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EU Contractual Protection of Creators: Blind Spots and Shortcomings

Séverine Dusollier*

“We have no idea what we’re signing, in an act of legendary mental deficiency.”
—Morrissey¹

INTRODUCTION

One key objective of copyright is to grant exclusive rights to authors and creators to enable them to reap the full value of their creations. As a consequence, they should be able to transfer or license their rights to persons and companies more apt to exploit them commercially, thereby earning some revenues from such exploitation. Both United States² and the European Union³ recognize the creator as the primary copyright owner. Because copyright is transferable, at least the economic rights,⁴ the work can transform into an economic asset whose rights are acquired by producers, publishers or other economic actors whose purpose is to make it available on the market. The creation then becomes a book, a music album, a play. 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 authors.⁵ The first modern copyright law, the U.K. Statute of Anne, recognized early on this reality, as its first provisions already mentioned the author and publisher side by side.⁶

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1. MORRISSEY, *AUTOBIOGRAPHY* (2013).

2. With the exception of works made for hire in the U.S. and in some E.U. States.

3. See CJEU, Case C-277/10, *Martin Luksan v. Petrus van der Let*, 2012 E.C.R. II-1.

4. Moral rights are deemed unwaivable in many European continental countries.

5. 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.

6. See Statute of Anne, 1710, 8 Ann., c. 19, Art. II (Eng.) (“That the author of any book or books already composed, and not printed and published, or that shall hereafter be composed, and *his assignee or assigns*, shall have the sole liberty of printing and reprinting such book and books for the term of fourteen years, to commence from the day of the first publishing the same, and no longer”) (emphasis added).

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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—and more accustomed—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 a sufficient income out of their creation and it has been estimated that the top ten percent of the U.K. creators get about sixty to eighty percent of the total income of the creative profession.⁷

It will come as no surprise that, on average, incomes of creators are well below the median income.⁸ 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. The same could be said of countries outside of the European Union.

The European Union has so far declined to harmonize the legal provisions aimed at protecting creators in the contracts they enter into,⁹ the matter being left to Member States. Some (e.g. Belgium, France, the Netherlands, Germany, Spain or Italy)¹⁰ have a detailed and protective set of legal provisions aimed at rebalancing

7. See MARTIN KRETSCHMER, ET AL., STRATEGIC ADVISORY BOARD FOR INTELLECTUAL PROPERTY POLICY, *THE RELATIONSHIP BETWEEN COPYRIGHT AND CONTRACT LAW, THE RELATIONSHIP BETWEEN COPYRIGHT AND CONTRACT LAW 3* (2010), <https://perma.cc/XES8-5VXV>.

8. See M. Kretschmer & P. Hardwick, *Authors' Earnings from Copyright and Non-Copyright Sources: A Survey of 25,000 British and German Writers*, THE BOURNEMOUTH U. BUS. SCH. DEPT. OF LAW'S CTR. FOR INTELL. PROP. POL'Y & MGMT. (CIPPM) (2007), <https://perma.cc/PF37-Q55S>.

9. Commission of the European Communities, Communication from the Commission to the Council and the European Parliament on European Contract Law, Brussels, 11 July 2001, COM (2001) 398 final, Annex 1, p. 38. A study on copyright contracts was drafted by the Information Law Institute (“IVIR”) of the University of Amsterdam in 2002, upon commission by the European Commission. 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 the European Commission decide not to act on the issue. See Lucie Guibault & P. Bernt Hugenholtz, *Study on the Conditions Applicable to Contracts Relating to Intellectual Property in the European Union*, INSTITUTE FOR INFORMATION LAW (2002), <https://www.researchgate.net/publication/279686314> [hereinafter IVIR Study].

10. For a comparative study on the regulatory framework of some EU Member States, see S. Dusollier, et al., EUROPEAN PARLIAMENT'S COMMITTEE ON LEGAL AFFAIRS, *CONTRACTUAL ARRANGEMENTS APPLICABLE TO CREATORS: LAW AND PRACTICE OF SELECTED MEMBER STATES* (2014), <https://perma.cc/TXC9-7FLY>.

the bargaining power between the creator and her publisher/producer. Other countries have no rules at all (e.g. U.K.) or only partial ones (e.g. Denmark).

