREATIVE COMMONS/CMOS EXPERIMENTS

With the ambition to conciliate CMO membership with the Creative Commons licences, the Creative Commons organisation has undertaken to discuss and find a way forward with willing CMOs. Pilot experiments have been conducted with the collaboration of CMOs in the Netherlands, France, Denmark and Sweden; negotiations are currently under way in other countries. These experiments mainly consist in CMOs allowing the members to authorise non-commercial licensing of some of their works, while commercial licensing remains the exclusive competence of the CMO. The evaluation of the first experience, the Netherlands Creative Commons/Buma-Sterma pilot, showed that the experiment proved that it is very difficult to bring effective results and was only a relative success. However, in the Netherlands, only few members the Creative Commons/Buma-Sterma pilot undertook to take advantage of the possibility. The reason put forward was the definition given to "non-commercial uses", which was too narrow to allow for meaningful uses of the dual licensing option given (under that definition, the following were considered commercial: websites generating a very small amount of advertisement revenue in the form of Google ads, inferior to operating costs; the distribution of works via music sharing platforms specialising in freely licensed music such as jamendo.com; the use of works in schools or churches). Another point was that many members found it easier to simply license their work in violation of the CMO statute than to submit to the procedure put in place to benefit from the flexibilities set by the experiment. Experts also reported that too much focus was put by the CMO on obtaining royalties, making the establishment of flexibility for authors difficult. However, a survey among authors confirmed that a majority of respondents (77%) had a positive attitude toward more flexibility, in particular for self-promotional on-line uses⁴²⁷.

The proposal of Directive on collective rights management and the amendments of the European Parliament

Open licensing has been discussed in the preparatory work concerning the Proposal for a directive on collective rights management. Several amendments were proposed by Members of the European Parliament to make the CMOs' mandates compatible with open licensing⁴²⁸. A new article was thus incorporated in the Gallo Report⁴²⁹. The tentative final

⁴²⁷ P. KELLER (Creative Commons, Netherlands) , A. ZONDERVAN (Buma/Sterma), Report available at http://www.creativecommons.nl/downloads/100824evaluation_pilot_en.pdf .

⁴²⁸ See amendments 258, 260, 261. European Parliament, Committee on Legal Affairs, Amendments 123 – 331, Draft report, Marielle Gallo (PE510.562v01-00), Collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online uses in the internal market.

compromise text agreed by the European Council and European Parliament includes a specific provision providing that right-holders shall have the right to grant licences for the non-commercial uses of rights⁴³⁰. This is obviously a step forward on the ground of the flexibility in collective management. This provision echoes the concern of recital 9, as modified by one of the amendments proposed, to achieve a balance “between the freedom of right-holders to dispose of their works [...] and the ability of the organisation to manage effectively the rights [...].” However, the previously reported Dutch experiment with Creative Commons (see insert above) has proven that the most delicate point may reside in the definition of non-commercial uses. A definition in the Directive may be indispensable to make sure that this regulatory improvement is not simply an empty shell.

3.6.3. Conclusion

It would be a positive move if CMO membership did not prevent authors from enjoying the opportunities of self-promotion and collaboration provided by the Internet. A more flexible approach of collective management of copyright, consisting in allowing individual licensing simultaneously with licensing from CMOs, in some hypotheses, may be favourable to the parties involved. Reuse of their works, when authors agree, to create new, collaborative, ones will favour the creative process. As to self-promotional uses, they may have positive repercussions on the commercial uses of the works. The possible coexistence of collective management with open content/open source movement also satisfies the sociological need for legal models that are diverse and not mutually exclusive. The new provision in the Proposal for a directive on collective rights management represents a good step forward in that regard.

⁴²⁹ Amendment 54, European Parliament, Committee on Legal Affairs, Rapporteur: Marielle Gallo, Report on the Proposal for a directive of the European Parliament and of the Council on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online uses in the internal market (COM(2012)0372 – C7 0183/2012 – 2012/0180(COD)).

⁴³⁰ Art. 5.2a Council of the European Union’s and European Parliament’s tentative final compromise text concerning the Proposal for a Directive on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online uses in the internal market, Doc. 15695/13, Brussels, 5 November 2013.

4. CONCLUSION AND RECOMMENDATIONS

In 2002, The University of Amsterdam completed a study for the European Commission on copyright contracts and, despite its observation that the legal protection of creators in the contracts they enter into did not constitute a coherent body of law, concluded that “a Community initiative on the harmonisation of the rules on copyright contracts may be, at the present stage, wholly premature”.

Is it time, after more than a decade, and has the topic matured enough, to recommend some legislative action?

The context of copyright and of contracts transferring creators' rights has certainly evolved. It is somewhat artificial to say that the digital environment has radically transformed the application of copyright, for some issues remain the same for the analogue world and the information society. Arguably, copyright contracts have remained a building block of the exploitation of the works: they are the first legal act that triggers the value chain of exploitation and in most cases, the first act by which the author puts her work into the public sphere by the intermediation of a publisher or producer. What has changed however is the market of exploitation of works. Digital technologies have some effects on the exploitation of works that are not without consequences on the contractual process between authors and producers or publishers.

A first element is the evolution of exploitation from a static to a dynamic process, or rather the acceleration of such evolution. When copyright contracts concerned the publishing of a book, the production and exploitation of an audiovisual work, the edition of a musical composition in a book or the release of phonograms, the scope of a contract and the modes of foreseen exploitation were rather easy to define. The contract could have a long duration but the passing of time did not change radically what was agreed upon in the contract. New modes of exploitation have emerged that require some revision of the contract, but once adapted and agreed upon, the contract would be sustainable and efficient for many years. With the digital technologies, the pace of change constantly speeds up. It is not only the Internet that constitutes a new mode of exploitation but each new business model (from unit-based downloading to subscription-based streaming, from VOD to catch-up TV) is likely to disrupt the balance achieved in the contract. Determining some contractual bargain for the next decades seem now unattainable or could produce unfair outcomes over time. Furthermore, media companies are more and more concentrated, so that their catalogues become bigger and bigger and new opportunities enable them to use “old” works again. In order to cope with the evolving nature of the digital age and the on-going need of new modes of exploitation, some agents have changed their policies to sign with new artists all-encompassing contracts transferring all rights to producers or publishers.

Some issues analysed in the present study particularly revealed the contradiction between a contract that is negotiated and agreed upon at some point in time and is deemed to validly regulate the relationships of the author and her first exploiter, and modes of exploitation that are increasingly dynamic. The long duration of a contract, fixed in time, could elicit unfair consequences for authors, unless specific legal provisions or contractual clauses grant the author some fair participation to digital exploitation or allow rights reversion under certain circumstances. A second element is the multiplicity of forms of exploitation and of undertakings exploiting works in the current environment. Publishers and producers used to be the first and main exploiters of a work, which explains the traditional distinction in copyright discourse and practice between primary

exploitation and secondary exploitation. As a consequence, the contract by which the author would assign her rights to her publisher or producer was indeed the most important framework to determine a fair remuneration and conditions for the exploitation. Other remunerations for secondary exploitation would have been entrusted to collective management (broadcasting, public retransmissions, rental, public lending...). Works are now exploited by many other entities than the first publisher or producer. The contract signed by the author is only one element in a web of contractual relationships that authorise the use of the work and determine the share of each participant in the revenue it will generate. This has created a complex picture where the intervention of CMOs is more difficult and the secondary exploiters might have more economic power than all the other actors, including the publisher or producer, to the effect that the share of the author in the benefits from her work is no longer primarily defined by the contract she agreed upon at the beginning of the value chain, but depends on an obscure flow of exploitations and revenues. The examples given in this study of the difficulty to secure a fair remuneration in digital exploitations, of the practice of buy-out contracts, of the invocation of the presumption of transfer, of the refusal to pay CMOs remuneration for authors of audiovisual works, are illustrative of the shifting elements and power among the stakeholders to the detriment of creators.

A last factor is the cross-border dimension that increasingly characterises the exploitation and use of works. The very fragmented picture of the contractual protection of authors in the national laws of the Member States, in comparison to the contracts of exploitation that will be concluded for a multi-territorial scope of exploitation between global content providers and the first transferees of authors' rights, will create discrepancies of the protection of authors depending on the level of protection they enjoy in their country. Copyright contracts may now have more impact on the Internal Market than they used to.

The European Union regularly insists on the high level of protection that should be guaranteed to copyright and related rights, ensuring an appropriate reward both to the creators for the use of their works and to the producers for their investment and risk-taking. This has recently been confirmed in the revision of the Term of Protection Directive of 2011, where new rights were given to musicians. In parallel to the extension of duration of music performers' rights, the performers were granted some guarantee to a fair participation to the exploitation of their performances and some reversion rights should their performances no longer be exploited.

The digital economy is based on creative works by authors. A basic principle is that they should be associated in the exploitation of their works; they should be entitled to partake in the determination of the scope and forms of exploitation and receive a fair remuneration each time the economic value of their work is exploited.

The contract assigning their rights to a publisher or producer to make that exploitation happen is precisely that: a *contract*, meaning that, by virtue of the Europe-wide recognised principle of contractual freedom, two parties agreed upon some bargain. By such a deal, the work is given to an exploiter to ensure its public transmission and marketing, and the revenues of the exploitation are shared between the person having created the work and the person having put it on the market.

The rules existing in some Member States to protect the creator to ensure that such a contractual bargain will be effective aim, on the one hand, to define the conditions of negotiation so as to balance the bargaining power of both parties (acknowledging that

such a balance is tilted against the author) and, on the other, to impose some basic obligations inherent to the bargain itself. These rules are far from being homogenous across the European Union and, despite the additional recourse to the general principles of contract law, European authors are in a difficult position as demonstrated throughout this study. This patchwork of national provisions also prejudices exploiters of copyright works due to the uncertainties they face in an industry that is becoming more and more global.

This study has shown the complexity of such rules and to some extent, their partial inefficiency for the following reasons:

- the legal provisions in most Member States pay very little attention to the remuneration of the author;
- the weaker position of the author in the enforcement of the protective legal provisions is largely ignored;
- once agreed upon, contracts govern a dynamic and evolving situation usually without any adaptive or corrective measures included;
- the obligation of an explicit determination of the scope of transfer of rights proves inefficient in preventing an all-encompassing, and time-unlimited, assignment.

Two key objectives should guide any EU intervention in the field of copyright contracts. First, the real contractual nature of copyright contracts should be restored: authors agree on some reciprocal bargain for effective exploitation and fair remuneration should be the counterpart of the transfer of copyright. Second, copyright contracts should be addressed within the broader picture of the exploitation of creative content, which requires consideration of the articulation of such contracts with other contractual relationships and exploitations undertaken by all stakeholders.

This could lead to the following recommendations:

As to the contractual bargain:

- Some **minimal formalities** should be imposed to contracts transferring copyright from authors to publishers or producers to ensure the informed consent of the authors, such as a written form, the mandatory determination of the exact scope of the transfer and that of the due remuneration.
- An **obligation of exploitation** for each mode of exploitation that has been transferred would guarantee that the assignment of rights effectively leads to an exploitation of the work, hence defeating buy-out contracts or the excessive scope of transferred rights. The "use it or lose it" clauses to be included in contracts between performers and record companies, according to the Term of Protection Directive of 2011, can serve as an example of how to introduce an exploitation obligation in contracts to benefit authors from the moment they have transferred their rights. This would allow authors to get their rights back if the exploiter does not exploit the work of the author and allow the author to either find another exploiter willing to make use of her work or do it herself. However, a single obligation to exploit the work is not sufficient. If the producer buys all the rights but refrains from exploiting them or chooses only to engage in some exploitations, the author is deprived of some modes of exploitation for which she has transferred the rights. The obligation of exploitation should apply for each significant mode of

exploitation for which the publisher has contracted the economic right transfer from the author and the author could get back the rights for which no exploitation has been executed. This is the French model for books, where collective agreements have resulted in an obligation for publishers to exploit the literary work in paper form and in e-books, the author being entitled to annul the transfer of her rights for each mode of exploitation that has not been developed.

- **Reporting obligations** should be imposed on the transferees of copyright, detailing on a regular basis the exploitations undertaken and the revenues yielded by such exploitations. Some transparency should equally be required from other content providers and exploiters⁴³¹ in order to enable the author to have a broader understanding of the financial flows related to her work and her actual share in its economic exploitation. Revenues and profit margins of digital content providers must be known to adequately share the value generated by those services along the value chain. A provision at the European level is indispensable to avoid market distortion.
- Some inspiration could be found in the **unfair terms model** in consumer protection to balance the contractual bargain between the creator and the transferee. By analogy to consumer protection, a protection against unfair contractual terms could prevent the weaker party to the contract from agreeing to unbalanced terms. The unfair terms directive distinguishes two types of unfair clauses. First, a list of defined clauses is enumerated and such clauses are deemed to be void and null if they appear in a consumer contract. On the other hand, any contract provision "which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer". When transposed to copyright contracts, a similar model of unfair terms could be defined as: "any contract provision that, contrary to the requirement of good faith, causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the author". In addition, a list of precluded "black" terms could be drawn up, including for example, clauses: stipulating an indefinite duration without giving the author the possibility to review the contract; providing an unreasonably low remuneration for the transfer of rights; covering unknown forms of exploitation without a separate remuneration for the author; etc...

As to the fair remuneration of authors

- To better assess the economic situation of European creators and the link between the contracts they sign and their revenues, an **economic study on the remuneration of authors** should be undertaken and should also consider the discrete financial flows in different exploitation sectors between all stakeholders.
- A first legal protection for the author would be to impose the **determination of the remuneration** of the author in the contract for each mode of exploitation, its mode of calculation, and, if proportional, the types of revenues on which it will be

⁴³¹ A users' obligation to inform has been included in the Council of the European Union's tentative final compromise text concerning the Proposal for a Directive on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online uses in the internal market, Doc. 15695/13, Brussels, 5 November 2013, art. 15a.

based. That remuneration should **be fair**, which namely implies that it should not be solely based on the number of copies sold but based on the actual revenue generated by the exploitation (including subscription-based or advertising-based models). It should not necessarily be proportional as some works or exploitations could be fairly remunerated by lump sums –in such a case, however, it is advisable to consider complementary solutions such as the one prescribed in the Term of Protection Directive (Art. 3.2b and 3.2c as introduced by Directive 2011/77) where a supplementary royalty should be paid after a defined period of time. In case the contract applies to unknown forms of exploitation, authors should also be entitled to an additional fair remuneration when they emerge.

- Further research might be envisaged to study the **impact of competition law** on the admissibility of collective measures to enhance and secure fair remuneration for authors.
- **Obligations of transparency and reporting of financial streams** and revenues related to the exploitation should be imposed, mainly on transferees, but also, to some extent, on further exploiters.
- The rights to equitable remuneration or fair compensation should be conceived as **unwaivable rights**, in line with the recent case law of the Court of Justice of the European Union (as regards the private copy remuneration in the *Luksan* decision).
- Some other **unwaivable rights to remuneration** could be proposed for some forms of exploitation, notably for some kinds of digital exploitations, possibly subject to collective management.

As to the dynamic process of copyright contracts

- The transfer of rights for **unknown forms of exploitation**, considered to be void in some legislation, could be included in the transfer but solely in exchange of a fair remuneration of authors and with a possibility for the author to have her rights reverted for that exploitation and to renegotiate the contract and remuneration to that regard.
- Contracts transferring copyright from an author to a publisher or producer should be **limited in time** to enable some renegotiation (for the author) in consideration of the evolution of the modes of exploitation, of business models or models of consumption of works.
- Contracts should be subject to a **clause of revision** in case of change of circumstances in the exploitation market or of commercial success of the work (best-seller clause).
- A general **principle of reversion** of transferred rights should be considered in European law to enable the authors to terminate a contract for reasons to be determined, but including lack of exploitation, lack of payment of the foreseen remuneration as well as lack of regular reporting. The reversion right could also enable the author to get out of a contract after some period of time to exploit her rights herself or to entrust them with another publisher or producer.

- **Dual licensing** should be allowed to some extent to enable authors to develop some non-commercial exploitation by themselves despite the assignment of their rights to CMOs.
- Finally, in order to cope with the challenges posed by new technologies, the European institutions should foster a **dialogue among stakeholders towards more flexible contracts and exchange of best practices** that could be encouraged all over Europe.

As to the collective dimension:

- The collective dimension of management and enforcement of copyright should not be neglected and should contribute to a fair protection of authors. **Collective agreements, model contracts, standard contractual practices or Memoranda of Understanding** should be encouraged to secure a fair protection and remuneration of authors in individual contracts, in conformity with competition law. Collective negotiation may constitute, as agreed by many (academics, professionals of the sector, decisions-makers, the most sustainable manner to guarantee the protection of the interests of authors. Collective negotiation helps adapt to market and technological changes (as shown by the French agreement on digital exploitation), as well as to the economic and cultural sector concerned, as collective agreements are negotiated by professionals of the sector. But collective agreements are, up until now, national in scope. Their European dimension deserves further reflection.
- Another challenge is to ensure that authors may effectively enforce their contractual rights or that the exploitation of their work is undertaken and the remuneration paid. Individual litigation is difficult for authors. **Collective actions** (or class actions) should be allowed against undertakings violating the rights of authors, namely by entitling the representatives of the authors to act on a collective basis particularly in the case of adhesion contracts, on the model of consumer protection law.
- **Collective mechanisms of alternative dispute resolution and mediation procedures** should be organised at the national level to facilitate conflict resolution as regards key contractual issues: for example when remuneration, renegotiation of a contract or a request for reversion is contested.
- Some efforts should be put in the **education and awareness of creators**, for the authors to be better informed as regards contractual practices, to know their rights and obligations and to have a more balanced bargaining process.

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ANNEX I: NATIONAL REPORTS

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Belgium

1. Rules depending on the form of assignment (assignment, licence, waivers, ...)

Art. 3 of the Copyright Law (*Loi sur le droit d'auteur* – hereinafter, “LDA”) stipulates that authors’ rights can be assigned, licensed or waived (*aliénation*)⁴³². The requirements hereunder are applicable to any kind of such transfer contracts. Only licences are allowed in performance contracts (see below 9.4).

2. Form requirements

Written form is necessary to prove a transfer of right(s) against an author (art. 3, 1er, al. 2, LDA). This form requirement is *ad probationem* and is imperative. Without a written form, the transfer is null but the nullity can only be claimed by the author (*nullité relative*).

3. Determination of the scope of rights

3.1 A general obligation to determine the assigned or licensed rights

In order to protect the author, art. 3 of the LDA makes particular contractual provisions mandatory. The author is generally entitled to claim the nullity of the transfer in the absence of those mentions (when not otherwise stipulated in the LDA). Depending on the circumstances, the nullity may be partial. These rules include a provision according to which the exploitation modes must be expressly defined. For example, the mention of “the right of reproduction” and “the right of public communication” are not sufficient⁴³³.

