

Appropriate and Proportionate Remuneration Art.18 CDSM Directive

Copyright Challenges during the pandemic and beyond – 2021 ECS Conference

21 May 2021

Prof. Raquel Xalabarder
Chair of Intellectual Property – Universitat Oberta de Catalunya
rxalabarder@uoc.edu

Article 18

Principle of appropriate and proportionate remuneration

1. Member States shall ensure that where authors and performers license or transfer their exclusive rights for the exploitation of their works or other subject matter, they are entitled to receive appropriate and proportionate remuneration.

2. In the implementation in national law of the principle set out in paragraph 1, Member States shall be free to use different mechanisms and take into account the principle of contractual freedom and a fair balance of rights and interests.

A bit of context

EU copyright contract law was not harmonized (“no need for it”)

Contractual rules (like Art.18-22) existed at national level
→ Not enough to secure fair remuneration of Authors and Performers

Contractual “buy-outs”, only initial payment, no subsequent remuneration along the exploitation chain

... A real “value gap”!

Art.18 CDSM Directive

- **Appropriate and Proportionate ...**
 - ✓ Equitable, fair, adjusted, proportional, lump-sum in specific cases
- **Remuneration ... not compensation**
- **It is a principle ... not a contractual rule.**
 - ✓ No need for protection against contractual override
 - ✓ Plus “direct effect” (“unconditional and sufficiently clear and precise”)
- It applies to **ANY license or transfer** of exploitation rights (in any form, in exclusive or not, presumed, etc)
- It applies to **NEW, as well as OLD productions**
 - *Art.26(2) CDSM: “without prejudice to any acts concluded and rights acquired before 7 June 2021” (statutory remuneration rights)*
 - *Art. 27 CDSM: “Agreements for the licence or transfer of rights of authors and performers shall be subject to the transparency obligation set out in Article 19 as from 7 June 2022.”*

Art.18 CDSM Directive

- ... not “only” a principle!
- Art.18 imposes on national legislators **an obligation** to secure fair remuneration of A&P
 - ✓ It arrived late (not in Commission’s initial proposal, cooked at the Parliament) ... but very much underlying the contractual rules proposed
 - ✓ Art.18 CDSM justifies all 4 contractual provisions.
 - ✓ A “contractual *corpus*” ... “communicating vessels” (Art.18 mechanisms are especially important in sectors, markets, where A&P cannot fully benefit from Arts.19-22)
- **“Copy-paste” transpositions will not suffice!**

Mechanisms for its implementation

Art.18(2): *In the implementation in national law of the principle set out in paragraph 1, Member States shall be free to **use different mechanisms** and take into account **the principle of contractual freedom and a fair balance of rights and interests.***

Recital 73 CDSM: ***Member States should be free to implement the principle of appropriate and proportionate remuneration through **different existing or newly introduced mechanisms**, which could include **collective bargaining and other mechanisms**, provided that such mechanisms are in conformity with applicable Union law.***

Voss report - Amendment 80:

Principle of fair and proportionate remuneration

1. ... This may be achieved **in each sector** through **a combination of agreements, including collective bargaining agreements, and statutory remuneration mechanisms.**

➤ **Contractual freedom ... and improving contract law**

Absolutely necessary... BUT it will hardly suffice

➤ **Sectorial collective bargaining agreements**

A significant role to play ... BUT depends on parties' will to negotiate and on conditions conducive to its success + enforcement; for the benefit of new productions/contracts

➤ **Statutory remuneration rights**

“Residual” rem. retained by A&P after transferring exclusive rights

Sanctioned by EU *acquis*: Art.5(1) Rental & Lending Dir.

Used (successfully) in national laws to secure rem. in complex markets

Do not duplicate rights / depend on transfer + license of rights

Do not turn exclusive rights into statutory licenses

Do not disturb the pre-existing contract (transferred rights)

ius prohibendi, licensing & revenue streams in hands of producers

Flow of remuneration to A&P, via CMOs, also new exploitation means

BUT: they require a statutory enactment!

➤ **Contractual freedom ... and improving contract law**

Absolutely necessary... BUT it will hardly suffice

➤ **Sectorial collective bargaining agreements**

A significant role to play ... BUT depends on parties' will to negotiate and on conditions conducive to its success + enforcement; for the benefit of new productions/contracts

➤ **Statutory remuneration rights**

“Residual” rem. retained by A&P after transfer
Sanctioned by EU *acquis*: Art.5(1) Rental
Used (successfully) in national laws to secure
Do not duplicate rights / depend on transfer
Do not turn exclusive rights into statutory
Do not disturb the pre-existing contract (transfer
ius prohibendi, licensing & revenue streams
Flow of remuneration to A&P, via CMOs, also new exploitation means
BUT: they require a statutory enactment!

Most effective when:

- ✓ Unwaivable and inalienable
- ✓ Paid by user / licensee
- ✓ Managed by CMOs (mandatory, if necessary)

- **Other mechanisms?**
 - ✓ *Extended Collective Licensing*
 - ✓ *...?*

 - **“Copy-paste” transpositions are not enough!**

 - **Let’s not miss this opportunity!**
-

Thanks !

rxalabarder@uoc.edu

 UOC.universitat

 @UOCuniversitat

 UOCuniversitat