The legal protection that exists in some countries consists of default and mandatory 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.

Additionally, the general rules of contract law can be used to confer more protection to the authors. As the area of contract law is less harmonized in the European Union,¹¹ 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 paper is based on a study commissioned in 2013 by the European Parliament to assess the situation of European creators and the contractual protection conferred to them by E.U. Member States.¹²

Part I rapidly summarizes the legal provisions existing in some European countries that protect authors when transferring their copyright.

Part II zooms out of the specific rules regulating the copyright contracts to draw the overall context of exploitation of creative works and of its many actors to challenge the central role that such national laws confer to the first contract entered upon between the creator and her publisher or producer. This insufficiency is illustrated by selected issues for which these specific rules are incapable to provide a satisfactory solution or protection to the author.

Part III offers a conclusion in the form of some recommendations for a better treatment of creators when transferring their rights for exploitation of their works. These recommendations take into account the broader picture of exploitation of creative content and the shortcomings of the current legal provisions, when they exist.

I. OVERVIEW OF CONTRACTUAL PROTECTIONS OF CREATORS IN THE EUROPEAN UNION

A. COPYRIGHT PROVISIONS

Copyright laws may intervene at different places in the contractual relationship between the author and the exploiter of the work and for different purposes. The

11. See Commission of the European Communities, Communication from the Commission to the Council and the European Parliament on European Contract Law, Brussels, 11 July 2001, COM (2001) 398 final.

12. S. Dusollier, et al., *supra* note 10.

examples given below do not appear in all copyright regimes that contain a contractual protection of the author and there is no copyright act that could claim to ensure a comprehensive protection of creators.¹³ Each contractual protection is a patchwork of discrete provisions aimed at guaranteeing a better position for authors when their works are assigned to another entity for production and exploitation. They generally consist of either imposing formalities to ensure the contract is concluded in a fair manner or imposing actual obligations to the benefit of authors.

A first legal intervention could aim at *restricting or regulating the form of transfer of copyright*. 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 authorized in certain countries: for instance, assignment is not allowed in Germany,¹⁴ where “use rights” can only be licensed,¹⁵ or only in limited cases in Hungary.¹⁶ The same could arguably be said for Spanish copyright law, where some scholars consider an assignment of copyright to be contrary to legal tradition.¹⁷ Such restriction purports to prevent the author to transfer once for all her copyright and be dispossessed altogether. Indeed 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.

Whatever the type of transfer, license or assignment, it can be subjected to some *form requirements*. Many countries, e.g. Belgium, France, Spain, Hungary, Poland and UK, require the contract transferring or licensing economic rights to be in written form (sometimes with exceptions), mostly for purpose of evidence or even, in some countries, of validity of the transfer. Such evidence or validity conditions exist only to benefit the creator and do not occur for further transfers between subsequent copyright owners. The extent and consequences of the requirement of written form vary from one country to another.

This requirement of a writing first induces parties to negotiate and agree upon the conditions of the transfer of copyright. It also lays down such conditions in a stable document which serves evidentiary and security purposes.¹⁸ Ultimately the existence of a written contract could help the creator to enforce the contract before courts, should the other party not comply with its terms.

Beyond the requirement of a written form, a number of countries mandate that the exact *scope and terms of transferred rights be properly determined*. These

13. For a more complete analysis and comparison of national legislative frameworks, see S. Dusollier et al., *supra* note 10.

14. Urheberrechtsgesetz [UrhG] [Act on Copyright and Related Rights] Sept. 9 1965 [BGBl] No. 1, as last amended by Article 1 of the Act of Dec. 20 2016, §29 (Ger.). 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.

15. *Id.* at §§ 31-32.

16. Act No. LXXVI of 1999 on Copyright. (Hung.); see also S. Dusollier et al., *supra* note 10.

17. S. Cavanilhas in *MANUAL DE PROPIEDAD INTELECTUAL* 1462 et seq. (R. Bercovitz ed., 2007).

18. IVIR Study, *supra* note 9, at 31.

provisions strengthen the position and legal certainty of authors, by allowing them to be more aware of what they are assigning to the other party. The contracting parties are forced to be specific when drafting their 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.