3.2 Geographical scope and duration

The geographical scope and the length of the transfer must be stipulated. Nonetheless, rights can be transferred for worldwide exploitation and for the total length of protection⁴³⁴. The length of the transfer and the kinds (“*genres*”) of works must be stipulated in case of transfer of rights on future works. The length must be limited and reasonable.

3.3 Prohibition of waiving or assign rights to remuneration

The right to a fair remuneration for private copying is unwaivable (art. 55). The right to a fair remuneration for the renting of audio-visual or musical works is unwaivable (art. 24).

3.4 A limitation of the possibility to assign rights in future works

Transfer of rights on future works is possible for a limited length only and provided that the kind (“*genres*”) of works is stipulated⁴³⁵.

⁴³² “*Les droits patrimoniaux sont mobiliers, cessibles et transmissibles, en tout ou en partie, conformément aux règles du Code civil. Ils peuvent notamment faire l'objet d'une aliénation ou d'une licence simple ou exclusive*”.

⁴³³ A. BERENBOOM, *Le nouveau droit d'auteur et les droits voisins*, 3d edition, Bruxelles, De Boeck et Larcier, 2005, point 127.

⁴³⁴ *Idem*, point 129.

⁴³⁵ LDA, art. 3 §2, al.1.

3.5 A limitation of the possibility to assign rights in future and unknown forms of exploitation

The transfer of rights is void with respect to forms of exploitation that are unknown when the transfer is agreed upon. A transfer of rights for all modes of exploitation will not extend to new forms of exploitation, and a new agreement is necessary in case the contract has been concluded before the appearance of digital forms of exploitation⁴³⁶.

This rule does not apply to audio-visual works: in this field, rights on "all forms of exploitation" are transferred to the producer through a rebuttable presumption established by art. 18 LDA (cf. section 9)⁴³⁷.

3.6 A restriction to assign moral rights

Moral rights are unwaivable ("*inaliénables*") (art.1, §2, al. 1er, LDA), but authors may commit themselves not to enforce them. The scope of such commitment must be limited however. For instance, authors can commit themselves not to claim their moral right of integrity as to certain specified works. Whichever the commitment may be, the author can always reject any modification damaging her honour or reputation.

4. Determination of remuneration

The remuneration must be expressly determined for each exploitation mode (art. 3); however, a contract may stipulate that the counterpart agreed upon applies to all exploitation modes transferred⁴³⁸. The author is entitled to claim the nullity of the transfer if remuneration is not stipulated in the contract. There are also legally imperative best-seller clauses for publishing and performance contracts (see section 9.4). A non-imperative proportional remuneration is stipulated for contracts on audiovisual works (see section 9.5).

5. Obligations of the parties

An obligation of exploitation is stipulated in art. 3: the assignee must exploit the rights transferred. Such exploitation must be done according to contractual stipulations and according to honest professional practices ("*usages honnêtes de la profession*"). Such reference aims to protect against disrespectful professional practices and to prevent them⁴³⁹. This rule is imperative and any contrary contractual provision is deemed to be void. If the exploitation of the work is not carried out, the author may claim termination of the agreement.

The right of destination, founded on the right of reproduction and the principle of strict interpretation, has a doctrinal origin⁴⁴⁰. It consists in the right of the author to submit the use of a copy of the work to conditions (ex. limiting the use of a DVD to private use only). Although there is no general doctrinal consensus on the matter, some case-law has acknowledged the consequences of the right of destination, while not formally

⁴³⁶ This rule does not apply to transfers concluded before the entry into force of the LDA. For those contracts, such transfers may apply to unknown forms of exploitation as long as it has been unequivocally foreseen by the parties. Otherwise, the strict interpretation principle will apply in favour of the author.

⁴³⁷ A. BERENBOOM, 2005, point 164; F. DE VISSCHER et B. MICHAUX, *Précis du droit d'auteur et des droits voisins*, Bruxelles, Bruylant, 2000, p. 361.

⁴³⁸ A. BERENBOOM, 2005, point 128.

⁴³⁹ F. DE VISSCHER et B. MICHAUX, 2000, p. 332.

⁴⁴⁰ F. GOTZEN, *Het bestemmingsrecht van de auteur*, Bruxelles, Bruylant, 1975.

recognising it. In a decision from the Court of Cassation⁴⁴¹, the author was recognised the right to prevent broadcasting of her work made using a lawfully purchased copy (although the broadcaster had the authorisation to communicate the work to the public), and the right to submit the use of copies of the works to conditions. Since then, two different contracts are used in practice for the hypothesis of communication to the public made through a copy: a contract for public execution and another contract for a complementary mechanical reproduction⁴⁴². However, more recent case-law does not unanimously acknowledge this right of destination⁴⁴³.

For reporting obligations for publishing contracts, audiovisual contracts and performance contracts see below under 9.4.

6. Interpretation of contracts

The contractual provisions on copyright and exploitation modes are to be interpreted strictly (art. 3 LDA). The contractors must prove that the scope of the rights they claim have actually been transferred⁴⁴⁴. Such interpretation shall be used in case of an unclear contractual provision and where the search of the will of the parties has not brought a satisfactory answer⁴⁴⁵.

7. Termination of contract

Except for civil liability rules which may lead to the termination of the contract in case of non-execution, there is no general rule on termination in the LDA. Specific rules nonetheless provide the author with a reversion option under certain circumstances for publishing contracts (automatic reversion in case of absence of exploitation or refusal to make new copies of out-of commerce works), and for performance contracts (when public performance is interrupted, in the case of exclusive licence).

8. The transfer of contracts

The permission of the author is expressly required by the LDA for the subsequent transfer of publishing contracts and performance contracts. An order of priority among possible transferees is stipulated for the transfer of audiovisual contracts, in case of bankruptcy of the producer or of liquidation of the producing firm (see below section 9).

9. Specific contracts

9.1 Commission contracts (art. 3 section 3 LDA)

Works created on commission are subjected to the general rule of initial ownership applicable in Belgian law: the transfer of the work to the commissioner does not automatically transfer the author's rights on the work. Some exceptions to the above-mentioned form requirements apply to the transfer of rights from the author to the commissioner. Those exceptions only apply in the non-cultural industry (*i.e.* out of the scope of cultural goods) and in the advertising industry, and as long as the work is commissioned for the non-cultural or advertisement activity of the commissioner. In

⁴⁴¹ Court of Cassation, 19 January 1954, *Pas.* E p. 484.

⁴⁴² F. DE VISCHER and B. MICHAUX, 2000, pp. 81-86.

⁴⁴³ See S. DUSOLLIER, "Heurs et malheurs du droit de destination" *A&M.* 5-6/2010, pp. 450-458.

⁴⁴⁴ A. BERENBOOM, 2005, pt. 141.

⁴⁴⁵ F. DE VISSCHER et B. MICHAUX, 2000, p. 316 ; A. BERENBOOM, 2005, n° 126 ; CRUQUENAIRE, *L'interprétation des contrats en droit d'auteur*, Bruxelles, Larcier, 2007, notably n°314.

these sectors, the requirement of a written form remains mandatory, along with the principle of strict interpretation, but express stipulations of the exploitation modes, the remuneration, the scope and length of the transfer are not imperative.

In this case, the transfer of rights on future works is not subjected to the requirement of an express mention of the length and kinds of works concerned. The transfer of rights on unknown exploitation forms is allowed, provided that it is expressly mentioned along with participation in the profits. The obligation to exploit the work does not apply in this case.

9.2 Works created under employment

The rules applicable to transfers of authors' rights to the employer are similar to the ones applicable in case of commission contracts. The formal rules regulating authors' contracts are not applicable, except for the requirement of a written form expressly providing for the transfer of rights to the employer and the principle of strict interpretation. The transfer of rights on unknown forms of exploitation is allowed, provided that it is expressly mentioned along with participation in the profits.

This less strict regime applies both to employment contracts and civil servants statutes, but only to works created within the framework of the employment contract/civil servant tasks.

9.3 Edition/publishing contracts

The above-mentioned requirements concerning written forms and the mention of the exploitation modes, the length, the geographical scope, etc., also apply to publishing contracts.⁴⁴⁶ In addition, the contract must stipulate a minimal quantity of copies to be made (art. 25) and a delay for publishing (if no term is mentioned, it will be determined in accordance with professional practices⁴⁴⁷ – art. 26).

A proportional remuneration shall be paid. The basis for its calculation is the gross revenue of the publisher, but the parties may decide otherwise. The parties can also foresee no financial remuneration and decide that the counterpart to the transfer of rights consists in the exploitation risk undertaken by the publisher⁴⁴⁸. An imperative best-seller clause allows the author to claim for a revision of flat remunerations agreed upon by the parties, in case of success. In such a case, professional practices will be taken into account to review the remuneration⁴⁴⁹.

The publisher has the obligation to provide the author with information concerning the revenues generated from the exploitation of the work, the quantity sold and the rights transferred for each exploitation of the work (art. 28); publishers are also in charge of making copies⁴⁵⁰, exploiting the work and ensuring its distribution to the public⁴⁵¹

⁴⁴⁶ The publishing contract deals with books, phonogram recording, musical scores publishing, CD-Rom publishing, etc. but does not apply to audio-visual works. Specific provisions apply (see section on contracts on audio-visual works).

⁴⁴⁷ Although depending on the circumstance and the industry, according to the Belgian Publishers Organization, a normal publishing delay is 12 months (M. MARKELLOU, *Le contrat d'exploitation d'auteur*, Bruxelles, Larcier, 2012, p. 310).

⁴⁴⁸ BERENBOOM, 2005, n°. 134.

⁴⁴⁹ BERENBOOM, 2005, n°. 143.

⁴⁵⁰ LDA, art. 26 §1.

⁴⁵¹ Mons, 19 March 2002, *I.R.D.I.* 2003, p. 235.

according to the practices of the industry⁴⁵². There is no obligation to reprint an out-of-commerce/out-of-print work.

In the absence of exploitation of the work without any legitimate reason, the LDA provides that the author is entitled to automatic reversion of the rights (art. 26, §1st). According to F. DE VISCHER and B MICHAUX, this reversion right also applies in case of denial to re-print an out-of-print work without a legitimate reason⁴⁵³. The transfer of the contract by the publisher requires the permission of the author; however, this rule does not apply in case of sale of the editor's business. In case of bankruptcy, the author is allowed to terminate the contract.

9.4 Performance contract

The performance contract is the contract through which authors transfer their communication to the public right for live performances and is regulated by articles 31 and 32, LDA. Performance contracts may be concluded for a limited time or for a limited number of communications of the work to the public only. The limited time and limited quantity of communications to the public are to be determined by professional practices⁴⁵⁴. In case of an exclusive assignment, the legal length for live performances is three years.

In case of exclusive licences, the author has a right to reverse the contract if no public performances are organised for two consecutive years. The transfer of a contract to a third party requires the permission of the author. There is a best-seller clause in case the success of the shows is patently disproportionate to the flat remuneration. The author is thus entitled to claim for an "equitable remuneration". The rule is imperative. The author must be informed of the performances executed and the gross revenue from the exploitation of the work of the licensee.

9.5 Contracts related to audio-visual works

The director is deemed to be the principal author of an audiovisual work. Other participants (such as scriptwriters, adaptation authors, text writers, and music composers) are presumed to be co-authors, but such presumption is rebuttable.

Although the producer is not deemed to be an author of the audiovisual work, the LDA institutes a rebuttable presumption of assignment of rights to the producer for the universal exploitation of the work (art. 18 LDA). The presumption of transfer applies to all audiovisual rights (cinema, video, TV -broadcast, cable, satellite, etc.-, digital exploitation) and to those rights only; thus, it does not apply to merchandising rights for non audiovisual uses or uses of some pictures of the film for advertisement, for example. It also includes the yet unknown forms of exploitation,⁴⁵⁵ unless the parties decide otherwise. The presumed transfer does not cover private copy remuneration⁴⁵⁶, as its waiving shall be expressed to be valid. The presumption does not apply to musical works.

Remuneration of authors of audiovisual works must be fixed distinctly for each exploitation mode (not however for each form of exploitation which relates to a specific

⁴⁵² BERENBOOM, 2005, n°144.

⁴⁵³ F. DE VISCHER and B. MICHAUX, 2000, p. 349.

⁴⁵⁴ BERENBOOM, 2005, n°. 148.

⁴⁵⁵ F. DE VISCHER et B. MICHAUX, 2000, p. 360.

⁴⁵⁶ Note that the LDA provides the producer with his own private copy remuneration - art.55.

technique of exploitation⁴⁵⁷). The remuneration is proportional to the gross revenue from the audiovisual exploitation, if not otherwise stipulated. The agreement may stipulate, if expressed clearly, that the remuneration agreed upon will apply to all modes of exploitation provided they are all distinctively enumerated. In the absence of such a stipulation, the rule of a distinct (for each exploitation mode) and proportional remuneration does apply.

Although the LDA does not fix the percentage of the "gross revenue" that constitutes the remuneration of the authors, it is understood that it refers to the net of amortisation but does not take into account the exploitation costs. In case of dispute, the professional practices will guide the jurisdictions. The rates authorised by the Fédération Bruxelles-Wallonie (which is one of the three Regions of the federal Belgium) for the subsidising of audiovisual productions might be a reference⁴⁵⁸.

The producer must annually inform the authors of the gross revenue for each mode of exploitation. This obligation is imperative in case of proportional remuneration⁴⁵⁹. Art. 16 stipulates that the producer must conserve the master of the film. The general obligation of exploitation shall apply in this case. French case-law⁴⁶⁰ has also ruled that reserving the right not to produce the work to the producer is a purely discretionary clause (*clause potestative*), or a contract without a cause or an object⁴⁶¹.

Art. 20 states that, in case of bankruptcy, dissolution or liquidation, the curator or *liquidateur* may decide to continue the exploitation of the work or transfer the contracts. In such a case, a priority is given to co-producers, and then to the director and the other authors.

⁴⁵⁷ For instance, "disc publishing" is a mode of exploitation, whatever the form - analog or digital, among others (DE VISSCHER et B. MICHAUX, 2000, p.401).

⁴⁵⁸ BERENBOOM, 2005, num. 165.

⁴⁵⁹ F. DE VISSCHER et B. MICHAUX, 2000, p.362.

⁴⁶⁰ Note that, where Belgian legal rules are similar to French ones (as it is the case for many copyright rules), Belgian legal scholars sometimes refer to French case-law where no relevant Belgian decisions exist.

⁴⁶¹ Paris, 11 January 1989, *D.*, 1989, somm., p.298; Paris, 14 May 19 90, *D.*, 1990, inf. rap., p.358.

France

1. Rules depending on the form of assignment (assignment, licence, waivers, ...)

French law does not specify any particular provision regarding the form of the assignment.

2. Form requirements

The French Copyright code ("CPI") contains numerous public order provisions that limit contractors' freedom in order to protect authors' interests. In particular, written form may be required: the CPI requires written form for publishing contracts, performance contracts and audiovisual contracts. Scholars are still discussing whether the rule extends to all transfers of rights⁴⁶². The CPI provides some important mandatory provisions for all authors' contracts, making a written form necessary for any kind of author's contract. The rule is stipulated *ad probationem* and in favour of the author: written form is necessary to prove the transfer of rights against the author (however, case-law admits tacit admission provided it is unequivocal⁴⁶³).

3. Determination of the scope of rights

3.1 A general obligation to determine the assigned or licensed rights, the geographical scope and duration of the transfer/assignment

Art. L. 131-3, CPI, lists the mandatory mentions that must be stipulated in a copyright contract: each right transferred must be distinctly mentioned along with the scope ("étendue"), the destination, the geographical scope and the length of each mode of exploitation.⁴⁶⁴ According to scholars, the mention of the destination of the exploitation implies the specification of "why and what for" the right(s) is/are transferred⁴⁶⁵. The sanction for non-observance of these rules is the nullity of the transfer. Such nullity can be claimed by the author only.

3.2 Prohibition of waiving or assigning rights to remuneration

There is no provision prohibiting the waiving of the private copy remuneration.

3.3 A limitation of the possibility to assign rights in future works

Art. L. 131-1⁴⁶⁶ stipulates that the global assignment of rights in future works is null – a nullity that can be claimed by the author only. However, the author can confirm the clause from the moment such works are created.

⁴⁶² M. MARKELLOU, 2012, p. 185.

⁴⁶³ See notably CA Paris, 4e ch.B, 13 mars 2009: *JurisData* n°2009-004621.

⁴⁶⁴ A mode of exploitation means a method (*procédé*) to communicate the work to the public: A. LUCAS H.-J. LUCAS, and A. LUCAS-SCHLOETTER, *Traité de la propriété littéraire et artistique*, Paris, LexisNexis, 2012, 4^{ème} édition, n°665.

⁴⁶⁵ A. LUCAS H.-J. LUCAS, and A. LUCAS-SCHLOETTER, 2012, p. 568 citing Desbois.

⁴⁶⁶ Exceptions to this rule are pre-emption clauses in edition contracts, and "the general contract of representation" where a show-business company may be authorised by a CMO to communicate to the public the existing and future works of the CMO's repertoire.

3.4 A limitation of the possibility to assign rights in future and unknown forms of exploitation

According to art. L. 131-6,⁴⁶⁷ the transfer of rights on future and unknown or unforeseen forms of exploitation must be expressly stipulated along with and a participation of the author to the profits from such exploitation.

3.5 A restriction to assign moral rights

Art. L. 121-1 states that moral rights are not transferable and cannot be globally and anticipatively waived. Courts admit partial and limited waiving, however. Waiving of moral rights *a posteriori* is admissible; *a priori* waiving of the right to integrity is admissible, notably in case of conflict with assigned economic rights (in the hypothesis of adaptation of the work, for example). On the contrary, the case-law only rarely admits the waiving of the paternity right⁴⁶⁸.

4. Determination of remuneration

As a general rule, the remuneration of the author must be proportional to the transferee's incomes: in order to associate the author with the success of her work, art. L.131-4 requires a proportional participation of the author to the profits from the sales of copies and the exploitation⁴⁶⁹. The revenue of the assignee is the base for the calculation of the proportional remuneration⁴⁷⁰. Where exploitation consists in the selling of physical copies (books, video-grams, multimedia goods...), the remuneration must be determined according to the actual selling price⁴⁷¹. However, the possibility to take account of decreasing rates paid to the assignee by the distributor in the audiovisual sector brings an exception to the criterion of the selling price, as stipulated in art. L. 132-25⁴⁷².

