





# Revision of contractual conditions

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# Fair remuneration to authors and performers?

- ▶ The exclusive rights provided by copyright law only turn into **financial reward**, and thus **incentives** to creators, through a contract with a third party to exploit protected material.
- ▶ With the emergence of digital technology the production and distribution of copyright protected content is rapidly shifting from the physical to the online domain.
- ▶ Content is now offered digitally via a wide range of different business models, such as 'on-demand' streaming, 'near-on-demand', for download-to-own, download-to-rent, webcasting etc.
- ▶ **These emerging modes of content distribution pose challenges to the rights of authors and performers to receive adequate or fair remuneration for the use (exploitation) of their creative content.**




# Imperfect information and asymmetric information problems


- ▶ **Imperfect information** refers to a situation in which the value of a relevant economic variable is uncertain.
  - ▶ E.g. the market success of the author's work cannot be known by either party ex ante.
- ▶ **Asymmetric information** refers to a situation in which one party to a transaction has relevant information, whereas the other does not.
  - ▶ E.g. the author has less information than the exploiter on the effort and investments the exploiter will make in order to maximise the economic exploitation of the author's content.
  - ▶ Also, the exploiter is likely to have superior information on the current market conditions and sales.
- ▶ **Both imperfect information and asymmetric information will affect the perceived expected value of the authors' content and the level of remuneration.**



# Remuneration mechanisms

- ▶ The type of remuneration mechanism agreed between the author and the economic right exploiter can determine the extent to which the risk of imperfect and asymmetric information is shared between the two parties.
  - ▶ **Upfront** (ex-ante) payment.
  - ▶ **Lump-sum** (ex-post) payments.
  - ▶ **Proportional** remuneration payments (royalties).

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- The content of exploitation contracts and the level of remuneration paid to authors and performers have not been subject to comprehensive regulation at the European level.
  - Some EU Member States, have a long tradition of **protecting authors as a weaker party in contractual relations** with the parties responsible for the exploitation of their rights.
    - Formalities for the conclusion of contracts
    - Restrictions on the scope of transfers of rights (regarding future modes of exploitation or future works)
    - Rules obliging the payment of adequate or equitable remuneration
    - Best-seller clauses or similar corrective mechanisms
    - Rules specifying how to interpret the (scope) of contracts
    - Rules determining the effect of transfers in relation to third parties
    - A duty to exploit the work
    - Termination of contracts
  - In other Member States, contracting parties are given the space to organise their contractual relations as they see fit on the basis of the general rules of contract law. There, the need to safeguard the principle of **freedom of contract** is deemed to prevail over the authors' demand for legislative intervention.



# Supplementary means to strengthen the bargaining position of authors and performers

- ▶ Authors and performers often organise themselves into unions through which they attempt to negotiate model exploitation contracts with representatives of the industry. Unions try to achieve better conditions for their members than those that would be attainable on an individual basis.
- ▶ CMOs also play a major role in establishing the level of remuneration received by authors and performers, although the importance of this role differs by right holder, sector and even Member State.



# Commission proposal: DSM Directive

- ▶ Proposal for an EU Directive on Copyright in the Digital Single Market, 2016/0280(COD), 14 September 2016.
  - ▶ **Article 14** requires Member States to include transparency obligations to the benefit of authors and performers.
  - ▶ **Article 15** requires Member States to establish a contract adjustment mechanism, in support of the obligation provided for in Article 14.
  - ▶ **Article 16** requires Member States to set up a dispute resolution mechanism for issues arising from the application of Articles 14 and 15.
- ▶ “Transparency measures would rebalance contractual relationships between creators and their contractual counterparties by providing the creators with the information necessary to assess whether their remuneration is appropriate in relation to the economic value of their works and if the remuneration is deemed inappropriate, a legal mechanism in order to seek out a renegotiation of their contracts.”



# Article 14 Transparency obligation

- ▶ 1. Member States shall ensure that authors and performers receive on a regular basis and taking into account the specificities of each sector, **timely, adequate and sufficient information on the exploitation of their works and performances from those to whom they have licensed or transferred their rights**, notably as regards modes of exploitation, revenues generated and remuneration due.
- ▶ 2. The obligation in paragraph 1 shall be proportionate and effective and shall ensure an appropriate level of transparency in every sector. However, in those cases where the administrative burden resulting from the obligation would be disproportionate in view of the revenues generated by the exploitation of the work or performance, Member States may adjust the obligation in paragraph 1, provided that the obligation remains effective and ensures an appropriate level of transparency.
- ▶ 3. Member States may decide that the obligation in paragraph 1 does not apply when the contribution of the author or performer is not significant having regard to the overall work or performance.
- ▶ 4. Paragraph 1 shall not be applicable to entities subject to the transparency obligations established by Directive 2014/26/EU.






## ➤ Article 15 Contract adjustment mechanism

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

## ➤ Article 16 Dispute resolution mechanism

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



# Amendments by the Council and the Parliament

- ▶ Council: In the main, similar to the proposal by the commission.
- ▶ Parliament: "**Rights reversion mechanism**".



# Comments

- ▶ Is there a problem?
  - ▶ Freedom of contract viz. The need to safeguard the interests of authors and performers.
- ▶ What is "**disproportionately low**" remuneration?
  - ▶ Cf "a right to fair remuneration"
- ▶ Ex ante or ex post intervention?
  - ▶ Would it be more effective with ex-ante intervention (i.e. at the stage when a contract is being defined) via options such as prohibition of certain contractual clauses?