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;¹⁹ (4) some limitation to transfer rights in future works; (5) a prohibition or limitation to transfer rights in yet unknown forms of exploitation;²⁰ (6) restrictions to transfers of moral rights.

Different countries impose different sanctions for failure to mention the extent of the transferred rights, from the strict limitation of transfer to what is specifically mentioned in the contract, and from the annulment of a contractual provision resulting in an excessive or legally prohibited transfer to the annulment of the whole contract.²¹

The *indication of the remuneration and its mode of calculation* is also generally a mandatory contractual provision. But the rules about remuneration, as a way to protect authors and to secure them some fair revenue when transferring their rights, sometimes go a bit further. 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.

Germany has introduced the principle of “adequate remuneration” in the revision of its copyright law in 2002, to the effect that an adequate remuneration for the transfer of rights is guaranteed in case the contract contains no specific agreement or provides for an inadequate remuneration.²² 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

19. This option has been imposed by the CJEU in the Luksan case for some rights to remuneration. *See* Case C-277/10, *Martin Luksan v. Petrus van der Let*, 2012 E.C.R. II-1.

20. 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.

21. The French court of cassation has opted for this solution when the scope and duration of the transfer was not specified. *See* Cour de cassation [Cass.] [Supreme Court for judicial matters] 1e civ., Jan. 23, 2001, Bull. civ. I, No. 98-19990 (Fr.), <https://perma.cc/C748-JNJK>.

22. *UrhG*, *supra* note 14, §§ 11, 48.

is granted, in particular the duration and time of exploitation, and considering all circumstances.²³ In a recent legislative revision, the Netherlands has equally enacted a right of fair remuneration in favor of authors, that can be determined by the author in the contract and in addition be decided sector by sector by the ministry of Culture.²⁴

The obligations related to the scope of rights transferred and to the remuneration do not generally oblige to exploit the rights transferred or to provide for a remuneration. In some national copyright laws though, an *obligation to exploit* is laid down on the transferee, for some types of contracts or for some modes of exploitations. For instance, France reviewed in 2014 the obligations of the publisher of literary works to take into account the exploitation of e-books.²⁵ Authors of literary works are now entitled to take back their copyright for publishing in e-books or in traditional paper form, if the publisher neglects to exploit the work in one of these modes. The Netherlands has introduced a broader obligation of exploitation for all transfer contracts agreed upon by the author: by default of exploitation of the work after a reasonable period of time, or of sufficient exploitation, the author is allowed to rescind partially or totally the assignment contract.²⁶

Copyright law provisions in France, Belgium and Spain lay down a *rule of strict interpretation* of the transfers of rights in favor of the author, who is the weaker party. This rule provides that unclear or incomplete contractual provisions will be interpreted and applied in a way that limit the transfer or assignment of copyright, presuming that the author would have transferred her copyright only in a clear and precise manner. Germany also has interpretation rules that generally have the effect of favoring the author, by following the so-called “purpose-of-transfer” rule (“*Zweckübertragungslehre*”) that would interpret an unclear contractual clause to make it compatible with the purpose of contract.²⁷ Thus, uses not envisaged by the parties at the time the contract was concluded will remain outside the scope of transfer.

In practice, these interpretation rules have led transferees to be very careful when formulating the rights assigned by the author to ensure that they are wide enough to cover different types of exploitation modes.²⁸ This normally protective rule has thus resulted in an adverse effect for authors who are required to agree to a

23. For case law interpreting the notion of adequate remuneration, see Bundesgerichtshof [BGH] [Federal Court of Justice], 7 Oct. 2009, Az. I ZR 38/7, <https://perma.cc/8FLD-52YZ>; Bundesgerichtshof [BGH] [Federal Court of Justice], 21 May 2015, Az. I ZR 38/7, Bundesgerichtshof [BGH] [Federal Court of Justice], 7 Oct. 2009, Az. I ZR 39/14, <https://perma.cc/UQ56-QZYC>. For an analysis of these decisions, see Martin Senftleben, *More Money for Creators and More Support for Copyright in Society – Fair Remuneration Rights in Germany and the Netherlands*, 41 COLUM. J.L. & ARTS 413 (2018) (in this volume).

24. Art. 25c of Auteurswet.

25. Art. L. 132-17-1 to L. 132-17-3 of Code de la Propriété Intellectuelle.

26. Art. 25e of Auteurswet.

27. *UrhG*, *supra* note 14, s.31 Abs. 5.