Art. L. 131-4, al. 2 mentions all the accepted exceptions to proportional remuneration. A flat remuneration is allowed:

- if the basis for the calculation of the proportional remuneration is impossible to determine or control is impossible;
- if the calculation and the control costs are disproportionately high;
- if the nature and the conditions of the exploitation make the implementation of a proportional remuneration impossible. Two hypothesis are envisioned: the contribution of the author does not constitute an essential component of the work (an example is the minor contribution to collective works such as updating⁴⁷³), and the use made of the work is accessory to the good marketed;
- conversion of the proportional remuneration to a flat sum, on request of the author;
- for publishing contracts (see the section hereunder);

⁴⁶⁷ *La clause d'une cession qui tend à conférer le droit d'exploiter l'œuvre sous une forme non prévisible ou non prévue à la date du contrat doit être expresse et stipuler une participation corrélatrice aux profits d'exploitation.*

⁴⁶⁸ Paris, Feb. 1st, 1989, *RIDA* 1989/4, p. 301, note Sirinelli ; D 1990 Somm. 52, obs. Colombet ; Civ. 5 May 1993 : *RIDA* 1993/4, p.205 (validating a temporary waiving of the paternity right) ; see M. VIVANT , J.-M. BRUGUIERE, *Droit d'auteur et droits voisins*, Paris, Dalloz, 2013, n°479.

⁴⁶⁹ Although the reason for this rule is to protect the author, it has been criticized given that a flat remuneration, with the possible revision that the French Law institutes, might be more advantageous for the author (A. LUCAS, H.-J. LUCAS, and A. LUCAS-SCHLOETTER, 2012, p. 594).

⁴⁷⁰ A. LUCAS, H.-J. LUCAS, A. LUCAS-SCHLOETTER, *op.cit.*, n° 676.

⁴⁷¹ Cass. 1re civ., 20 January 2004: *JurisData* n° 2004-022041; CA Paris, 1st ch., 18 janv. 2000: *D.* 2000, act. Jurispr. P. 203; Cass.1st civ., 15 July 1999: *CCE* 1999, comm. 25, note Caron.

⁴⁷² Note that another exception is the assignment of rights for unforeseen modes of exploitation which is permitted provided it mentions a correlative participation to the *profits* of the exploitation.

⁴⁷³ A.LUCAS quoting A. HUGUET, « L'ordre public et les contrats d'exploitation du droit d'auteur », *LGDJ*, 1962, n° 217.

- if the author or assignee is established abroad (132-6, al. 2);
- for news publications (L. 132-6, al. 3).

It is observed that the scope of these exceptions may be very large⁴⁷⁴.

It is up to the parties to determine the rate of remuneration. In practice, remuneration rates vary a lot across different copyright industries and, as suggested by Lucas⁴⁷⁵, it is very difficult to come up with a legal rate: a 0.5% rate has been admitted in the film industry⁴⁷⁶, whereas a 2.5% rate has been rejected in the editing sector⁴⁷⁷.

Contractual clauses stipulating a flat sum when it is not allowed, as well as clauses stipulating a different basis from the revenue for the calculation of the remuneration, are deemed null. The nullity might affect the contrary clause⁴⁷⁸ or the whole contract⁴⁷⁹, according to the circumstances. The nullity can be claimed by the author only⁴⁸⁰.

The transferee has a reporting obligation that completes the proportional remuneration principle⁴⁸¹.

Art. L. 131-5 stipulates that, in case of flat remuneration, the author might claim a revision of the remuneration if their prejudice amounts to at least 7/12 of the remuneration they would have been entitled to if the remuneration had been proportional. There is no consensus however on the applicability, or not, of this provision to the hypothesis where the profits are unexpectedly higher than what was foreseen at the time of contracting⁴⁸².

5. Obligations of the parties

There is no general obligation of exploitation in French copyright law⁴⁸³. Only publishing contracts and audiovisual contracts are submitted to such an obligation⁴⁸⁴.

Reporting obligations of the transferee are also to be considered (see below under section 9).

A right of destination also exists in French Law: accordingly, authors may control the use that is made of copies of the work by final purchasers, and submit it to conditions. They may prohibit certain uses of a copy for both transferees and final users (ex. private use). This right does not appear explicitly in the law but some scholars argue that it can be founded on art. L. 131-3 al. 3 CPI (according to which, the "destination" of the modes of

⁴⁷⁴ A. LUCAS, H.-J. LUCAS, and A. LUCAS-SCHLOETTER, 2012, p. 602, citing Ph., ALLAYES, *Hypothèses de forfaits en droit d'auteur: Propr. Intell.* 2007, pp. 269-278.

⁴⁷⁵ A. LUCAS, H.-J. LUCAS, and A. LUCAS-SCHLOETTER, 2012, p. 599.

⁴⁷⁶ CA Paris, 1st ch., 23 November 1970: *RIDA* 3/1971, p. 74.

⁴⁷⁷ TGI Seine, 3d ch., 16 May 1969: *RIDA* 1/1970, p. 213, note Schmidt ; *D.* 1969, p. 630, 2^e esp.

⁴⁷⁸ CA Paris, 1st ch., 27 March 1998 : *RIDA* 4/1998, p. 259 ; CA Paris, 4th ch., 28 February 2003.

⁴⁷⁹ TGI Paris, 3^d ch., 7 March 1986: *RIDA* 1/1987, p. 252 ; CA Paris, 4th ch., 25 June 2003 : *RIDA* 1/ p. 246.

⁴⁸⁰ A null clause can however be confirmed by the author. Some academic authors opine that confirmation should not be possible before the situation of uneven bargaining powers has come to an end (before the remuneration has been paid): see A. LUCAS, H.-J. LUCAS, and A. LUCAS-SCHLOETTER citing Desbois and Colombet, 2012, n°393.

⁴⁸¹ Art. L. 131-7 CPI expressly mentions such an obligation in case of partial transfers; however, it is admitted that the reporting obligation applies on a general basis (A. LUCAS, H.-J. LUCAS, and A. LUCAS-SCHLOETTER, 2012, n°677, quoting Desbois).

⁴⁸² A. LUCAS, H.-J. LUCAS, and A. LUCAS-SCHLOETTER, 2012, n°693.

⁴⁸³ A. LUCAS, H.-J. LUCAS, and A. LUCAS-SCHLOETTER, 2012, n°673.

⁴⁸⁴ Some authors have argued for the existence of a general obligation of exploitation but case-law does not follow. For more details, see M. MARKELLOU, 2012, p. 298.

exploitation transferred must be stipulated in the contract). The doctrine of the right of destination has also been applied by the courts⁴⁸⁵. However, it has been very much criticised as it may be inconsistent with the exhaustion principle established by European law and it may be difficult to justify⁴⁸⁶. Taking this into account, Dusollier argues that it is difficult to defend this French and Belgian exception⁴⁸⁷.

6. Interpretation of contracts

As a consequence of art. L.131-3 (which states that each right transferred must be distinctly mentioned), rights are considered independent, which means that the transfer of the reproduction right does not cover the representation right and vice versa. The same goes for the translation right and the adaptation right, corollary rights to the reproduction right and the representation right⁴⁸⁸.

Contracts must be interpreted strictly and in favour of the author. According to art. L. 122-7, al. 4 and the *Cour de Cassation's* case-law⁴⁸⁹, transfers of rights are limited to the exploitation modes, scope, destination, geographical scope and length stipulated in the contracts⁴⁹⁰. In case of unclear stipulations and doubt as to the parties' will, the field of exploitation of the rights assigned will be limited according to a strict interpretation of the contract. This interpretation rule is imperative and it cannot be decided otherwise by the parties.

7. Termination of contract

The French law admits the possibility of reversion of the transfer of rights in certain cases. There exist specific provisions for publishing contracts (see also the Agreement between SNE and CPE⁴⁹¹, and the Code of practices for the translation of general literature, adopted by the literary translators association - ATLF - and the SNE), as well as for representation contracts (see below section 9).

8. The transfer of contracts

Specific provisions on publishing contracts and representation contracts submit the transferring of the contract to the permission of the author (see section 9).

9. Specific contracts

9.1 Works created under employment or by civil servants

There is no exception to the general rule according to which the author's rights initially belong to the creator of a work and the employment contract does not imply the automatic transfer of rights to the employer⁴⁹². The principle is applicable to works of

⁴⁸⁵ For instance, it was ruled that an author had the right to prevent the use of a copy of the work in a discotheque or on radio (for radio: Paris 27 April 1945, 1945, JCP 1946. II 3074, note Plaisant).

⁴⁸⁶ M. VIVANT and J.-M. BRUGUIERE, 2013, p.423-425.

⁴⁸⁷ S. Dusollier, "Le droit de destination, une espèce vouée à la disparition", *Propr. Intell.* 2006, n°20, p. 281.

⁴⁸⁸ A. LUCAS, H.-J. LUCAS, and A. LUCAS-SCHLOETTER, 2012, p 586, and CA Paris, 4th ch. B, 9 January 1992: *JurisData* n° 1992-020023 (about the right of translation).

⁴⁸⁹ Cass. 1st civ., 30 September 2010: *CCE* 2010, comm. 119, note Caron.

⁴⁹⁰ CA Versailles, 1st ch. 13 February 1992 : *D.* 1993, p.402, note Eldman.

⁴⁹¹ See a description of the Agreement in Chapter II, section 3. The text of the Agreement is reproduced in Annex III.

⁴⁹² See art. L. 111-1, CPI, and Cass. 1^{re} civ., 16 December 1992 : *RIDA* 2/1993, p. 193, note Sirinelli and Cass. 1st civ. 21 October 1997: *Bull. civ.I.* n° 285

public agents although the law establishes an assignment of the rights as far as it is strictly necessary to fulfil the public service mission (art. L. 131-3-1, CPI). General rules on transfers therefore apply to employment contracts.

Journalists are presumed to be hired under employment contracts by the Labour Code. The Law of June 12, 2009 ("HADOPI") institutes an exclusive assignment of rights to the employer, unless otherwise agreed upon by the parties, as provided by art. L. 132-36. It also states that no authorisation is required for the use of the work within the employer's press group (*famille cohérente de presse*) but it requires an additional remuneration.

Art. L. 132-37 stipulates that the remuneration for the exploitation of the work within a "reference period" is included in the paid salary. A collective agreement between representative press agencies and journalists' organisations⁴⁹³ has notably defined further conditions under which the journalists' works may be used by the employer, the "reference period" and the remuneration applicable beyond that period. The reference period corresponds to the periodicity of the news publication. This Agreement also stipulates some obligations aimed at ensuring respect of the moral rights of the journalists.

9.2 Commission contracts

There is no specific rule for works created on commission except when the work is dedicated to advertisement.

Where the work is dedicated to advertisement, articles L 132-31 and ff. stipulate rules aiming at associating the author to the scale of the advertising campaign which he has worked for.

Although the CPI stipulates that the rights over the work are transferred to the advertisement producer unless otherwise agreed by the parties, such presumption of transfer is effective provided that distinct remunerations are stipulated for each mode of exploitation. These must notably take into account the territorial scope and the length of the exploitation, the extent of the project and the nature of the medium. As a consequence, too generic provisions as to the remuneration of the author may render the contract void - no rights will be legally transferred to the producer of the advertisement.

The CPI mandates representative organisations of authors and producers of advertisement to agree upon the criteria for the determination of the remuneration. In case an agreement cannot be reached between such organisations, a commission composed of magistrates, a person appointed by the minister of Culture and representatives of the above-mentioned organisations fixes such criteria⁴⁹⁴.

These rules aim at protecting authors when they contract with commissioners (*producteur en publicité* or "advertisement producer") and do not apply in case of contract between the commissioner and a transferee (an advertisement agency for example).

⁴⁹³ Agreement of November 26, 2013 on author's rights.

⁴⁹⁴ Decision of 23 February 1987, fixing the criteria for the remuneration of authors has been adopted through this procedure given the failure of the representative organization to come to an agreement.

9.3 Edition/Publishing contract

Publishing contracts⁴⁹⁵ will certainly be affected by the recent agreement between the Publishers Union (*Syndicat national de l'Édition* - SNE) and the Writers Council (*Conseil permanent des Écrivains* - CPE)⁴⁹⁶ with the main purpose of adapting the existing legal framework to the digital publishing economy and digital books. Some provisions of the agreement are applicable also to non-digital contracts. The Agreement proposes modifications to the CPI: its scope, legal implications and particular clauses related to publishing contracts are detailed in Chapter II section 3 and Chapter III section 1 of the study.

The publisher has the obligation to publish (or make available) the work in accordance with the provisions of the contract, within a delay agreed by the parties or determined by the practices of the industry⁴⁹⁷. He must permanently exploit and disseminate the work ("*exploitation permanente et suivie*"), whatever its success may be (make a sufficient quantity of copies, have sufficient stocks of physical copies...) and promote the work in accordance with the practices of the industry.

The practices of the industry notably contribute to specify the obligation of exploitation. In music publishing contracts, for example, the marketing of a CD with the sound-track of a film, together with the film it is related to, is a common practice, along with an autonomous promotion⁴⁹⁸, and according to the same schedule⁴⁹⁹. The publisher must at least contact a phonographic publishing undertaking⁵⁰⁰.

Art. L. 132-17, al. 2 provides that the contract is terminated when the publisher does not republish an out-of-print work. The work is out-of-print when two delivery orders to the publisher have not been executed within three months (art. L. 132-17, al. 3). The case-law is not unanimous, however. According to some decisions it is up to the publisher to decide to publish again, provided her motivation is not faulty⁵⁰¹. Some courts have decided that the publisher must always have copies marketed and should not await the work to be out-of-print before republishing⁵⁰². Others submit the obligation to republish to the demand of the public⁵⁰³.

General principles of proportional remuneration and determination of the rate by the parties are applicable to publishing contracts. Note for example that the case-law has declared null the stipulation of a "paltry rate" of 2.5%⁵⁰⁴.

The Law of 26 May 2011 on the single price of digital books has introduced a principle of "fair and equitable" remuneration of the authors for the exploitation of digital books that is stipulated at art. L. 132-5⁵⁰⁵.

⁴⁹⁵ Art.s L. 132.1 and seq. are applicable to the making of numerous physical or digital copies of a work, associated with an obligation of exploitation for the editor (Art. L. 132-1; see A. LUCAS, op. cit., p. 620-624).

⁴⁹⁶ "Memorandum of Understanding" of 21 March 2013, on the publishing contract in the book industry, of the Writers Permanent Council and the Publishers National Union, see main Study Chapter II, section 3 and Annex III.

⁴⁹⁷ In case of assignment of the audiovisual adaptation right, however, the publisher "only" commits himself to search for exploitation, consistent with the practices of the industry.

⁴⁹⁸ CA Paris, 4th ch., sect. B, 6 July 2007, CCE n°6, June 2008, chron. 6.

⁴⁹⁹ CA Paris, 4th ch., Sec. A. 13 April 2005, un-published, cited by M. MARKELOU, 2012, p. 313.

⁵⁰⁰ TGI Paris, 3^d ch. 11 May 1968, RIDA, n°57, p. 189.

⁵⁰¹ CA Paris, 4th ch., 12 February. 1980 : RIDA 1/1981, p. 152.

⁵⁰² CA Paris, 4th ch., 11 June 1997: D. 1998, somm. p. 193, obs. Colombet.

⁵⁰³ TGI Paris, 1st ch., 26 November 1975 : RIDA 1/1976, p. 145.

⁵⁰⁴ TGI Seine, 3^d ch., 16 May 1969 : RIDA 1/1970, p. 213, note Schmidt.

Specific exceptions to the principle of proportional remuneration are added to the general ones: scientific or technical editions, encyclopaedias and anthologies, translations, cheap and popular editions, luxurious limited editions, etc.

Art. L.132-13 states a reporting obligation that is applicable even if rights have been sub-transferred according to the case-law⁵⁰⁶ or in case of flat remuneration⁵⁰⁷. The non-execution of this obligation may cause the termination of the contract or justify a request for damages⁵⁰⁸.

Art. L. 132-17, al. 1 and 2 considers two hypothesis of automatic (unilateral) termination of the publishing contract by the author: the publisher destroys all the copies of the work, and the publisher does not publish the work or does not republish an out-of-print work within prior reasonable notice given to the author.

Subsequent transfers are prohibited, unless the permission of the author is obtained, according to L.132-16, al. 1^{er}. The permission must be given in written form, according to Lucas⁵⁰⁹. This rule is imperative and its nullity can be claimed by the author only. An exception to the rule is the case of transfer of the publisher's business, unless such transfer severely undermines the material or moral interests of the author.

9.4 Audiovisual works production contracts

The CPI institutes a presumption of assignment of the exclusive rights of exploitation⁵¹⁰ on an audiovisual work to the producer, if not otherwise agreed by the parties (with the exception of the work of the music composer)⁵¹¹. The presumption covers the diffusion of the work "in any possible form"⁵¹². The presumption is applicable to the contracts concluded after the Law of 1985 (which introduced these provisions in the CPI) came into force, i.e., contracts concluded from January 1st, 1986. It does not apply to graphic and theatrical rights.

The requirement of a written form *ad probationem* is applicable; however, in absence of any mention, the transfer is presumed anyway.

⁵⁰⁵ A. Lucas, H.-J. Lucas and A. Lucas-Schloetter note the symbolic character of this provision: A. LUCAS, H.-J. LUCAS, and A. LUCAS-SCHLOETTER, 2012,, n° 751.

⁵⁰⁶ Cass.1st civ., 24 nov. 1993 : *RIDA* 3/1994, p. 293.

⁵⁰⁷ T.civ. Seine, 18 May 1920 : *Gaz. Pal.* 1920, 2, p. 63.

⁵⁰⁸ CA Paris, 4th ch., 9 November 1988 : *Cah. Dr. auteur* avr. 1989, p.12; Cass. 1st civ. 24 November 1993 : *RIDA* 3/1994, p. 293.

⁵⁰⁹ A. LUCAS, H.-J. LUCAS, and A. LUCAS-SCHLOETTER, 2012,, n° 761.

⁵¹⁰ The audiovisual production is intended to be both reproduced and represented, which generally requires large transfers of rights and explains the presumption of transfer ("exclusive rights of exploitation") to the producer. According to Lucas, this is so much related to the nature of the production contract that the decision of the parties to exclude the transfer would make the contract lose this nature and become a work-on-commission contract (A. LUCAS, H.-J. LUCAS, and A. LUCAS-SCHLOETTER, 2012, n° 786).

Note that the presumption of transfer to the producer remains applicable in case of CMO membership of the author. However, the perception of royalties or the management of rights that are not included in the transfer to the producer may be undertaken by the CMOs (A. LUCAS, H.-J. LUCAS, and A. LUCAS-SCHLOETTER, 2012, n° 793).

⁵¹¹ The producer is not perceived by the lawmaker as a possible threat to the authors but as an entrepreneur for the creation. This contributes to explaining the favourable legal provisions as to the audiovisual producer. The important economic aspect of the audiovisual production, the fact that the producer undertakes the economic risk of the production of the work and the necessity for the producer to have all the rights for the exploitation of the work has also determined the characteristics of the specific regime applicable to audiovisual production contracts (A. LUCAS, H.-J. LUCAS, and A. LUCAS-SCHLOETTER, 2012, n° 784 and 791).

⁵¹² A. LUCAS, H.-J. LUCAS, and A. LUCAS-SCHLOETTER, 2012, n° 794, referring to the preliminary works of the Law of 1985.

The *Cour de cassation* has ruled that in the absence of stipulation of the length in the contract, the transfer is done for the whole copyright length⁵¹³. This is in line with the presumption of transfer⁵¹⁴.