28. IVIR, *supra* note 9, at 44.

comprehensive transfer of all their rights for all possible modes of exploitation and for the whole duration of copyright.

Some countries provide for *termination of copyright transfers*,²⁹ i.e. a possibility for the author to regain her rights from the person to whom they have been transferred upon some conditions (lack of exploitation, exploitation against the author's interests, lapse of time, etc.). Such protective legal provisions could be compared to the reversion of rights enabled by the US Copyright Act.³⁰

Specific types of contract are granted a specific status in most European national laws that addresses the protection of authors in contractual transfers of copyright. Generally, works created under employment or under commission are more easily assigned to the employer or commissioner, such contracts being less encumbered with protective measures for the author.

On the contrary, some legal regimes organize a more detailed regime for contracts pertaining to certain categories of works, such as publishing contracts for literary works³¹ or production contracts for audiovisual works,³² taking into account the specific process of producing, marketing and exploiting such cultural items.³³ The obligations related to exploitation, reporting, and fair remuneration are generally increased, and some States protect authors in case of bankruptcy of these economic actors.

The comparative analysis of the contractual protection of authors in the legislation of the Member States shows a lack of harmonization and great disparities in the application of the existing rules, from legal regimes with very detailed provisions to regimes favoring 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.

B. GENERAL RULES OF CONTRACT LAW

Aside from the application of specific rules aimed 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

29. Such as the Netherlands (Art. 25e of Auteurswet).

30. See Jane C. Ginsburg, *Foreign Authors' Enforcement of U.S. Reversion Rights*, 41 COLUM. J.L. & ARTS 459 (2018) (in this volume).

31. This is in particular the case for Belgium, France, Spain and Sweden.

32. This is the case namely in Belgium, France, Spain and Hungary.

33. For an in-depth analysis of such regimes, see S. Dusollier et. al, *supra* note 12, at 43.

granted by copyright law, even though contracts are not tailored to the needs of creators and may favor the transferee rather than the author. In some cases, these principles might nullify or mitigate unreasonable clauses, although the principle of freedom of contract will generally prevail.

European Union member states employ a variety of recognized doctrines of fairness, good faith or equity and may specify, complement, or create obligations, as well as mitigate or set aside contractual clauses considered to be unfair.³⁴ Usages can also play some role in certain legal systems, sometimes to add some obligations to the parties or to extend the scope of the transfer beyond what has been specifically agreed upon in the contract.³⁵ Belgian courts, for example, have added to the legal obligation of publishers to report the gross revenue from exploitation of a work to its author, as well as the obligation to report the costs, based on usage and on the good faith principle, as it was considered necessary to enable the author to have a full understanding of the benefits generated by the exploitation of her work.³⁶ United Kingdom doctrines of undue influence, unconscionability, restraint of trade (and their equivalents in other countries) can annul contracts where one party exploits the other's poverty or ignorance and have sometimes been applied to protect vulnerable authors.³⁷ Other nations also permit revision of contracts due to significant changes in circumstances, although due to the exceptionality of this rule, this author knows of no court that has yet used it.

General contract law offers different tools of interpretation for unclear contracts, such as looking for the common will of the parties or the purpose-of-grant, or favoring the party committing herself to an obligation. Such rules of interpretation, however, do not always result in better protection of the author. Additionally, national courts have applied legal rules related to defect of consent and other conditions for the formation of contract to ensure a genuine consent of the author to the transfer of her rights.³⁸ Contracts might be invalidated in cases of lack of informed consent, or even but more rarely, in cases of unequal economic bargaining power. Some national courts have applied consent-based rules to protect authors in copyright contracts. Finally, legal provisions on unfair terms (primarily a tool of consumer protection law) could inspire courts to protect authors with uneven bargaining power.³⁹ This would require however a legal regime

34. See COMM'N ON EUR. CONT. L., *THE PRINCIPLES OF EUROPEAN CONTRACT LAW, PART I: PERFORMANCE, NON-PERFORMANCE AND REMEDIES* (Ole Lando & Hugh Beale eds., 1995).

35. See, e.g., Paris, (4^e ch.), 12 Feb. 2003, *Communications-Commerce Electronique*, 2003, comm. N°57; Cass. (1^{ere} civ.), 30 May 2012, No. 10.17780, *Propriétés Intellectuelles*, 2012, p.44, <https://perma.cc/CL56-3753>.

36. Martin, Kretschmer, Estelle Derclaye, Marcella Favale, and Richard Watt, *The Relationship between Copyright and Contract Law, A Review* commissioned by the UK Strategic Advisory Board for Intellectual Property Policy (SABIP), 2010, at 101, <https://perma.cc/5C7A-GJ46>.

37. GIUSEPPINA D'AGOSTINO, *COPYRIGHT, CONTRACTS, CREATORS: NEW MEDIA, NEW RULES* 130 (2010).

38. See, e.g., Court of Cassation, 1st civ., January 28, 2003; Paris Court of Appeal, Avril 25, 1989, RIDA 1990, at 314.

39. See, e.g., "Council Directive 93/13/EEC on Unfair Terms in Consumer Contracts 1993 O.J. (L 95/29) (EC) (defining unfair terms).

related to contractual unfair terms that is not limited to the protection of consumers, for authors are not consumers in the copyright contracts into which they enter.⁴⁰ Some jurisdictions entitle authors' representatives to challenge contractual practices before courts by collective action in a manner similar to consumer law practice.⁴¹

In conclusion, because common contractual rules are not designed to specifically protect authors, their use is infrequent and may be inconsistent with an author-protective approach, or even hinder specific copyright protections. Given their breadth of applicability, general principles of contract law sometimes fail to take into consideration the possibly weak bargaining positions of author. Specific protective rules that adequately consider authors' contractual positions would then be preferable to general contractual principles unsuited for addressing authors' need for protection. Some inspiration can, however, be found in general principles of law to help authors challenge unfair copyright transfers or contracts, 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.

C. COLLECTIVE AGREEMENTS

Collective agreements are another tool to protect creators. Since the author is perceived as weaker than 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.⁴² Two models exist in Europe: (1) German "fair compensation";⁴³ and (2) the French regime and practice of copyright.⁴⁴ In many sectors, a collective negotiation and determination of the conditions applicable to copyright contracts is encouraged and might be made eventually mandatory by law. Recently, the French government orchestrated negotiations over the digital exploitation of books, which lead to the drafting of a Code of Usages, whose mandatory nature for contracts of copyright assignment has finally been integrated into relevant legal provisions in the Intellectual Property Code.⁴⁵ The French Ministry of Culture has initiated a similar initiative for a fair distribution of music streaming revenues. Both examples demonstrate that

40. See, e.g., BORGERLICHES GESETZBUCH [BGB] [CIVIL CODE], as amended 1 Oct. 2013, BUNDESMINISTERIUM DER JUSTIZ UND FÜR VERBAUCHERSCHUTZ, § 305–307 (Ger.).

41. This is the case in Sweden. See S. Dusollier et. al, *supra* note 12, at 58.

42. See generally Carmita Rodrigues, *General Report*, in 1997 ALAI CONGRESS MONTEBELLO, CONFERENCE PROCEEDINGS: PROTECTION OF AUTHORS AND PERFORMERS THROUGH CONTRACTS 853–63 (Ghislain Roussel ed., 1998).

43. Such agreements are called upon by the German Copyright Act, art. 32, even though only few agreements have so far been signed. IVIR, *supra* note 9, at 78; Martin Senftleben, *More Money for Creators and More Support for Copyright in Society – Fair Remuneration Rights in Germany and the Netherlands*, 41 COLUM. J.L. & ARTS 413 (2018) (in this volume).