The producer has the obligation to exploit the work, "in accordance with the practices of the industry"⁵¹⁵. There is no stipulation of an obligation of "*permanente et suivie*" exploitation as in the case of publishing contracts. The law adds that producers' and authors' associations and CMOs may write together a Code of the practices of the industry. Such a Code has not yet been drafted.

Remuneration is due and must be distinctively calculated for each mode of exploitation. The principle of proportional remuneration is applicable⁵¹⁶. Art. L. 132-25 provides the basis for the calculation of the remuneration: the price paid by the public. However, decreasing tariffs paid by the distributors to the producer shall be taken into account. Very low rates of remuneration are associated with very high advances paid, overreaching the amount to be eventually paid according to the foreseen rate⁵¹⁷.

A Memorandum of Understanding on the remuneration of cinematographic and audiovisual works, adopted on the basis of art. L. 132-25⁵¹⁸; another regarding transparency in the cinematographic industry⁵¹⁹; and a last one dedicated to contractual relations between scriptwriters and fiction producers have been ratified and their application has been extended to the whole sector through a Ministerial decree (see also in the Study Chapter II, section 3).

An obligation of reporting is applicable in the case of proportional or flat remuneration, as well as the obligation to inform authors, on their demand, on contracts of rights' transfer concluded by the producer.

There is an obligation for the producer to conserve the master of the work, which may be favourable to the moral right of the authors⁵²⁰.

9.5 Performance contracts

The written form and the mention requirements (distinct mention of the rights transferred and their modes of exploitation) are repeated in the section of the CPI applicable to representation or performance contracts.⁵²¹ The authorisation given for

⁵¹³ Cass. 1st civ., 5 November 1991 :*RIDA* 2/1992, p. 1786 . See also A. LUCAS, H.-J. LUCAS, and A. LUCAS-SCHLOETTER, 2012, n° 796.

⁵¹⁴ A. LUCAS, H.-J. LUCAS, and A. LUCAS-SCHLOETTER, 2012, n° 796

⁵¹⁵ Cass, 3 April 1974, *RIDA*, p. 124.

⁵¹⁶ Lucas notes that that principle is often put aside in practice thought the payment of advances (A. LUCAS, H.-J. LUCAS, and A. LUCAS-SCHLOETTER, 2012, n° 804).

⁵¹⁷ A. LUCAS, H.-J. LUCAS, and A. LUCAS-SCHLOETTER, op.cit., p. 600, quoting F. BENHAMOU et D. SAGOT-DUVAUROUX, *La place et le rôle de la propriété littéraire et artistique dans le fonctionnement économique des filières de l'industrie culturelle*, Study commissioned by the ministère de la Culture et la Communication, April 2007, p. 17 ; *Observatoire permanent des contrats audiovisuels* established by the SACD.

⁵¹⁸ "Memorandum of Understanding" of October 12, 1999, completed by "Memorandum of Understanding" of February 2, 2002, April 12, 2002 and February 17, 2004, on the remuneration of cinematographic and audiovisual works ratified by Decree of February 15, 2007, in application of art. L.132-25 of the Copyright Code, available at

<http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000464153&dateTexte=&categorieLien=id>

⁵¹⁹ "Memorandum of Understanding" of December 16, 2010 on transparency in the cinematographic industry, ratified by Decree of February 7, 2011 in application of art.L.132-25 of the Copyright Code.

⁵²⁰ A. LUCAS, H.-J. LUCAS, and A. LUCAS-SCHLOETTER, 2012, n° 814.

⁵²¹ Note that such contracts have a limited scope, the bigger share of representation contracts being concluded with the CMOs via a "general representation contract" that covers the whole repertoire of the latter (A. LUCAS, H.-J. LUCAS, and A. LUCAS-SCHLOETTER, 2012, 765).

broadcasting does not extend to cable or satellite, nor to the diffusion in a place accessible to the public.

Performance contracts are concluded for a limited length or a precise quantity of acts of representation only. The author cannot assign the representation right for the whole copyright length. Exclusive performance contracts for dramatic authors are limited to five years, and interruption of the performance for two consecutive years automatically terminates the contract.

Performance contracts cannot be transferred without written permission of the author. There is no legal provision concerning the transfer of the assignee's business and scholars are divided as to the question⁵²².

There is no exploitation obligation for the transferee, even in case of exclusive assignment, but it can be decided otherwise in the contract.

The general principles of proportional remuneration and reporting are applicable.

⁵²² A. LUCAS, H.-J. LUCAS, and A. LUCAS-SCHLOETTER, 2012, n° 769.

Germany

1. Rules depending on the form of assignment (assignment, licence, waivers, ...)

The German Copyright Law (hereinafter UrhG) does not contain any specific provision concerning the form of transfer of rights. The legal nature of such transfers is controversial. The term "*Nutzungsrecht*" (use right) in s. 29 Abs. 2 UrhG is unique in German law and mostly comparable to the term "licence" as a permission to use someone else's work.

2. Form requirements

The transfer of rights in German copyright is generally not bound to a specific form. It can even be arranged without an explicit declaration and derive from the circumstances. Only the transfers of rights for future works or rights in future or unknown forms of exploitation need to be agreed in written form to be valid (s. 31a, 40 UrhG). The lack of formalities has been confirmed in a case regarding the right of use of paintings of painter Alexej Jawlensky.⁵²³ When the painter died, his works were inherited by his son. The son concluded a written contract with a publisher (defendant) *to publish a book which would show reproductions* of Jawlensky's paintings. There were no other provisions in the written contract. When the son died, his heirs (plaintiffs) objected to what was already published and to the publishing of further books. Following the ruling of the German Federal Supreme Court⁵²⁴, it was held that the conclusion of a contract can be done without even having discussed the issue of remuneration, since the author can claim fair remuneration by law (i.e. s. 22 II Law for Publishing: *Verlagsrecht*). Therefore, one cannot claim defect of consent (section 154 BGB) due to not having discussed this issue, because no special form is required. The contract in question did not have to be in written form, since only contracts about future, not sufficiently determined works need to be concluded in that form. The catalogue of works was already sufficiently determined regarding its content, so there was no form required, as the plaintiffs argued. Therefore, the court dismissed the suit.

3. Determination of the scope of rights

3.1 Obligation to determine the assigned/licensed rights, the geographical scope and duration of the assignment

There is no rule that forces the contracting parties to determine the exact dimension of the rights being transferred. The "licence" can be simple or exclusive. The geographical scope and duration may also be limited or unlimited. If the parties do not agree upon a certain amount of transferred rights or one of the previously mentioned conditions, the general purpose of the contract indicates the scope of the rights (s. 31 Abs. 5 UrhG).

3.2 A prohibition to waive or assign some rights to remuneration

An author cannot waive her rights to remuneration, which are granted to her by law, in advance (s. 63a UrhG). Contractual agreements that lead the creator to waive these rights, given by law, are void.

⁵²³ File number 6 U 103/89, Higher Regional Court Frankfurt (OLG), NJW-RR 1992, 756.

⁵²⁴ File number I ZR 50/69, GRUR 1971, 362.

3.3 A limitation of the possibility to assign rights in future works

The author has the possibility to grant exploitation rights over future works even if they are not specified in any way (s. 40 UrhG). Such a contract, however, needs to be in written form. Moreover, the agreement on future works may be terminated within five years from the conclusion of the contract; this right is unwaivable.

3.4 A limitation of the possibility to assign rights in future and unknown forms of exploitation

Since 2008, it is possible to transfer rights with respect to unknown types of exploitation (s. 31a Abs. 1 UrhG). Before the introduction of this section, contracts on future uses unknown at the time of the licensing agreement were prohibited. Under the new provision the author is entitled to demand an equitable remuneration instead of challenging the transfer of rights. However, the section provides certain precautionary measures. First, contracts on unknown types of exploitation have to be drawn up in writing and second, the author has the right to revoke the transfer of right within the period of three months after the other party informed the author about the new form of exploitation. However, in the case of remuneration agreed through a joint (collective) agreement, revocation shall not be exercised by the author (s. 31a Abs. 3 UrhG). The author may additionally not exercise reversion contrary to good faith if her work is part of an entity of works (collective works/collection), in accordance with s. 31 a Abs. 3 UrhG.

3.5 A restriction to assign moral rights

The copyright itself as a personal moral right cannot be transferred (s. 29 Abs. 1 UrhG). The right of first publication (article 12UrhG), the right to paternity (article 13) and the right of integrity (article 14) are the moral rights of the author recognised under German Copyright Law. A provision for instance allowing the publishing house not to mention the photographer's name is void, since this right is one of the most important rights in copyright law, even though some authors do not want to be mentioned. Under some provisions, certain alterations of the works are admitted (see s. 39, 62, 93 UrhG).

4. Determination of remuneration

The remuneration system set up in Germany in 2002 differs from system in place in most EU countries⁵²⁵. New s. 11 declares that copyright serves to secure authors an adequate remuneration. Such a principle is specified later on in the legal text: s. 32 UrhG explicitly guarantees an adequate remuneration for the transfer of rights in case the contract contains no specific agreement⁵²⁶; if the negotiated remuneration is not adequate, the author can claim an adequate remuneration. According to s. 32 Abs. 2 UrhG, a remuneration is considered adequate if it was determined in accordance with a *joint remuneration agreement* (see below) or if it corresponds to what is customary and fair in business relations, given the nature and extent of the possibility of exploitation granted, in particular the duration and time of exploitation, and considering all circumstances.

S. 36 UrhG encourages associations representing authors/creators on one side and associations of users of works or individual users of works on the other side to negotiate

⁵²⁵ Although there are similar provisions in other jurisdictions, for example in Slovenian copyright law.

⁵²⁶ The concept of adequate remuneration has long been a basic principle of German copyright law, as developed by the courts.

collective agreements defining the adequate level of remuneration for various types of works. According to s. 36 Abs. 2 UrhG, such an association must be (1) representative, which means it has to represent a large number of creators, (2) independent, i.e. only creators, not users of works, are members of the association and finally (3) empowered by its members to establish remuneration agreements. S. 36 Abs. 1 S. 2 UrhG determines that these agreements shall take account of the circumstances of the respective area of regulation, especially the structure and size of the users. In order to reach an agreement, the parties can either negotiate directly or turn to an arbitration board.

As a legal consequence, the fairness of the remuneration negotiated in the agreement cannot be challenged, as s. 32 Abs. 2 S. 1 UrhG clarifies. To compensate this strict provision, there is a high burden of proof (discovery obligation) if a party relies on such an agreement before court.

The German Copyright Law also allows further claims by the author, in case the agreed remuneration is disproportionate compared to the benefits derived from the exploitation of the transferred right (s.32a UrhG). This right may not be exercised if the remuneration falls in the scope of a collective agreement. Additional remuneration for the author is foreseen in case the transferee starts a new type of exploitation of the work that was unknown at the time of the conclusion of the agreement (s. 32c UrhG); however, there shall be a written term in the agreement, pursuant to s. 31a UrhG (see above under sect. 3.5).

New provisions on adequate remuneration have already been discussed in recent court decisions. In the cases *Talking to Addison*⁵²⁷ and *Destructive Emotions*⁵²⁸, the court held that translators who had transferred unlimited rights to a publisher could demand additional payment under certain circumstances. In both cases, a translator was paid a fixed fee per page. In addition to that, there was a provision on profit sharing: if a certain amount of texts were sold, the translator should get an additional payment of less than 1 % of the book's net price. The translator sued for higher remuneration according to s. 32 I 3, s. 32 II 2 UrhG, since she did not accept the contractual price as "adequate remuneration". The court held, in both cases, that the translator could claim an additional payment of 0.8% of the net price on hard cover books and 0.4% of the net price on paperback books, starting from the 5000th book sold. However, this claim could be increased or reduced under certain circumstances, for example if the fee was unreasonably high. In addition to that, according to the first judgment, translators could claim half of the net revenue which the publisher gained from transferring their rights to third parties. This amount was reduced by the second judgment to 20% of the foreign-language author's interest in the net revenue and limited to the publisher's revenue. The Regional Court of Cologne has recently held that a 25 eurocent compensation per line is not adequate for independent journalists⁵²⁹.

The issue of flat remuneration has also been scrutinised by German courts. In a case brought before the Higher Regional Court of Hamburg,⁵³⁰ the Court held that a flat fee as remuneration for the transfer of rights is void, if the right holder is no longer able to gain a reasonable interest in the earnings of her work because of it. As the BGH, the Federal

⁵²⁷ Federal Supreme Court Germany (BGH), File number I ZR 38/07, NJW 2010, 771.

⁵²⁸ Federal Supreme Court Germany (BGH), File number I ZR 19/09, GRUR 2011, 328.

⁵²⁹ Regional Court Cologne (LG), File number 28 O 695/11.

⁵³⁰ Federal Supreme Court Germany (BGH), File number I ZR 38/07, GRUR 2009, 1148.

Supreme Court, had decided earlier in 2009,⁵³¹ flat fees are licit only if they ensure a reasonable interest in the overall revenue for the use. Both courts therefore rejected buy-out clauses.

The evaluation of flat fees by courts is still highly debated, in particular in relation to remuneration clauses contained in adhesion contracts. The Higher Regional Court of Munich,⁵³² deciding on the general terms used by the defendant, a publisher in journalists' contracts, considered that it could evaluate clauses concerning the remuneration following the common rules of control of general terms and conditions set out in the German Civil Code (in particular, in s. 307 BGB).

S. 307 BGB states that a specific clause forming part of general terms and conditions can be void if it causes an undue disadvantage. However, according to s. 307 Abs. 3 BGB, undue disadvantages can only be evaluated by a court if the clause in question "departs from legal provisions". In principle, it can be said that the remuneration itself (i.e. the price) is not a "legal provision" from which one can depart, since it is freely negotiated by the parties and not prescribed by law. Therefore, a court cannot evaluate a clause on remuneration. However, the Higher Regional Court of Munich found that, in that particular case, the remuneration could be subjected to judicial evaluation. The court considered that s. 11 S. 2 UrhG, on the principle of adequate remuneration, sets forth a principle of participation of the author in the use of her work. In this logic, clauses on remuneration can be seen as departing from the "legal provision" established in s. 11 S. 2 UrhG. If the author is no longer able to gain a reasonable interest in the earnings of her work, the remuneration is not "adequate". Hence, the clause constitutes an undue disadvantage. Therefore, the court held that the flat fee in this context is void.

The Federal Supreme Court had held, in a previous decision, that s. 31 Abs. 5 UrhG, which states that the right-holder shall be able to participate as much as possible in the use of his work, is not a "legal provision" in the above-mentioned sense and therefore departing from this provision cannot constitute an undue disadvantage. In a recent decision,⁵³³ the court held that this did not change with the introduction of s. 11 S. 2 UrhG into the law. This provision may be a key principle in copyright law, but it cannot be used in a way to interfere with the freedom of contract. Therefore, the freely negotiated remuneration of two parties cannot be evaluated by a court within the context of s. 307 BGB.

As a consequence, according to the Federal Supreme Court, courts cannot hold a flat fee-provision void *per se* according to the common rules of control of general terms and conditions, but can only evaluate the adequate remuneration according to s. 32 UrhG on a case-to-case basis by examining all available circumstances. This conclusion is still highly debated by legal professionals in Germany, since many disagree with the Federal Supreme Court and argue in favour of the Higher Regional Court of Munich.

5. Obligations of the parties

No specific provisions exist.

⁵³¹ Federal Supreme Court Germany (BGH), File number I ZR 38/07, GRUR 2009, 1148.

⁵³² File number 6 U 4127/10, GRUR-RR 2011, 401.

⁵³³ Federal Supreme Court Germany (BGH), File number I ZR 73/10, GRUR 2012, 1031.

6. Interpretation of contracts

S. 31 Abs. 5 UrhG imposes a fundamental rule of interpretation in favour of the author concerning exploitation contracts. It codifies the principle according to which the scope of rights granted by the author is limited by the purpose of the contractual provision. In case of doubt the author is not deemed to have granted more extensive rights than those required by the purpose pursued in the transfer at issue⁵³⁴. S. 37, –concerning agreements to grant exploitation rights, further develops the principle of interpretation favouring the author, so that, in case there is any doubt as regards the scope of the contract, the author retains certain rights. S. 88 also contains an interpretation rule for audiovisual works in virtue of which, in case of doubt, the presumption of transfer (see below section 9) does not entitle the producer to re-make the work.

7. Termination of contract

According to s. 31 Abs. 1 UrhG, it is up to the parties to determine the duration of an exploitation contract as an expression of contractual autonomy in copyright law. In three cases the German Copyright Law provides the licensor with a way out, before the contract would normally end.

Reversion of rights (s. 41 Abs. 1, a, UrhG), gives the author an unwaivable call-back-right if the licensee does not make use of her exploitation rights within the first two years of the contract (s.41 Abs.2, 4UrhG).

S. 42 Abs. 1 UrhG provides the author with the unwaivable right to revoke the exploitation rights if her creation does not coincide with her conviction any more. The right cannot be waived in advance.

In these aforementioned cases, the author has the obligation to compensate the person affected if and insofar as this is fair and adequate (s. 41 Abs. 6 , 42 Abs.3 UrhG).

Since the 2002 German Copyright Law amendment, the author may also call back the exploitation rights if the transferee is not in a position to exploit her rights. This may be the case, for example, when the shareholder relations with respect to the enterprise of the transferee have substantially changed (s. 34 Abs. 3 S.2-3 UrhG).

8. The transfer of contracts

According to s. 34 Abs. 1 UrhG, an exploitation right may only be transferred with the author's consent. The author may not refuse her consent contrary to the principles of good faith. Yet, a transfer without the author's acceptance is possible, if the transfer is part of the sale of the entire enterprise or the sale of parts of an enterprise (s. 34 Abs. 3, a) UrhG). In this case the author may revoke the exploitation right under the condition of s. 34 Abs. 3, a, b UrhG.

If the holder of an exclusive exploitation right only wants to transfer parts of her rights, she is still bound to the author's consent (s. 35 Abs. 1UrhG).

⁵³⁴ Relevant case law on the matter: *Spiegel CD-ROM* BGH, 5 July 2001 , AfP 2002/1, p. 35; *PausshaleRechtseinräumung* BGH 131, p. 8 ; *Comic-Übersetzungen I* BGH 137, p. 387.

9. Specific contracts

9.1 Works created under employment

In German Copyright Law, the general principle is that the copyright is vested in the author (s. 7 UrhG). According to s. 43 UrhG, the general copyright regime applies in respect of exploitation rights "unless otherwise provided in accordance with the terms or nature of the employment or service relationship". However, the application and interpretation of this provision is not as simple as one might conclude at first sight. German case law has admitted, for example, implied grants when the work is created within the specific exercise of the duties of the employee and if she is aware of the fact that the work is used by the employer and the employer will compensate for this transfer⁵³⁵. This, as reasoned by the legal doctrine, is required by the very purpose of the contract. S. 43 does not apply to freelancers or independent workers, since they work under no employment agreement⁵³⁶.

As for moral rights, they remain with the employee.

9.2 Commission contracts

Regarding works created on commission, the buyer only obtains ownership of the work, not exploitation rights, unless this is explicitly negotiated (s. 44 Abs.1 UrhG); the right to exhibit the work in public may be exercised by the owner, unless agreed otherwise with the author (s. 44 Abs.2 UrhG).

9.3 Edition / publishing contracts

The provisions on edition or publishing contracts are not laid down in the German Copyright Law, but in the more specific Publishing Law (*Verlagsgesetz*). The main substance of a publishing contract is, according to s. 1 VerlG, the commitment of the author to grant the publisher all rights to distribute and exploit the work economically and of the publisher to publish it. The individual provisions of the Publishing Law affect specific items of the contract like the adequate remuneration (s. 22 VerlG).

9.4 Audiovisual works

In principle, all exploitation rights belong to the physical person who makes a creative contribution to the audiovisual work. Specific provisions on films and other audiovisual works are laid down in s. 88-94 UrhG. The author who grants the producer the right to visualise her work in form of a film or a different audiovisual work is deemed to have granted the producer the right to use her work unaltered, or following adaptation or transformation, and to use the cinematographic work as well as translations and other cinematographic adaptations in all manners of use (s. 88 Abs. 1 UrhG). S. 89 Abs.1 UrhG sets a similar presumption regarding other participants in the film; it creates a presumption that all collective authors of an audiovisual work grant exclusive exploitative rights over the work to the producer. S. 89 Abs. 3 UrhG states however that the copyright of participants having contributed to the film with their pre-existing works, such as novels, screenplay and film music, remains unaffected. If the author has granted the exploitation right to a third party, like a collective management society, she still

⁵³⁵ Regional Court Cologne (LG), File number 12 O 416/06.

⁵³⁶ IVIR, 2002, p.75.

retains, according to s. 89 subs. 2 UrhG, the right to grant these rights to the producer, with or without limitation. Thus the first grant will be legally void in relation to the producer of the film. This exceptional rule concerns only the rights concerned by the presumption of transfer in s. 89 subs. 1 UrhG. Legally granted rights to remuneration, e.g. the remuneration for rental and lending (s. 27 UrhG) or the obligatory remuneration (s. 54 UrhG) are not affected. These rights do not conflict with the interests of the producer, because they do not exclude her from use of the work⁵³⁷. So, future users of the film have to acquire the rights of the producer as well as to pay the royalties for remuneration rights.

⁵³⁷ Köln Higher Regional Court, File number 6 U 7/98 - ZUM 2000, 320.

Hungary

1. Rules depending on the form of assignment (assignment, licence, waivers, ...)

The Hungarian Copyright System is very much focused on the concept of licence rather than transfer of rights. This is clearly evidenced by arts. 9(3)-(6) and 16(1). A detailed set of rules on licensing or the so called "use contracts" are laid down under art. 42-55 of the Hungarian Copyright Act (hereinafter HCA).

Art. 9(3) of the HCA underlines that economic rights cannot be waived or assigned. However, there might be exceptions: art. 9(6) acknowledges exceptions to this assignment restriction in "the cases and under the conditions specified by law - notably in respect of jointly created works (art. 6), works made for hire (art. 30), works ordered for advertising (art. 63) and film contracts (art. 66)".

2. Form Requirements

The basic formality requirement is codified in art. 45(1), according to which, "contracts shall be put in writing." BH1994.129⁵³⁸ ruled that any infringement of the rule requiring written form results in an "invalid contract". Consequently, art. 45(1) is an "*ad validitatem*" provision of the statute. This has been confirmed in further cases.⁵³⁹ On the other hand, the lack of written agreement does not impede the claim for payment of the licence fee.⁵⁴⁰ Should the parties start to perform under an unwritten contract, courts might declare the contract valid until the day when the decision is handed over and require the parties to conclude a valid contract for the future.⁵⁴¹

Art. 45(2) contains two exceptions to this formality rule. It is not obligatory to put a contract in writing if the work is to be published in a daily newspaper or periodical⁵⁴² and in relation to the making available of works by the author. In this latter case the "use contract" shall be considered to have been made in writing, if the author has granted additional use rights for the respective works in a contract negotiated and executed by way of electronic means, that is, in an electronic contract.

3. Determination of the scope of rights

3.1 A general obligation to determine the assigned or licensed rights

Art. 43(1) stresses that any "use contract" grants exclusivity for the user only if expressly stated.

The HCA sets a standard in respect of the extent of use. According to art. 43(5), if the contract fails to indicate the means of use to which a licence pertains or the licensed extent of use, the licence will be limited to the extent necessary for implementing the purpose of the contract. This latter rule was applied by the Copyright Expert Board

⁵³⁸ Legf. Bír. Pf. IV. 20 887/1992. sz.

⁵³⁹ See for example Decision no. 4.P.20.188/2010/7 of the County Court of Győr-Moson-Sopron, where it was considered that when parties failed to put an oral contract in writing the agreement shall be void due to the breach of formality requirement.

⁵⁴⁰ Decision no. Pf.V.20.167/2011/4 of the Court of Appeals of Győr.

⁵⁴¹ See especially BH1994.22: Legf. Bír. Pf. IV. 20 837/1993, BH1994.24: Legf. Bír. Pf. IV. 20 242/1992, BH1994.129: BH1994.129: Legf. Bír. Pf. IV. 20 887/1992 or BH1994.249: BH1994.249: Legf. Bír. Pf. IV. 20 336/1993.

⁵⁴² Compare to BH1992.525: Legf. Bír. Pf. IV. 20 062/1992.

(SzJSzT) in its expert opinion no. 14/2002. Here the expert body emphasised that if the contract did not expressly indicate that it covers online uses, the SzJSzT cannot interpret it – under art. 43(1) and (5) – as including these uses as well.

3.2 Geographical scope and duration of the assignment

Art. 43(3) leaves the parties free to decide upon the area, duration, manner and extent of use covered by the contract. Art. 43(4) adds that it is possible to apply customary duration for contracts unless otherwise provided. Courts emphasise that the clause of a “use contract” that grants the transferee the right to use the work “anywhere in her territory of operation” does not imply an expressed authorisation to use the work outside of Hungary.⁵⁴³

3.3 Prohibition to waive or assign rights to remuneration

Authors may waive their right to remuneration; however, they cannot waive those remunerations that are collected by CMOs, if the law prohibits it (see for example: art. 20 on private copy or art. 23 (6) on rental rights). Even if the waiver of remuneration collected by CMOs is possible, the waiver shall be valid only if it is submitted to the association in writing.

3.4 A limitation of the possibility to assign rights in future works

Two further strict provisions include restrictions on the scope of contracts. According to Art. 44(1) of the HCA, “a use contract in which an author grants a licence for the use of an *indefinite number* of future works is null and void.” Accordingly, authors are free to sign a contract for an indefinite period of time; however, they cannot lawfully conclude any contract that would grant a monopolistic right to exploiters for “not-even-created” works.

3.5 A limitation of the possibility to assign rights in future and unknown forms of exploitation

Similar provisions are included into the HCA in respect of means of use that are unknown at the time a contract is concluded ((art. 44(2) of the HCA)). Right-holders cannot grant a valid licence for the user for not existing means of use. However, the same paragraph clarifies that: “a method of use that comes into being after a contract is concluded is not to be considered a means of use that is unknown at the time the contract was concluded if it merely makes it possible to implement previously known means of use more efficiently, under more favourable conditions, or with better quality.”

Finally, art. 47 sets some further limitations on the possible content of the “use contract” regarding the adaptation of a work, the reproduction, the licence for distribution and the work’s reproduced copies.

3.6 A restriction to assign moral rights

Under art. 9(2) moral rights cannot be waived nor assigned.

⁵⁴³ On the other hand, the previous stipulation does not mean that the work might be used solely in a building, since the “territory of operation” does not mean a single location. Decision no. Pfv.IV.21.771/2008/7 of the Supreme Court.

4. Determination of remuneration

Art. 16(4) of the HCA acknowledges that authors are entitled to remuneration in return for granting permission to use their works and establish the rule of proportional payment, in the absence of any agreement to the contrary.

A *best-seller clause* is included in art. 48 of the HCA so that if a work becomes more popular than it was expected when the contract was concluded, the author has the possibility to initiate a court proceeding to modify the agreement.⁵⁴⁴

5. Obligation of parties

There are no specific provisions focused on the obligations of the parties. General principles apply: namely, the author authorises the use of her work and the transferee is obliged to pay a remuneration; the parties are free to determine the contents of the "use contracts" (art. 42 HCA).

Specific provisions do exist as to contracts concerning works to be created in the future. Thus, art. 49 requires users to make a statement concerning acceptance of the work within two months of the delivery. The user is entitled, if there is justification, to return the finished work to the author (and set an appropriate deadline) for revisions or corrections.

In case the author refuses to make revisions or corrections without good cause for doing so or if she fails to make the revisions or corrections by the deadline that has been set, the contract may be repealed by the user without payment.

Generally, art. 50 HCA imposes that the authors make any nonessential changes that are clearly necessary and indispensable for using the work. If they refuse or are unable to do so, the user is entitled to make the changes without the authors' authorisation. This rule served as the basis of several expert opinions of the SzJSzT that related to architectural works.⁵⁴⁵

6. Interpretation of contracts

The HCA adopts the *in dubio pro autore* principle (art. 42(3) of the HCA) although in some provisions it departs from this approach. Thus, for instance, art. 47(4) HCA reads: "A licence to reproduce a work shall, in case of doubt, include distribution of the reproduced copies of the work".

7. Termination of Contracts

Contracts may terminate according to the general expiration rules set out in art. 54 of the HCA, namely 'The licensing agreement shall cease to have effect with the lapse of the time determined in the contract, with the emergence of the circumstances referred to in the contract, as well as after the expiration of the term of protection'.

⁵⁴⁴ The best-seller clause's constitutionality was challenged during the 1990's, that is, under the previous copyright regime. The Constitutional Court claimed in its decision *no. 852/B/1995* that the freedom of contract was not a fundamental constitutional right, and therefore any limitation on this freedom is acceptable as long as the limitation is not unjustified in respect of any other fundamental constitutional right.

⁵⁴⁵Expert opinion no. 02/2001 and 35/2002.

Additionally, art. 51(1) provides for a termination right in the case of lack of exploitation or use of works in a non-agreed manner. When it comes to long term contracts (more than five years), the author may only exercise the right of termination after two years from the conclusion of the contract, after setting a deadline for the user to fulfil the terms and conditions of the contract (art. 51(2)-(3)). The right of termination cannot be waived; its use can be excluded by contract for a period of no more than five years. In case the user has an exclusive exploitation right, the author might terminate the exclusivity of the contract (not the contract itself) and proportionally decrease the remuneration paid by the user (art. 51(4)-(5) HCA).

As for contracts concerning works to be created in the future, the law provides an unwaivable right of termination for both parties when the works are designated in the agreement only by genre or type – partial specification of the scope of the works – and at least five years after the contract conclusion (art. 52(1)-(2)).

Licences for the exercise of the right of communication to the public might be terminated for good reason. The exercise of termination, though, requires a compensation clause for any damage occurring from the time of the termination announcement till the denunciation of the contract (art. 53(1)-(2)).

8. The transfer of Contracts

Art. 46(1) of the HCA requires authors' expressed authorisation to transfer or sub-licence the licensed right. However, express authorisation is not required in the case of the licensee's legal successors (art. 46(2)). In the case of rights transferred without the author's authorisation, the user and the transferee shall be jointly responsible for performing the "use contract" (art.46 (3))⁵⁴⁶.

9. Specific contracts

9.1 Works created under employment (art. 30 HCA)

Art. 30 of the HCA includes a general set of rules for works created under employment (works made for hire). Unless otherwise agreed, the delivery of the work to the employer shall imply the transfer of economic rights to the latter when the work is deemed to have been created under employment⁵⁴⁷. The employee shall not be further entitled to remuneration in case of works made under employment⁵⁴⁸; there is one exception,

⁵⁴⁶ The basic provisions on joint responsibility are located in Art. 334-338 of the HCC. The joint liability of the transferor and transferee was confirmed by the court practice on the previous HCA. See: BH1994.23: *Legf. Bír.* Pf. IV. 21 080/1993. and BH1994.25: *Legf. Bír.* Pf. IV. 21 071/1992.

⁵⁴⁷ There may be an expressed exclusion of transfer of rights on a work for which the employee/author and the employer/user sign a separate use contract. See: expert opinion no. 32/2006 of the SzJSzT. The Court of Appeals of Budapest stressed that the creation of two detailed, educational books (having scientific value) by the plaintiff, who used to be a public employee of defendant for around 20 years, shall not be deemed as works made for hire, if the employment contract did not include an express obligation to publish books. See: decision no. 8.Pf.20.498/2010/3. If the employer pays an appropriate remuneration to the creator of photographs from their own income, and this payment is not part of the company accounts, the works shall not be deemed as works made for hire. See: decision no. 6.P.24.783/2005/31 of the Municipality Court. Academia has criticised these decisions, claiming that an obligation of the employee might arise under the written job description or oral order of the employer. See: P.GYERTYÁNFY, "A szerzői jog bírói gyakorlata 2006-tól: a jogok keletkezése, forgalmuk; személyhez fűződő jogok", *Iparjogvédelmi és Szerzői Jogi Szemle*, Issue 3/2013, fn. 1, p. 80-81.

⁵⁴⁸ Decision no. 8.Pf.20.477/2011/5, Court of Appeals of Budapest, confirmed that the remuneration is included in the employee's salary as long as she is employed, and the employer shall pay an appropriate remuneration to the author so long as the exclusive rights to use the work were licensed or transferred by the employer to a third party. According to the expert opinion no. 09/2001 of the SzJSzT, it is lawful to set the frames of "appropriate remuneration" in standard contractual provisions.

though, in case the employer transfers to a third person the economic rights or authorises someone to use the work⁵⁴⁹. In accordance with the general rules of the HCA, moral rights are not subject to transfer to the employer.⁵⁵⁰

9.2 Commission contracts

The HCA includes detailed provisions on one type of contract, in respect of works created on commission: art. 63 speaks about *works ordered for advertising*.

In this case, the basic rule is that the economic rights are subject to transfer to the user (art. 63(1)). The difference from the general regime is that transfer is allowed, while the basic rule is the prohibition of transfer of rights. Under Art. 63(2) parties to the contract shall agree at least upon the method, extent, geographic area and duration of use, the determination of the advertising medium, as well as the remuneration due to the author. Art. 63(2) focuses on the minimum elements of a contract for the creation of a work ordered for advertising in so far as the general licence contract rules do not regulate them; without these elements the contract is not valid. Copyrights on works ordered for advertising are not managed by any CMO (art. 63(3)). Art. 63(4) of the HCA, however, declares that parties have a right to agree that the creation of any work is ordered for the purpose of advertising. In this case the author – by a written notice sent to the competent CMO – might exclude their work from the scope of collective right management.

9.3 Edition/publishing contracts

The HCA has specific provisions on publishing contracts. Art. 56(1) provides a definition of publishing contracts by detailing the obligations of the parties: the author makes her work available to a publisher, the publisher shall be entitled to publish and market it, and the latter must pay remuneration to the author. Art. 56(2) reads “the right of publication exercised under contract is exclusive, except in the case of works made for collections, daily newspapers, and periodicals.”

Case law confirmed that edition contracts are valid only if they are in written form (BH1989.353).⁵⁵¹ The submission of the manuscript to the publisher therefore does not render it unnecessary to conclude a written contract in order to set the rights and obligations of the parties and the scope of the use.

Before 1988, the state made it compulsory for publishers to pay fixed remunerations to the right-holders. Since 1988 parties may agree as they wish. The court practice has confirmed, however, that the publisher shall pay the remuneration set by the contract to the right-holder even if the sale of books did not produce any profit.⁵⁵²

⁵⁴⁹ The remuneration of the author due to the use of her work shall be paid to the author by the employer, even if the right to use is sub-licensed or transferred by the employer. See: BH1990.333; *Legf. Bír.* Pf. IV. 20 701/1989, expert opinion no. 09/2001 of the SzJSzT.

⁵⁵⁰ The provision does not regulate the reversion of the economic rights to the author in cases where the legal successor/employer is wound up (terminated without legal successor). The SzJSzT highlighted in its expert opinion no. 02/2005 that this lack of regulation leads to a gap in the law, since these copyrights will become “abandoned” (or unclaimed) rights, and no one can legally exploit them until the term of protection elapses and the work enters the public domain.

⁵⁵¹ BH1989.353; *Legf. Bír.* Pf. IV. 20 101/1989.

⁵⁵² See especially: BH1992.633; *Legf. Bír.* Pf. IV. 20 222/1992, BH1992.755; *Legf. Bír.* Pf. IV. 20 174/1992, BH1998.477; *Legf. Bír.* Pf. IV. 20.170/1997.

Art. 57 covers the specific issue of cases where illustrations are included in the literary work published under the publishing contract. In this case the statute makes it obligatory to get the permission of the author of the illustrations before publishing takes place.

9.4 Audiovisual works

Art. 66 serves as an exception from the priority of the licensing regime. According to that, pursuant to a contract concluded for the production of a motion picture work, in the absence of stipulations to the contrary, the author transfers to the producer the right of use for the motion picture work and the right to licence use. Parties may conclude their contract contrary to the priority of transfer of rights; however, in practice, this exception is rarely used.

Under art. 66(2), the author cannot effectively transfer her right to claim specific fees, stipulated by articles 20 (the right for blank data carrier royalty), 23(3) and (6) (remuneration for public lending and rental) and 28 (remuneration for retransmission by way of broadcasting). These rights are mandatorily managed by a CMO ("Filmjus"). However, in practice no one collects the remuneration due under public lending of audiovisual works.

The author is entitled to payment for each and every type (related to different economic rights) and occasion of use (art. 63(2)).

Art. 66(6) stipulates a right of termination for the author in case of lack of exploitation or lack of timely exploitation of the work.

The law grants a right (and at the same time creates an obligation) for the producer of the motion picture to decide whether she accepts the work created by the author or she needs to revise the work. Art. 66(7) sets a strict deadline (3 months) for this decision. In case the producer fails to meet the deadline and to express her acceptance or refusal of the work, the HCA stipulates that the *work shall be deemed as accepted*. Art. 66(8) also forbids authors – without prior permission of the original producer – to sign dual licensing agreements with different producers for the same work and for a specific period of time⁵⁵³.

⁵⁵³According to this paragraph "the author may not, without the producer's consent, conclude a new film contract for the same work within ten years of the end of production. This limitation shall also apply to characteristic figures in a cartoon or puppet film and – if it is agreed between the parties – to other works by the author with the same theme as that of the work created and used for the production of the film."