44. See IVIR, *supra* note 9, at 61–72.

45. Accord entre le conseil permanent des écrivains et le syndicat national de l'édition sur le contrat d'édition dans le secteur du livre [Agreement Between the Permanent Council of Writers and the National Editors Union on the Publishing Contract in the Book Sector], Dec. 14, 2014, <https://perma.cc/V3L5-ALM6>; Art. L.132-17-1–8 of Code de la Propriété Intellectuelle (Fr.) [hereinafter CPI].

collective negotiations and agreements can help all authors to get a balanced bargain when transferring their rights. These agreements cannot, however, determine remuneration due to authors or set tariffs for the exploitation of works, as this might be deemed to be anticompetitive.⁴⁶

II. THE COPYRIGHT CONTRACTS IN CONTEXT

The contractual protection that is sometimes conferred to authors by European copyright laws, despite its justification and rightful intentions, does not seem to deliver on its promises to ensure that creators are not excessively dispossessed of their rights and get a fair payment for the exploitation of their works. Such protection inherently intervenes in isolation by focusing on one contract between the author and the first exploiter of the work, while neglecting the broader context of exploitation of cultural products. Paradoxically, it also adopts a very artificial and formal view of the contractual relationship between a creator and her producer or publisher and fails to better secure remuneration to authors. Part II purports to place the first exploitation contract concluded by the author in its proper context to identify possible shortcomings or blind spots of the existing legal provisions protecting the creators.

A. THE CONTRACTUAL BARGAIN IN COPYRIGHT CONTRACTS

1. Issue

Copyright contracts are contracts, which mean that they give rise to reciprocal rights and obligations. “Contract” refers not only to the formal document that has been signed between the parties (the instrumentum), but also to the very nature of a contract: it encapsulates and conveys a reciprocal commitment of parties, a mutual agreement (the negotium). When the author licenses or assigns her copyright to a publisher or producer, she does so in consideration of a contractual bargain, a deal providing some advantages in compensation to 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. The reciprocal parts of the agreement are the transfer of rights, on one side, and the remuneration for such a transfer, on the other. The author primarily desires her work to be publicly distributed and disseminated and bring her some revenue and recognition.

This first contract concluded by a creator and pertaining to her creation is a fundamental moment in the life of a work, as it enables the work to become an economic asset and yield revenue. 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 endeavor in exploiting the work and finding channels for its public diffusion, access to the market, and the expertise and know-

46. See IVIR, *supra* note 9, at 65.

how in the said market. The publisher or producer undertakes the risk of commercializing the work by, for example: (1) organizing its production (film or phonogram production); (2) manufacturing commodities (books or phonograms publishing); (3) including the work in some collective product (newspapers or scientific articles); or (4) making it publicly available via proper channels (movie theaters, bookstores, online platforms). That does not mean that the author does not have access to production capacities or the market on her own, but that she entrusts the producer or publisher with such a role. The assignment or license 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. The above 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 exploitation of the work.

For most authors, one essential aim of the copyright contract is to secure remuneration for the transfer of their work. This is also a repeated principle in European Union copyright directives. 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.”⁴⁷ This is a matter, for the same directive, of “safeguarding the independence and dignity of artistic creators and performers.”⁴⁸ Determining remuneration for the assignment or license of copyright in her works is the first means by which a creator secures some revenue in exchange for the transfer of her rights and determines the participation in economic exploitation that will be undertaken by the transferee and, subsequently, by other exploiters with whom the creator will not have any relationship.⁴⁹ Although a contract can determine the model for remuneration, it does not necessarily ensure the author will be paid, as this might depend on the benefits (or lack thereof) generated by the work (when remuneration is proportional thereto) and on the good execution of the contract by the transferee. Even when legal provisions impose a remuneration that would be proportional to

47. 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, 2001 O.J. (L 167) recital 10 [hereinafter *Infosoc*]. See also Directive 2006/115/EC of the European Parliament and of the Council of 12 Dec. 2006 on Rental Right and Lending Right and on Certain Rights Related to Copyright in the Field of Intellectual Property, 2006 O.J. (L 376) recital 5; Directive 2001/84/EC of the European Parliament and of the Council of 27 Sept. 2001 on the Resale Right for the Benefit of the Author of an Original Work of Art, 2001 O.J. (L 272) recital 3 (“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”).

48. *Infosoc*, 2001 O.J. (L 167) recital 11.

49. In some fields, compensation is not the primary purpose for exploiting works, and authors are not customarily paid (for example, scientific publication). Authors can also freely disseminate their works, even partially (as in the case with open access licensing models). The lack of expected remuneration in such cases might change the balance of power in contract negotiations.

the commercial success of the work, it has been shown that authors often do not get their fair share.⁵⁰

Remuneration is not the only goal of authors. Access to the market and investment in making their work ready for such market, which can be encompassed under the notion of “exploitation”, are also significant parts of authors’ expectations. Additionally, because creative works are “experience goods” in economic terms, their value is only revealed after their use, which may make it difficult to assess the value of the work and hence, the adequate remuneration for its transfer.