Poland

1. Rules depending on the form of assignment (assignment, licence, waivers, ...)

The Polish legislation, in art. 41 of the Act of 4 February 1994 on Copyright and Related Rights (hereinafter: UPAPP)⁵⁵⁴, distinguishes two categories of copyright contracts:

Transfer contracts: The transferee acquires the economic rights in a derivative or translative way.⁵⁵⁵ The transfer of economic rights may be either "in full" (specific entitlements are transferred) or "partial" (of a smaller scope⁵⁵⁶);

Licences: the licensee acquires the permission to use the rights, which, after the use (according to terms of contract), are to go back to the licensor⁵⁵⁷, through many variations: "non-exclusive licences, exclusive licences, complete and limited licences, statutory, compulsory and passive and active licences"⁵⁵⁸. Licences differ by their form, length, nature and scope.

In practice, the division between a transfer contract and a licence contract (which raises criticism⁵⁵⁹) is far from obvious, as the differences between the two types of contracts may be minor⁵⁶⁰. The general rule, stated in art. 65 UPAPP, reads as follows: "if there is no clear provision regarding the transfer of copyright it is deemed that the author has granted a licence".

According to the Supreme Court: "The regulation in copyright agreements relating to the copyright does not eliminate the application of the provisions of the Civil Code (hereinafter: KC⁵⁶¹), including its specific parts. It is therefore impossible to conclude contracts other than provided in the copyright agreement on the transfer of copyrights or contract for use of the work (licensing), taking into account the specific nature of copyright. So there is no reason to exclude - in principle - the need to establish the admissibility of the lease on copyright"⁵⁶².

2. Form requirements

Art. 60 KC states that, unless otherwise provided by law, "the will of a person performing legal action may be expressed by any activity of the person which discloses the will in a satisfactory way". The rule varies regarding the legal nature of the transfer: according to art. 53 UPAPP, the transfer of author's economic rights and licence agreements (written form *ad solemnitatem* stipulated in art. 73 section 1 KC) are invalid unless concluded in a

⁵⁵⁴ Ustawa o prawie autorskim i prawach pokrewnych z dnia 4 lutego 1994 r. (t.j. Dz.U. z 2006 r. Nr 90, poz. 631 z późn. zm.).

⁵⁵⁵ P., ŚLEZAK, *Prawo autorskie wzory umów z komentarzem*, Wolters Kluwer Polska, Warszawa 2012, p. 16; T. TARGOSZ, K., WŁODARSKA – DZIURZYŃSKA, *Umowy przenoszące autorskie prawa majątkowe*, Wolters Kluwer Polska, Warszawa 2010, p. 17.

⁵⁵⁶ P. ŚLEZAK, 2012, p. 16.

⁵⁵⁷ A. DAMASIEWICZ, *Umowy wydawnicze*, Warszawa, 2007, p. 66; Z. Okoń, *Charakter prawny umowy licencyjnej*, ZNUJ PIPWI 3/2009, p. 36.

⁵⁵⁸ *Ibidem*.

⁵⁵⁹ E. TRAPLE, *Umowy o eksploatację utworów w prawie polskim*, Wolters Kluwer Polska, Warszawa 2010, p. 19; A. DAMASIEWICZ, 2007, p. 66.

⁵⁶⁰ J. BARTA (ed.), *System Prawa Prywatnego. Prawo autorskie*, C.H. BECK - Instytut Nauk Prawnych PAN, Warszawa 2007, p. 464.

⁵⁶¹ Ustawa z dnia 23 kwietnia 1964 r. Kodeks Cywilny (Dz.U. z 1964 r. Nr 16, poz. 93 z późn. zm.).

⁵⁶² Judgment of the Supreme Court of 26 January 2011 (IV CSK 274/10).

written form⁵⁶³; but a non-exclusive licence is a special case as it does not require a particular form.

According to art. 410 section 2 KC, "a benefit is undue (...), if the legal act underlying the benefit was void and has not been validated after it was rendered". Two legal effects can apply: the acknowledgment of the ineffectiveness of the contract for the parties, if the required form is not fulfilled; but in practice, the legal act can be validated through a "conversion" clause: the legal qualification of a contract can be "changed" when it does not correspond to the proper form required by law. This clause protects the effectiveness of the declarations of will made by contractors⁵⁶⁴.

3. Determination of the scope of rights

3.1 A general obligation to determine the assigned or licensed rights

Exploitation rights may be transferred observing the following:

- a) The work subject to the contract must be precisely defined (the title of the work, if existing, may be given) in such a way that no potential conflict shall arise concerning the proper execution of the contract by the author and the entitlement of the contractor.
- b) The legal status of the work should be determined (i.e. who is entitled to economic and personal rights, if the work is subject to third party rights).
- c) The responsibility in case of legal defaults regarding the subject of the contract must be stated, that is, defining the responsibility of the licensor or transferor of right "in case it turns out that she was not entitled to the transfer of rights or to grant a licence and when exploitation of work infringes third party rights"⁵⁶⁵.
- d) The contract must establish its own nature (licence contract or transfer contract) and which precise exploitation fields (art. 50 UPPAP) are covered.

The author's economic rights are based on the notion of "fields of exploitation". Art. 41 section 2, pt. 2 UPAPP stipulates that "the contract for the transfer of author's economic rights or for the use of work, hereinafter called 'the licence', covers the fields of exploitation expressly specified therein". A non-exhaustive list of fields of exploitation is mentioned by the legislator in art. 50 UPAPP⁵⁶⁶, distinguishing particularly: 1) recording and reproduction, 2) distribution, 3) communication to the public (that is distinct from distribution, *i.e.* exhibition, broadcasting, etc.).

In order to identify whether a right has been transferred in a field that the contract does not mention, two doctrines may be applied:

⁵⁶³ J. BARTA(ed.), 2007, p. 477.

⁵⁶⁴ *Idem*.

⁵⁶⁵ J.BARTA, R. MARKIEWICZ, *Prawoautorskie*, Warszawa, 2008, p. 158-159.

⁵⁶⁶ Art. 50. The separate fields of exploitation shall be, in particular:

- 1) within the scope of fixing and reproduction of works - production of copies of a piece of work with the use of specific technology, including printing, reprographics, magnetic fixing and digital technology;
- 2) within the scope of trading the original or the copies on which the work was fixed -introduction to trade, letting for use or rental of the original or copies;
- 3) within the scope of dissemination of works in a manner different from that defined in subparagraph 2 - public performance, exhibition, screening, presentation and broadcast as well as rebroadcast, and making the work publicly available in such a manner that anyone could access it at a place and time selected thereby.

a) The first maintains that if the exploitation field is not mentioned, the legal consequence is that there are no rights transferred in this field⁵⁶⁷, which may lead to recognising the contract as invalid (using a more or less strict interpretation, for example, acknowledging or not overall descriptions in the contract⁵⁶⁸);

b) The second consists in using general directives of interpretation of declarations of will of the parties to the agreement and allows rebuilding the scope of transfer⁵⁶⁹.

3.2 Geographical scope and duration

Art. 68 UPAPP states that, except if a contractual clause stipulates otherwise, the author may terminate a contract according to "the contractual time limits". On the other hand, a licence granted for more than five years shall, after the period of time elapses, be deemed indefinite.

3.3 Prohibition of waiving or assign rights to remuneration

No specific legal provisions in the law.

3.4 A limitation of the possibility to assign rights in future works

According to art. 41 UPAPP, any provision of a contract concerning all works or all works of a specific type by the same author to be produced in the future shall be invalid.

3.5 A limitation of the possibility to assign rights in future and unknown forms of exploitation

The same provision also stipulates that "a contract may provide only for such fields of exploitation which are known at the time of its conclusion". Both limitations intend to protect the creator from being limited in her future actions by a single transferee distributing her works⁵⁷⁰.

3.6 A restriction to assign moral rights

The definition and the legal status of moral rights are determined by art. 16 UPAPP, protecting "the link between the author and her work, which is unlimited in time and independent of any waiver or transfer". The main moral rights are the right of attribution (or paternity), the right to anonymity, the right of integrity or adaptation, the right of disclosure and the right of access. They are unwaivable and untransferable.

4. Determination of remuneration

Copyright transfers are in principle subject to remuneration "unless the contract states that transfer of copyrights or granting a licence was free of charge" (art. 43 pt. 1 UPAPP). Art. 43 section 2 UPAPP states that "if the contract does not specify the amount of author's remuneration, the remuneration shall be set taking into account the scope of the granted right and the benefits resulting from the use of the work". The broader the

⁵⁶⁷ P. ŚLIZAK, 2012, p. 23.

⁵⁶⁸ T. TARGOSZ, K. WŁODARSKA – DZIURZYŃSKA, 2010, p. 26.

⁵⁶⁹ *Idem*.

⁵⁷⁰ E. TRAPLE, 2010, p. 19; A. DAMASIEWICZ, 2007, p. 48.

scope of acquired rights, the higher the remuneration for the licensor should be⁵⁷¹ - an interpretation confirmed by art. 45 UPAPP stating that, unless the contract stipulates otherwise, the creator is entitled to separate remuneration for the use of work in each separate exploitation field. Nonetheless, the law does not impose any way of setting creator's remuneration⁵⁷². Based on the freedom of contract, the Polish legislator leaves the question of remuneration to the parties, who decide about the system they use⁵⁷³.

In practice, the most common solutions are proportional remuneration (percentage), flat-rate, or mixed systems⁵⁷⁴.

The question of proportional remuneration is additionally regulated by art. 48 UPAPP stating that, in case the price of a copy is increased, the author is entitled to the agreed percentage from copies sold at a higher price. The creator should be paid a percentage of the sale of copies at their real price⁵⁷⁵. What is more, according to art. 45 UPAPP, in absence of other rulings in the contract, the creator is entitled to additional remuneration in case of derivative works.

Art. 44 UPAPP provides for the possibility of changing the amount of remuneration by the creator: "in case of gross discrepancy between remuneration of the author and benefits of the acquirer of author's economic rights or licensee, the author may request that the court duly increases her remuneration"⁵⁷⁶.

5. Obligations of the parties

According to art. 54 UPAPP, the author must deliver the work within the time limit specified in the contract; if there is none, the work shall be delivered as soon as it is completed. The provision guarantees to the ordering party the right to withdraw in case the contract is not fulfilled or fulfilled improperly by the creator, obliging the former, as a counterpart, to set a proper additional time limit for the author to deliver the work. The author shall respect the time limits referred to above. If that obligation is not fulfilled, "the ordering party may renounce the contract".

Art. 55 UPAPP concerns the situations in which the delivered work has faults or defects. A defective work, if not justified by external circumstances, may lead the ordering party to renounce the contract. The exploiter shall inform the author within six months of the acceptance or rejection of the work; if the time limit is not respected, the work shall be deemed as fully accepted. In case of legal defects, the ordering party may not only withdraw from the contract but also claim a reduction of the agreed remuneration or claim the damage to be remedied.⁵⁷⁷

The exploiter, in turn, must disseminate the work according to the agreed time-frame, making the work available in a suitable form, and engage herself not to violate the integrity of the work; if those obligations aren't fulfilled, the author may terminate the contract and claim for damages. Defining whether or not a fault exists can be, in many

⁵⁷¹ J. BARTA (ed.), 2007, p. 526.

⁵⁷² J. BARTA et al., *Ustawa o prawie autorskim i prawach pokrewnych. Komentarz*, Warszawa 2005, p. 401.

⁵⁷³ T. TARGOSZ, K. WŁODARSKA – DZIURZYŃSKA, 2010, p. 226.

⁵⁷⁴ P. ŚLEZAK, 2010, p. 25; T. TARGOSZ, K. WŁODARSKA – DZIURZYŃSKA, 2010, p. 227.

⁵⁷⁵ J. BARTA (ed.), 2007, p. 530.

⁵⁷⁶ J. BARTA et al., 2005, p. 402.

⁵⁷⁷ *Idem*.

cases, disputable due to the lack of explicit, objective criteria of assessment of the work regarding its value, level, usefulness⁵⁷⁸.

6. Interpretation of contracts

Art. 65 UPAPP states that "if there is no clear provision regarding the transfer of copyright, it is deemed that the author has granted a licence", which means that in case of doubts concerning the character of a contract (i.e. whether it is stipulated as a contract for the transfer of the rights or a licence contract), the rules apply in favour of licence contract⁵⁷⁹.

Art. 49 section 1 UPAPP states that "if the contract does not specify the manner of the use of the work, the manner should comply with the character and purpose of the work and the accepted practice". This provision may help to define more precisely the content of rights and duties of parties to the agreement⁵⁸⁰.

7. Termination of contract

UPAPP enables the termination of a legal contract either by withdrawing from it or renouncing it. We can distinguish the provisions on withdrawal concerning the ordering party (the exploiter) and the creator.

Art. 56 UPAPP stipulates that "the author may renounce or terminate the contract because of her own fundamental interests"⁵⁸¹, as a statutory right to which only authors are entitled⁵⁸². The notion of "creative interests" is not defined and its interpretation is controversial. Maintaining the creator's good name or desire to disseminate results of artistic or scientific work may be regarded as significant creative interests⁵⁸³. Parties may specify in the contract under which circumstances withdrawal from the contract is possible⁵⁸⁴.

Other provisions in the copyright law also allow the author to terminate the contract early for other reasons, notably when the transferee fails to start the dissemination of the work within the agreed time limit (art. 57), fails to make the work available in a suitable form (art. 58) or disseminates the work with changes to which the author may rightfully object (art.59 UPAPP).

8. The transfer of contracts

In the case of a sub-licence, the regulations regarding licence contracts are applied all the same: the licensee, who becomes a sub-licensor, grants authorisation for the use of the subject of sub-licensee's copyright⁵⁸⁵. In practice, a licence contract may provide for the possibility of granting sub-licence or proscribe such action. If the parties decide to permit the conclusion of sub-licences, this must clearly be expressed in the contract⁵⁸⁶.

⁵⁷⁸ J. BARTA (ed.), 2007, p. 473.

⁵⁷⁹ J. BARTA et al., 2005, p. 518.

⁵⁸⁰ *Idem*, p. 412.

⁵⁸¹ J. BARTA (ed.), 2007, p. 488.

⁵⁸² *Idem*, p. 489.

⁵⁸³ J. BARTA et al., 2005, pp. 489 – 490.

⁵⁸⁴ J. BARTA (ed.), 2007, p. 488.

⁵⁸⁵ M. ZALUCKI, *Licencjanaużywanieznakutowarowego. Studiumprawnoporównawcze*, Warszawa 2008, p. 66.

⁵⁸⁶ P. ŚLEZAK, 2012, p. 19.

According to art. 67 section 3 UPAPP, if there are no appropriate provisions in the contract it is assumed that the licensee is not allowed to grant further sub-licences.

9. Specific contracts

9.1 Works created under employment

Art. 12 UPAPP states that, unless the law or employment contract decides otherwise, the employer whose employee has created the work as a result of performing duties arising from the employment contract acquires the author's economic rights at the moment of accepting the work within the limits resulting from the purpose of the employment contract and common intention of both parties. The regulation attempts to reconcile opposing principles of labour law and copyright law⁵⁸⁷. In case of works created beyond duties resulting from the employment contract or in the scope beyond "the purpose of the employment contract and unanimous intention of the parties", the rights return to the employee, according to chapter 5 of UPAPP⁵⁸⁸. The employer is not entitled to separate remuneration resulting from the employee's work and its exploitation within the scope of employer's entitlements⁵⁸⁹. However, according to the principles of freedom of contracting, parties may establish additional material benefits for the employee resulting from creating the work⁵⁹⁰. It must be noted that according to the Supreme Court: "If the performance of the work (subject to copyright) is subject to an employment contract, the employment relationship (not the agreement on the transfer of copyrights) is the basis of remuneration for the use of the work by the employer".⁵⁹¹

9.2. Commission contracts

There are no specific provisions concerning commission contracts apart from the general rules concerning transfer of rights.

9.3. Publishing contracts

There are no specific provisions concerning publishing contracts apart from the general rules concerning transfer of rights.

9.4. Audiovisual works

The notion itself, although explicitly mentioned in the law, is not defined by the Polish legislator. We must assume that art. 1 section 1 UPAPP must be satisfied, that is, that an audiovisual work, to benefit from the Copyright legislation, must be a manifestation of the creative activity of individual nature⁵⁹². According to art. 70 section 1 UPAPP, it is assumed that the producer of audiovisual work, according to the contract concerning creation of the work or contract for the use of the existing work, acquires exclusive economic rights for the exploitation of the works within the framework of the audiovisual work as a whole.

⁵⁸⁷J.BARTA et al., 2005, p. 205.

⁵⁸⁸ *Idem*, p. 207.

⁵⁸⁹ J.BARTA et al., 2005, p. 211.

⁵⁹⁰ J.BARTA, R. MARKIEWICZ, *Prawoautorskie*, Warszawa 2010, p. 76.

⁵⁹¹ Resolution of the Supreme Court of 14 February 2012 (*III UZP 4/11*).

⁵⁹² P. ŚLEZAK, 2012, p. 132.

Spain

1. Rules depending on the form of assignment (assignment, licence, waivers...)

Exclusive rights in Spain may be transferred under exclusive (art. 48 and 49) or non-exclusive transfers (art. 50). The wording used in the law is *cesión*, sometimes *autorización*. The use of these terms is however not consistent throughout the whole text and it is difficult to delineate a strict meaning for each of them⁵⁹³.

The term licence is only used in some specific provisions concerning neighbouring rights⁵⁹⁴ with the purpose of clarifying that the corresponding exclusive rights may be transferred, assigned or subject to the granting of contractual licences. The wording of these sections is probably due to a literary transposition of art. 7.2 of Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property and has been strongly criticised by Spanish doctrine, which considers it as superfluous taking into account that neither the Spanish Copyright Law nor the Civil Code – subsidiary source of law (art. 609 Civil Code) – point to the existence of any limitation to the free transmissibility of rights⁵⁹⁵.

It is worth recalling, as pointed out by S. Cavanillas, that the specific configuration of authors' rights puts some obstacles to certain kind of contracts, notably to the full selling of rights⁵⁹⁶. Nowadays, a large majority of Spanish scholars consider absolute transmission of rights not compatible with Spanish legal tradition⁵⁹⁷.

2. Form requirements

Art. 45 require copyright assignments to be done in writing. If, after being formally requested to do so, the transferee fails to meet this requirement, the author can exercise her right to opt out of the contract. According to the doctrine, this formal requirement of written form is *ad probationem*⁵⁹⁸.

3. Determination of the scope of rights

Art. 43 of the Spanish Copyright Act includes certain requirements for copyright transfers.

3.1 A general obligation to determine the assigned or licensed rights

Art. 43.1 limits the assignment to the exploitation rights and modalities expressly provided for in the contract. According to art. 43.2, in case exploitation means are not detailed, the transfer will be limited to what is necessarily deduced from the contract itself and is essential to comply with the purpose of the contract.

⁵⁹³ S. CAVANILLAS, "Comentarios a los artículos. 48, 49 y 50", in R. BERCOVITZ (ed.), *Comentarios a la Ley de Propiedad Intelectual*, 3ª ed., 2007, España, p. 825.

⁵⁹⁴ Art. 107 and 109 are dealing with artists' rights; art. 115 and 117 with phonogram producers' rights, 121 and 123 with audiovisual producers' rights; art. 126 with broadcasting organisations' rights; and 133 with a *sui generis* rights' database.

⁵⁹⁵ R. SANCHEZ ARISTI, in R., BERCOVITZ, 2007.

⁵⁹⁶ S. CAVANILLAS, in R. BERCOVITZ (ed.), 2007p. 763 et seq.

⁵⁹⁷ R. BERCOVITZ, *Manual de Propiedad Intelectual*, Manuales, 3ª edición, 2007, p. 164.

⁵⁹⁸ J. A. TORRES LANA, in J R.,BERCOVITZ (ed.), 2007, p. 793.

3.2 Geographical scope and duration

Art. 43 also requires the contract to specify the time and the territorial scope of the transfer. If the parties fail to precisely indicate the length of the contract, the transfer will be limited to 5 years and the territorial scope will be limited to the territory in which the transfer has been concluded.

3.3 Prohibition of waiving or assign rights to remuneration

Art. 55 states that, unless otherwise established by law, all the benefits granted to authors in the provisions dealing with copyright contracts are considered as unwaivable.

More particularly, the following remuneration rights are explicitly qualified as unwaivable:

- Renting, Exhibition and Making available remuneration rights of audiovisual authors;
- Private copy remuneration was also considered as unwaivable by art. 25 of the Copyright Act. However, this provision has been suppressed by recent legislation (*R.D.-ley 20/2011, de 30 de diciembre, de medidas urgentes en materia presupuestaria, tributaria y financiera para la corrección del déficit público*, or «B.O.E.» 31 Diciembre).

3.4 A limitation of the possibility to assign rights in future works

Art. 43.3 considers null and void any clause referring to a global transfer of exploitation rights on all works that the author may create in the future. It is however licit to assign rights in a future work, if this is perfectly identifiable⁵⁹⁹.

In addition, art. 43.4 states that any stipulation whereby the author undertakes not to create any work in the future shall also be deemed null and void.

3.5 A limitation of the possibility to assign rights in future and unknown forms of exploitation

The final section of art 43 provides that rights' transfer cannot affect methods of use or exploitation modalities that do not exist or are unknown at the time of the transfer.

3.6 A restriction to assign moral rights

According to art. 14, moral rights are unwaivable and inalienable.

4. Determination of remuneration

Regarding onerous transfers, art. 46 imposes the rule of proportional remuneration as regards the benefits generated by the work. However, it exceptionally allows the parties to agree on a lump sum under certain circumstances: notably when, taking into account the exploitation modalities, it may be difficult to determine, or impossible or extremely expensive to monitor, the benefits generated; when the work or the use of the work has an accessory role; or in case of first or sole editions of certain kinds of works. In such cases, art. 47 gives creators a possibility of action to request the revision of the contract if there is a manifest disproportion between the remuneration of the author and the

⁵⁹⁹ M. del C. GETE-ALONSO, *in R.*, BERCOVITZ (ed.), 2007, p. 780.

benefits obtained by the exploiter. This action can be exercised in the ten years following the transfer of rights.

Thus, the law considers proportional remuneration as the most appropriate and protective way to ensure creators' interests. However, this provision has been criticised by Spanish scholars. As argued by professor Torres Lana, proportional remuneration systems do not necessarily ensure equitable remuneration unless they are accompanied by a certain control regarding the minimum levels of remuneration and their effectiveness⁶⁰⁰.

5. Obligations of the parties

Art. 48.2, concerning exclusive assignments, imposes on the assignee the obligation to exploit the work: to put in place all the necessary means to ensure effective exploitation, taking into account the nature of the work and the professional uses.

Later, in relation to publishing contracts, art. 64 details the obligations of the publisher, notably the obligation to exploit the work, to respect the author's moral rights and to pay the remuneration. Art. 65 deals with authors' obligations, including the delivery of the work, the warranty clause and proof corrections.

6. Interpretation of contracts

The Explanatory Memorandum of the Law already referred to the principle of restrictive interpretation of contracts governing the Spanish Copyright Act that is further incorporated in key provisions across the law: notably as regards the scope of transfer of rights in art. 43.1 and 43.2 (also SAP 12/2012) and in art. 76⁶⁰¹.

7. Termination of contract

The Spanish Copyright Law contains no specific provision on early termination of the contract at the creator's request, so the general regime prevails. Authors can terminate a contract in case transferees do not comply with their obligations, and notably, in the case of exclusive assignments, when they do not undertake the exploitation of the work⁶⁰² (according to art. 1124 Civil Code: "the power to terminate obligations is deemed to be implied in reciprocal obligations, if one of the parties should not perform her obligation").

Art. 68, dealing with publishing contracts, provides that authors may terminate the contract when the publishers fail to fulfil their obligations. Notably, this is the case when a publisher fails to produce the edition of the work in the agreed time and under the agreed conditions or to comply with key obligations in spite of an express demand from the author; when a publisher withholds or destroys the remaining copies of the edition without meeting the requirements laid down in art. 67; when a publisher assigns her rights to a third party without permission; or when, if more than one edition has been provided for and the last edition produced is out of print, a publisher does not produce the next edition within one year of having been called upon to do so by the author.

⁶⁰⁰ J. A. TORRES LANA, in R. BERCOVITZ (ed.), 2007, p. 801.

⁶⁰¹ S. CAVANILLAS, in R. BERCOVITZ (ed.), 2007, p. 818 .

⁶⁰² R. BERCOVITZ, "Dictamen sobre los derechos de propiedad intelectual sobre las obras arquitectónicas", available at http://www.ecoac.org/innoserver/3patent/pi_cscae/Bercovitz%20Propiedad%20intelectual%20Dictamen%20obra%20arquitectonica.htm.

The author can also terminate the contract in the event of liquidation or change of ownership of the publishing firm, in so far as the reproduction of the work has not been initiated, with repayment of any advances already paid.

Art. 62.2 and 62.3 provide that a creator can terminate a publishing contract in respect to the languages in which the work has not (yet) been published.

Moreover, art. 69 includes a rule on the expiration of the contract. Accordingly, publishing contracts will expire at the end of the agreed period of duration; on the sale of all the copies; after ten years from the assignment, if remuneration has been agreed upon exclusively as a lump sum; and, in any event, fifteen years after the author has placed the publisher in a position to carry out the reproduction of the work.

8. The transfer of contracts

Art. 49 authorises the transmission of exclusive licences, subject to the consent of the transferor. The need of explicit consent has been confirmed by a decision of the Spanish Supreme Court (STS 1662/2005). Consent is not required if the transfer occurs as a result of liquidation or change in ownership of the corporation.

9. Specific contracts

9.1 Works created under employment

Transfer of rights in labour relations (art. 51) is subject to the contractual freedom of the parties. The contract must be formalised in writing. However, in the absence of a written agreement, it is presumed that exploitation rights are transferred on an exclusive basis and to the extent required for the normal activity of the employee.

According to the doctrine, unless the contract specifies otherwise, the remuneration for the transfer of rights is included in the salary of the employee⁶⁰³. In case of manifest disproportion, authors might ask for a revision of the contract as foreseen in art. 47 (see supra, para. 4). Indeed, the Supreme Court applied art. 47 in a decision concerning a labour contract, where the remuneration perceived by the author was manifestly disproportionate compared to the benefits obtained by the company (STS 2601/2001).

The law does not deal with the intricate issue of the prohibition of creating future works once the labour relationship is extinguished. The Spanish doctrine understands that non-competition clauses are licit if they respect the provisions established in art. 21.2 of the Spanish Labour Law (*Estatuto de los Trabajadores*), that is, if a prohibition of creation of future works for a concurrent company is limited in time and is remunerated.

9.2 Commission contracts

The Spanish legislation does not include any specific provision regarding commissioned works. Recent jurisprudence has applied, by analogy, the provisions contained in art. 51 to commission contracts, provided that the creation of the work is at the request of the commissioner and implies the alienation of the results of the work (STS 18/12/2008).

⁶⁰³ J. M RODRIGUEZ TAPIA, in R. BERCOVITZ (ed.), *Comentarios a la ley de propiedad intelectual*, Tecnos, 2007, p. 842.

9.3 Edition/publishing contract

Spanish law regulates in detail publishing contracts⁶⁰⁴.

Art. 60 imposes certain specifications regarding the minimum content of the contract. The contract shall refer to:

- whether the assignment by the author to the publisher is of exclusive character;
- its territorial scope;
- the maximum and minimum numbers of copies constituting the print-run or each of the print-runs agreed upon;
- the manner of distribution of copies and those that are reserved for the author, for reviews and for the advertising of the work;
- the remuneration of the author, determined according to the provisions of art. 46 (proportional remuneration);
- the time limit for putting into circulation the copies constituting the sole or first edition, which may not exceed two years from the moment when the author delivers the work to the publisher in a form suitable for the reproduction thereof to be effected.

Failure to comply with the written form requirement⁶⁰⁵ and lack of information concerning the number of copies constituting the print-run or the remuneration will make the contract null and void. In order to ensure effectiveness of the specific rules on the print-run, art. 72 foresees mechanisms to verify print-runs that is further developed by *Real Decreto 396/1988, de 25 de Abril, por el que se desarrolla el artículo 72 de la Ley de Propiedad Intelectual sobre control de tirada*.

Remuneration is governed by the general rules established in art. 46, as indicated in art. 60.5.

In addition, regarding book publishing, the law requires the contracts to specify other aspects such as languages, advance royalties, or the publishing modalities (art. 62).

Music publishing contracts are subject to publishing provisions with certain particularities. In music publishing contracts, the author transfers not only the reproduction and distribution rights, but also the right of communication to the public. The contract is deemed valid even if the number of copies is not identified. The time limit for putting into circulation the first edition of the work is 5 years. Finally, the music publishing contract is easier to terminate and extinguish (art. 71.3), since certain provisions –notably art. 68.1(c) and 69.2, 69.3 and 69.4 – do not apply.

9.4 Audiovisual works

The Spanish legislator has introduced a presumption of transfer of certain exploitation rights in audiovisual production and transformation contracts. Thus, art. 88.1 states that the contract for the production of audiovisual works shall be presumed to assign to the

⁶⁰⁴ Future works cannot be covered by the publishing contract. Art. 59 specifies that the commissioning of a work shall not be subject to a publishing contract but any remuneration agreed should be considered as an advance.

⁶⁰⁵ In a recent decision, the Supreme Court confirmed a decision where a lower court declared *ex officio* the nullity of an oral publishing contract (STS 31/5/2005). This decision was however in contradiction with previous jurisprudence. BERCOVITZ RODRÍGUEZ-CANO, Rodrigo: "Comentario a la STS (Sala 1ª) de 31 de mayo de 2005", CCJC, nº 71 (mayo-agosto 2006), p. 849-855.

producer the exclusive rights of reproduction, distribution and communication to the public, and also the rights of post-synchronization or subtitling of the work. Producer and creators can however agree otherwise. According to A. González Gonzalo, this presumption does not include unknown exploitation modalities⁶⁰⁶. According to art. 90, it is also presumed that renting rights have been transferred. For cinematographic works, art. 88.1 requires the express consent of the author as regards exploitation through broadcasting or making available copies of the work for domestic use.

Art. 88.2 introduces a dispositive rule in virtue of which authors should always be able to make use of their own contribution if such use is without prejudice to the normal exploitation of the work. In virtue of art. 89, a similar regime is foreseen for audiovisual contracts for the transformation of pre-existing works.

In line with the protectionist spirit of the law and to ensure authors' remuneration, the legislator has introduced a detailed regulation of the remuneration system. Thus, art. 90 requires the remuneration to be determined in relation to each exploitation modality. The article remains silent about the remuneration system; however, Spanish doctrine considers that the general regime concerning proportional remuneration applies⁶⁰⁷. In addition, art. 90 contains particular rules concerning the audiovisual authors' remuneration rights. As regards the communication to the public against entrance fee, audiovisual authors have the right to perceive a percentage of the benefits generated through public exhibition. This payment should be made effective by the exhibitor – who can, however, deduce it from the amount due to the assignor for the rights' assignment. The exhibitor should periodically make available to the collecting societies the amounts collected for such remuneration. A lump sum is admitted in relation to exportation of the audiovisual work or when proportional remuneration is difficult to be enforced. For other modalities of communication to the public, as well as in the case of the making available of the work, the law stipulates that authors are remunerated according to the tariffs established by the relevant collecting society, the SGAE. The remuneration should be paid by the one undertaking the public communication – e.g. the broadcaster.⁶⁰⁸

The above mentioned remuneration rights concerning the communication to the public or the 'making available' are unwaivable and untransferable *inter vivos* and will be managed through collecting societies (art. 90.6 and 90.7).

In order to facilitate the exercise of these rights, the producer should provide the author with the relevant information at her request at least once a year (art. 90.5).

Articles 74 to 85 of the law provide specific rules for stage and music performance contracts. The rules refer to contractual forms and maximum terms, restrictive interpretation of the contracts, obligations of the author and of the assignee, remunerations, and other similar issues. These rules also give authors the power to terminate the contract in case of lack of compliance with the assignee's obligations.

⁶⁰⁶ G. GONZALEZ, in R. BERCOVITZ, 2007, p.212.

⁶⁰⁷ N. PEREZ DE CASTRO, in R. BERCOVITZ, (ed.), 2007, p. 1190.

⁶⁰⁸ SCA Art. 90.4.

Sweden

The Copyright Act contains few provisions of a general nature on creators' contracts. Instead, there are detailed rules on some specific types of contracts with special emphasis on publishing and film contracts, something that is critically assessed in legal doctrine.

2013 revision of copyright law: a failed attempt to redress the balance in copyright contracts

On 17 June 2013, Sweden passed a bill modifying the copyright Act. New provisions mainly focus on extended collective licensing, allowing for wider use of this Nordic system. Amendments to copyright law also increase the libraries' prerogative to facilitate online access to copyright works and proceeds to the implementation of the Term of Protection Directive.

Although the reform finally does not address the issue of copyright contracts, this was considered in the preliminary steps of the decision making process. Already in 2008, the Swedish Government had commissioned an Inquiry to prepare the ground for a major revision of the Copyright Act; the remit of the Inquiry, as defined in the Government Instructions (Dir. 2008:37), was to focus particularly on the provisions concerning the contractual transfer of copyright and to assess whether the contractual position of the author needs to be strengthened, as well as to consider the need to revise the existing schemes for extended collective licensing. The Inquiry submitted its first partial Report "Contracted Copyright" (AvtaladUpphovsrätt, SOU 2010:24). A final Report by the same Inquiry under the name "A New Copyright Act" was submitted in 2011 (see SOU 2011:32).

Both reports put forward proposals to give general application to certain principles already codified for publishing contracts and to promote clear and well defined contracts. In this vein, they proposed: to introduce a provision on the interpretation of copyright contracts, more specifically as regards the codification of the specification principle (see below, para. 6); to modify section 36 of the Contracts act to introduce a separate provision on unfair terms in copyright contracts; as well as to create a new obligation for exploiters to make use of the right acquired, granting the author the right to terminate the contract in case of violation of such obligation. The Report also addressed the issue of remuneration and proposed a waivable right to reasonable remuneration for transfers/licences signed in the framework of commercial activities together with mandatory provisions on reporting. Finally, the government's report proposed limiting the duration of contracts relating to the communication to the public and making available rights.

None of these proposals was finally included in the Bill.

1. Rules depending on form of assignment (assignment, licence, waivers...)

In Swedish Copyright Law, there are no special provisions regarding the transfer of rights.

2. Requirements of forms

Swedish Copyright Law (URL) does not require specific formalities for the conclusion of copyright contracts. They can be concluded orally, or even by tacit agreements.

3. Determination of scope of rights

Art. 27 URL establishes the principle of contractual freedom and transferability of rights, with the exception of moral rights. Still, certain provisions of the law include limitations as regards the scope of the transfer, even if not all of them are mandatory.⁶⁰⁹

Art. 3 URL sets out a limitation for the transfer of moral rights from the author. Pursuant to art. 3 section 3 URL, the author may, with binding effect, waive her moral rights under art. 3 only in relation to uses that are limited as to their character and scope. Waiver of moral rights which goes beyond such limited uses would consequently be considered invalid. Sufficiently limited and precise waivers of moral rights can be considered permitted - for instance, the approval of changes to a literary work that are necessary for its use in a film production.⁶¹⁰

4. Determination of remuneration

In Swedish law, there is no general rule establishing an obligation to provide remuneration for the transfer of copyright, nor is there a general requirement of equitable or proportional remuneration concerning the transfer of exclusive rights. There are, though, provisions containing detailed rules concerning the remuneration for certain uses, notably the rental of sound and video recordings (art. 29), resale rights for works of art (arts. 26 n, o, p), private copies levies (arts. 26 k, l, m), remuneration due to use of compulsory licences (arts. 17,18, 26a) and for collective licences (arts. 42 a section 3, 4).

5. Obligations of the Parties

The Swedish Copyright Act does not lay down any general provision concerning the obligations of the parties in exploitation contracts, following the general 'freedom of contracts' principle. Instead, there are rather detailed provisions on the obligations of the parties for certain types of contracts, namely contracts for transfer of the right to communication to the public and public performance (art. 30 URL, obligation of exploitation of the work), publishing contracts (Arts 32-37 URL) and film contracts (art. 39-40 URL). However, even these provisions are non-mandatory and the parties can deviate from them in their contracts.⁶¹¹

6. Interpretation of Contracts

Swedish legislation has no special provision for contract interpretation rules. Legal doctrine and case law have however developed rules that are widely applied. Even though different theories exist, there seems to be an agreement on what is the accepted definition of the 'Specification tenet' (*Specialitetsgrundsatsen*); that is, in cases of

⁶⁰⁹ See art. 28 URL on secondary transfer of rights, art. 30 URL on the transfer of the communication to the public /public performance rights, or arts. 31 and 39 on publishing and film contracts.

⁶¹⁰ See J. ROSEN, "Upphovsrättens avtal (Copyright contracts)", *Norstedts juridik*, 2006, p. 169 with reference to prop.1960:17, p. 73 and to SOU 1956:25, p. 128).

⁶¹¹ Art. 27.3 URL.

transfer of the economic right of the author, a right will be considered as having been transferred only within the scope that follows expressly from the agreement.⁶¹² There is also a distinction from the 'Principle of specification' (*Specificationsprincipen*), whose interpretation is that wide-reaching and unclear or tacit agreements should be interpreted restrictively and to the benefit of the author.

Following legal doctrine and established practice, agreements are interpreted strictly and the presumption is that the scope of transfer is limited only to what follows explicitly from the agreement.

Lower instance courts have applied the principles in several cases, but the Supreme Court has not explicitly confirmed them.⁶¹³ In the case *Evert Taube*, the highest tribunal held that the licence to use a work on the packaging of a product intended for resale to consumers is normally understood to include a right for the manufacturer of the goods and the sellers to use the package for marketing purposes in a conventionally accepted way. This decision interprets a copyright agreement extensively and invokes customary practice for the interpretation of the copyright contract. The specification principle, while mentioned by the first instance court, was not invoked by the Supreme Court.

7. Termination of contracts

The Copyright Act does not include any rule concerning termination of copyright contracts. There are only provisions for certain contracts such as:

Publishing contracts (arts. 33, 35 URL): Works ought to be published in reasonable time by the publisher so as to ensure the distribution of the work; otherwise the author may rescind the contract and keep remuneration and, in case of damage, receive compensation.

Film contracts (art. 40 URL): If the film is not produced and made available to the public within a reasonable time, the author may rescind the contract and keep the remuneration received; in case of damage not covered by the remuneration, there shall be compensation.

It is implied in both situations that the main reason for termination of contracts is the lack of exploitation of the work.

8. Transfer of contracts

In the absence of agreement to the contrary, the person to whom a copyright has been transferred may not alter the work or transfer the copyright to others. However, if the copyright forms part of a business activity, it may be transferred together with the business activity or of part thereof; the transferor remains liable for the fulfilment of the agreement (art. 28).

⁶¹² SOU 2010:24 p. 103.

⁶¹³ SOU 2010:24, with reference to the following cases: District Court of Skåne and Blekinge (Hovrätten över SkåneochBlekinge), case nr. T 2116-03; Svea District Court (*Sveahovrätt*), decision of 2007-05-02, case nr T 9659-05 (*En svensk tiger*); NJA 2004 s 363 (about the right to use photos commissioned by the Red Cross).

9. Specific contracts

9.1 Works created under employment

No specific provision exists in the Swedish Copyright Law concerning works created under employment. As in other continental jurisdictions, in Sweden too the starting point is that the copyright always follows the natural person who is the creator of the work.⁶¹⁴

The copyright of the work may be transferred to the employer totally or partially; thus, no “work for hire” doctrine is recognised in Sweden.

“Rule of thumb” though is a legal doctrine according to which works produced as a part of an employee’s task are allowed to be used by the employer within the purposes of her activities and to the extent that was foreseeable when the work was created; work alterations are permitted only to the extent necessary for the purposes for which the work was created under the employment relationship⁶¹⁵. The Government Inquiry had even proposed the principle’s codification.

9.2 Commission contracts

There are no provisions concerning commission contracts. In application of the principle of freedom of contract, the scope and conditions of such contracts are to be determined by the parties or by tacit agreement or accepted practice in the respective sector⁶¹⁶. For several agreements for works on commission, the specification principle (see above) has been applied.

9.3 Edition/publishing contracts

The Swedish Copyright Act includes detailed regulations on publishing contracts (Arts. 31-38 URL).

It specifies that any copy from which a work is reproduced is owned by the author (art. 31 URL). Publishers’ rights and obligations concern the right to publish one edition (art.32), the obligation to exploit the work within reasonable time (art. 33), the duty to ensure the work’s distribution (art.33), and the duty to report to the author about the number of copies produced (art.35). Authors have the right to make changes in the edition (art.36), the obligation to abstain from republishing the work in the form and manner covered by the contract (art.37), the right to include their literary work in an edition of collected/selected works after 15 years (art.37 (2)), the right to rescind the contract upon passivity by the publisher (art. 38).

The provisions concerning publishing contracts do not apply to contributions to newspapers or periodicals. Arts. 33 and 34 shall not apply to contributions to other composite works (see art. 38 URL).

⁶¹⁴ M. LEVIN, *Lärobokimmaterialrätt*, 10th ed., 2011, p.126.

⁶¹⁵ Governmental Bill 1988/89:85, p. 21

⁶¹⁶ SOU 2010:24, at 155

9.4 Audiovisual Works

In Swedish Copyright Law, audiovisual works are regulated under art. 39-40 URL which lay down the scope of transfer and the rights and obligations of the parties involved in a film contract.

The transfer of the right to record a work to the film producer includes the right to make it available to the public, namely 'through the film, in cinemas, on television or otherwise and to make spoken parts of the film available in textual form or to translate them into another language' (art.39); thus, this provision introduces a presumption of transfer. Producers have the obligation to produce the film and to make it available to the public within a reasonable time. The right of the author to rescind the contract is reciprocal to the obligation of the transferee to exploit the work. In the event the author exercises her reversion right, she has the right to keep the remuneration received and, in case of damage, to receive additional compensation. If the author has suffered damage which is not covered by the remuneration, such damage shall also be compensated (art. 40).

United Kingdom

1. Rules depending on the form of assignment (assignment, licence, waivers, ...)

According to the Copyright, Designs and Patents Act 1888 (hereinafter CDPA), copyright is transmissible by assignment, by testamentary disposition or by operation of law, as *personal or moveable property*. A mere sale or transfer of the work does not mean that the copyright in it is also assigned.

An assignment or other transmission of copyright may be total or partial. Partial assignments apply to one or more, but not all of the things the copyright owner has the exclusive right to do; or may apply to part, but not the whole, of the period for which the copyright is to subsist. Transfer can be for the payment of a royalty or a lump sum (s. 90 (2) (a) and (b)).⁶¹⁷

In the case of licences, the terms of the licence are left to the parties. In the case of exclusive licences, the exclusive licensee has the right to sue infringers with or without the copyright owner; on the contrary, non-exclusive licensees cannot sue infringers. The exclusive licensee can bring infringement proceedings in respect of any infringement after the date of the licence agreement (s. 101(1)). In sum, her statutory procedural status is equivalent to that of the owner. An action can also be brought by both the exclusive licensee and the copyright owner (s. 102).

Thus in practice, an exclusive licence is very close to a transfer. Sometimes it is difficult to determine if the parties drafted a contract for an exclusive licence or a transfer. It is a matter of construction and the words used by the parties are not conclusive (see *Jonathan Cape v Consolidated Press* (1954) 3 All ER 253).

However, there are differences between an exclusive licence and a transfer:

- the rights of an exclusive licensee are less certain (see s. 90(4));
- the exclusive licensee may not always be able to grant a sub-licence;
- the rights of an exclusive licensee may be limited by implied terms, e.g. implied term not to alter the work.

2. Requirements of form

The main provision as regards assignments is s. 90(3): "An assignment of copyright is not effective unless it is in writing signed by or on behalf of the assignor." Exclusive licences also require written form (s. 92 (1) CDPA), although an invoice or receipt has been considered as enough to comply with this requirement.⁶¹⁸

If the assignment is made orally, the equitable rule will apply: i.e., so long as there is consideration, an *oral contract* purporting to assign will be enforceable⁶¹⁹. Thus the prospective assignee will be treated as the equitable owner.

⁶¹⁷ See *Kervan Trading v Aktas* (1987) 8 IPR 583.

⁶¹⁸ See *Savoury v World of Golf* [1914] 2 Ch 566.

⁶¹⁹ *Malcolm v. Chancellor*, Court of Appeal, 18 December 1990, [1991]: The British Court of Appeal has upheld the validity of a publishing contract concluded over the telephone, whereby the author had engaged himself to bring corrections and improvements to a manuscript and the publisher had agreed to pay a fair royalty.

There is no need to register the assignment for it to be valid. The first in time has priority over subsequent purported transferees.

A non-exclusive licence can be made orally or in writing and might be contractual or gratuitous, express or implied.

Sometimes courts may find that there is an implied licence, but they are reluctant to imply licences from the circumstances. There are only two circumstances in which courts will imply terms in a contract: (1) they are implied by law if they are inherent in the nature of the contract⁶²⁰ and (2) terms may be implied to fill gaps in an agreement, but only if it is necessary to provide business efficacy.

When a court implies a term for particular cases, it looks at the existing express terms and the surrounding context. In this latter case, the term that is implied must be reasonable and equitable, necessary to give business efficacy to the contract, capable of being clearly expressed and must not contradict any express term of the contract (*BP Refinery (Westernport) v Hastings Shire Council* (1977) 16 ALR 363).

An example is the *Ray v Classic FM* case where it was held that Mr. Ray, an expert engaged by a radio station, had copyright on the catalogues of music he created. The terms of his consultancy were silent as to copyright but it was held that he granted an implied licence to Classic FM. Since the scope of the licence was limited to using the catalogues for broadcasting in the UK, Mr. Ray's copyright was infringed where copies were made available for exploiting his database abroad.

However, where a licence is claimed by a competitor who could have entered into a contract with the copyright owner but did not do so, the courts are reluctant to imply a licence.⁶²¹

3. Determination of the scope of rights

The law only requires the parties to identify clearly what is being transferred or licensed.

It is possible to assign future copyright, i.e. copyright over works not yet in existence at the time of the assignment (*Schroeder Music Publishing v Macaulay* (1974) 3 All ER 616 (HL)); in this case, however, the agreement must be for valuable consideration (s. 91(1)). See *PRS Ltd v B4U Network (Europe) Ltd* (2012) EWHC 3010).

The work must be identified sufficiently clearly so that it can be ascertained. However, oral evidence can be adduced to assist in identifying the work. (*Savoury v World of Golf* (1914) 2 Ch 566 and *Batjac Productions v Similar Entertainment* (1996) FSR 139).

There is a restriction to assign moral rights – they are not assignable between living people (s. 94) but are on death (s. 95). However, they are fully waivable (s. 87(2)).

4. Determination of remuneration

Copyright law in the UK does not provide for a specific rule related to the remuneration that is due for the transfer of copyright, such as the obligation to provide remuneration,

⁶²⁰ Implied by law means that the parties have intended the contract to fall into a particular class of contract.

⁶²¹ See *Banier v Newsgroup* [1997] FSR 812; *Express Newspapers v. News (UK)* [1990] FSR 359.

the obligation of a proportional remuneration or a best-seller clause. Only consideration is necessary - according to domestic contract law, just £1 is enough.

5. Obligations of the parties

Copyright law in the United Kingdom does not define the obligations of the parties in exploitation contracts.

6. Interpretation of contracts

There are no specific provisions in the copyright law on contracts interpretation, general contract law principles apply.⁶²²

7. Termination of contract

There is no provision in the UK Copyright act on how the creator can terminate the contract before its normal end. However, parties can end their contractual relationships in the circumstances allowed under contract law's general rules.

As regards the reversion right, there is no provision in the UK Copyright Act (it was abrogated in the 1956 Copyright Act) declaring or implying such a possibility. However, one can provide an automatic *reverter* of rights in a contract transferring copyright. In this case, the assignor gets her rights back when a future event arises, e.g. an unremedied material breach of contract by the assignee.⁶²³

8. The transfer of contracts

The UK national law does not contain limitations to the possibility to transfer the assigned rights to a third party or to sub-license the rights. The assignee becomes the owner of the copyright and can thus assign the copyright freely. However, the exclusive licensee may not always be able to grant a sub-licence, as she may need the consent of the owner. On the other hand, the non-exclusive licensee is not allowed to transfer her licence.⁶²⁴ Publishing contracts are considered as personal; thus, the publisher cannot assign the copyright to another publisher without the author's consent.⁶²⁵

9. Specific contracts

9.1 Works created under employment

S. 11(2) simply states that the employer is the owner of the economic rights for literary, dramatic, musical and artistic works and films made by her employees; broadcasts, sound recordings or typographical arrangements of published editions do not fall in the scope of this provision. Parties can derogate to this rule by contract. Moral rights always remain with the author, but can be waived. There is an exception for Crown copyright⁶²⁶ and copyright of some international organisations (see s. 11(3)).

⁶²² See *Ray v Classic FM* [1998] FSR 622 (ChD) referring to *BP Refinery* (1977) which sets out conditions to imply terms in a contract.

⁶²³ See *Crosstown Music Co 1 LLC v Rive Droite Music Ltd* [2010] EWCA Civ 1222.

⁶²⁴ PILNY, 1989, p. 131-132, cited by IVIR, 2002.

⁶²⁵ See e.g. *Don King Productions v Warren* [1998] 2 All ER 608.

⁶²⁶ Referring to copyright in works made by the UK Majesty or by an officer or servant of the Crown in the course of her duties.

An employer only obtains the copyright if the work is made by an employee in the course of employment, i.e. by a person employed under a *contract of service or apprenticeship* (s. 178). Traditionally, employment was defined by the degree of control and power of the employer on the employee – this test is still good but for certain professions it is not conclusive. In those cases, the courts have looked at whether the work is done as an integral part of the business; so, even if someone is not under a great degree of control they may still be an employee (see *Stevenson Jordan & Harrison v McDonnell & Evans* (1952) 69 RPC 10 (CA), at 22).

9.2 Commission contracts

No specific rule applies, thus, the 'first ownership of copyright' principle (the author of a work is the first owner of any copyright over it) applies. Therefore, the copyright is owned by the author, unless there is a contract between the parties transferring or licensing rights to the commissioner. The most important case on this is *Ray v Classic FM*⁶²⁷, where it was considered that Mr. Ray, the expert engaged by the Classic FM radio station, was the copyright owner of the playlist he had created in virtue of a consultancy with Classic FM.

9.3 Audiovisual works

According to art. 9(2)(ab) of the CDPA, the authors of a film are *the producer and the principal director*. The term 'producer' is defined in art. 178 as 'the person by whom the arrangements for the making of the film are undertaken'. According to *Slater v Wimmer* (2012) PCC 7, the film producer is the person who finances the cost of production of the film, but the term does not include the bank from which this person obtains the money.

Films are works of joint authorship unless the producer and the principal director are the same person (art. 10(1) and (1A)).

There is an exception to the rules mentioned above on assignments (s. 90) for film production in s. 93A-93C. When there is a contract between an author and a film producer, the author is presumed to have transferred her rental right to the film producer (s. 93A). This applies only for authors of literary, musical, dramatic and artistic works (LDMA works), not to the director of the film or to authors of the screenplay, dialogue or music specifically created for the film. The presumption can be rebutted by an agreement to the contrary which can be *expressed or implied*.

⁶²⁷ *Robin Ray v Classic FM Plc* [1998] FSR 622

ANNEX II: ORGANISATIONS PARTICIPATING IN THE SURVEY/INTERVIEWS

The research team launched an extensive survey targeted at different stakeholders, in particular associations and unions of authors, associations and unions of publishers, broadcasters and audiovisual producers and collective management organisations: 122 questionnaires were sent; 49 were returned, which represents about 40% of feed-back. The aim of those questionnaires was to complete the theoretical research carried out by the research team.

Organisations participating in the survey

Association des éditeurs belges – Association of the Belgian Publishers

Allianz Deutscher Produzenten – Alliance of German Producers

Arbeitsgemeinschaft der öffentlich-rechtlichen Rundfunkanstalten der Bundesrepublik Deutschland – Consortium of German Public Broadcasters

Artisjus – Hungarian Bureau for the Protection of Authors' Rights

Asociación de Compositores de Música para Audiovisual – Spanish Composers Association for Audiovisual music

Association des Journalistes Professionnels – Association of Professional Journalists

Börsenverein des Deutschen Buchhandels e.V. – Association of German Publishers

Bildkonst Upphovsrätt i Sverige ek för - Visual Art Collecting Society of Sweden

Confédération française démocratique du travail des journalistes français – French Democratic Confederation of Labour of Journalists

CC Composers Club

Design and Artists Copyright Society

Directors UK

European Federation of journalists

European Writers Council

European Visual Artists

Federación de Gremios de editores de España – Spanish Federation of Publishers' Guilds

Federación de Asociaciones de Productores Audiovisuales Españoles – Spanish Audiovisual Producers Confederation

Fédération Internationale des Associations de Producteurs de Films - International Federation of Film Producers Associations

Filmjus – Hungarian Society for the Protection of Audiovisual Authors' and Producers' Rights

Gesellschaft für musikalische Aufführungs- und mechanische - Society for musical performing and mechanical reproduction rights

Groupe 25 images – French Association of TV Directors

Muvészeti Szakszervezetek Szövetsége - Hungarian Composers' Union
Polska Książka – Polish Society of Authors and Publishers
Polskie Stowarzyszenie Wydawców Muzycznych – Polish Music Publishers Association
Pyramide Europe
Society of Audiovisual Authors
Société d'Auteurs Belge – Belgische Auteurs Maatschappij – Belgian Society of Authors, Composers and Publishers
Société des Auteurs et Compositeurs Dramatiques – Society of Dramatic Authors and Composers
Société des Auteurs, Compositeurs et Editeurs de Musique – Society of Music Authors, Composers and Publishers
Sociedad General de Autores y Editores – General Society for Authors and Publishers
Svenska Journalistförbundet – Swedish Union of Journalist
Sveriges Filmregissörer – Association of Swedish Directors
Sveriges kompositörer och textförfattare – The Swedish Society of Composers, Songwriters & Authors
Svenska tonsättares internationella musikbyrå – The Swedish Society of Songwriters, Composers & Music Publishers
Sveriges Författarförbund - Swedish Writers Union
Svenska Förläggareföreningen – Swedish Publishers Association
Syndicat National des Auteurs et des Compositeurs – National Union of Authors and Composers
Syndicat National de l'Édition - French Publishers Union
UK Authors' Licensing and Collecting Society
UK Music Publishers Association
UK National Union of Journalists
UK Publishers Association
Union Syndicale de la Production Audiovisuelle – French Union of Audiovisual Production
Verwertungsgesellschaft Bild-Kunst – Collecting Society of Visual Artists
Vlaamse Film Producenten Bond – Association of Film Publishers from Flanders
Vlaamse Onafhankelijke Televisie Producenten – Flemish Independent Television Producers
Vlaamse Uitgevers Vereniging – Book Publishers from Flanders
Związek Autorów i Kompozytorów Scenicznych – Polish Society of Authors & Composers
Związek Polskich Autorów i Kompozytorów – Polish Authors and Composers Association
Zweites Deutsches Fernsehen, Anstalt des öffentlichen Rechts – German Public Broadcasters Union

Interviews

Additionally, a number of interviews with individual experts and stakeholders representatives were undertaken in order to complete information collected and to have a better understanding of the issues at stake.

Interviewed experts/stakeholders

Börsenverein des Deutschen Buchhandels e.V. – Association of German Publishers

Canal Plus

Creators Rights Alliance

European Composers and Songwriters Alliance (ECSA)

European Visual Artists Organisation (EVA)

European Writers Council (EWC)

Federación de Gremios de editores de España – Spanish Federation of Publishers' Guilds

Federation of European Film Directors (FERA)

Federation of European Publishers (FEP)

Gilles Vercken, copyright lawyer

Gesellschaft für musikalische Aufführungs- und mechanische - Society for musical performing and mechanical reproduction rights (GEMA)

Society for Audiovisual Authors (SAA)

Société des Gens de Lettres (SGL)

ANNEX III: EXAMPLES OF COLLECTIVE AGREEMENTS

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ANNEX IV: EXAMPLES OF MODEL CONTRACTS NEGOTIATED BETWEEN REPRESENTATIVES OF BOTH AUTHORS AND EXPLOITERS

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