Provisions dealing with contractual transfer of copyright imperfectly embrace this bargain dimension. They are usually limited to ensure the author knows what she is doing when signing the contract by laying down obligations of form and mandatory mentions, but fall short in guaranteeing effective exploitation and remuneration in return.

2. Illustration: Excessive or Buy-Out Transfers of Copyright

Many copyright contracts 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 time limitation. A particular type of increasingly used “excessive” contract is the so-called “buyout” or “all rights included” contract, where an author transfers all her rights in exchange for a lump sum payment. This occurs, for example, with scientific publications—European authors conclude all-encompassing assignment contracts without reflecting on the actual needs of the publisher or requiring a remuneration. Waiving copyright for all modes of exploitation (including film adaptations),⁵¹ all languages, and the whole duration of copyright, stands in stark contrast with the very limited exploitation that is actually made of the work (i.e. one paper publication and inclusion in databases of scientific publications). Unlimited transfer of copyright bars authors from further publication, translation, inclusion in open access repository, or even use in their teachings.

Current legal provisions on copyright contracts generally do not invalidate buyout contracts despite some attempts of judiciary redress. To counter such far-reaching contracts, German law applies a “purpose of the grant” rule which, if the contract is ambiguous, limits transfers to rights that are necessary to fulfil the purpose of the contract. This seems a sounder solution than imposing a rule of strict interpretation of authors’ contracts. Indeed, a contract transferring all rights

50. See LUCIE GUIBAULT, ET. AL., *REMUNERATION OF AUTHORS AND PERFORMERS FOR THE USE OF THEIR WORKS AND THE FIXATIONS OF THEIR PERFORMANCES* (E.C. ed., 2015); GUIBAULT, ET. AL., *REMUNERATION OF AUTHORS OF BOOKS AND SCIENTIFIC JOURNALS, TRANSLATORS, JOURNALISTS AND VISUAL ARTISTS FOR THE USE OF THEIR WORKS* (E.C. ed., 2016) (recent studies by IVIR on author remuneration in different sectors in the European Union).

51. I found this extravagant mode of exploitation in a publishing contract I had to sign with a scientific publisher for a short article to be included in a scientific dictionary. I am curious to see what type of film could be made.

for all possible modes of exploitation might be formulated in a very clear way that would give no room for redressing the balance in favor of the author. More fundamentally, this issue is not sufficiently thwarted by rules of interpretation that would normally intervene only when the contractual provisions are unclear. It would be better to introduce a principle of adequacy of copyright transfers through a rule limiting the scope of assignments to what is reasonably needed for the envisaged exploitation. One step further would be to lay down an obligation to exploit the work to a reasonable extent and provide for a reversion of rights or a rescinding of the contract in case of insufficient exploitation of the rights that have been transferred.

B. THE CONTRACT IN TIME

1. Issue

A contract is a dynamic process. It is a relationship between two parties that has a duration in time. It is not just a moment that one can fix at the formal conclusion of the agreement. What has been agreed upon unfolds from the negotiation to the termination of the contract and governs the relation of author and transferee for a potentially long time. Thus, 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 relevant as well and might reveal an unequal power between the transferee and the creator. The latter might not have the information, financial means, nor power required to challenge the way the contract is executed and the exploitation is undertaken. Further, the author might not have 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 actual 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, which makes it even more difficult to get the relevant information about and monitoring the actual exploitation of the work. Enforcement before the courts, should the transferee not comply with her obligations, might be costly or complicated. The author might be willing to terminate the contract in court and recover her rights (i.e., 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 (i.e., exclusion from the market). It is not uncommon for authors who complain or decide to go to courts against their

publisher or producer to be blacklisted from future productions and collaborations.⁵²

The legal provisions aimed at protecting authors in the contractual process only follow part of that process. Most rules impose some formal conditions to ensure that the contract is concluded in a fair manner, addressing the stage of contract formation. By requiring a written form, or determination of the transfer scope, the law directs the author's attention to what will be agreed upon, and might have an effect on the validity or proof of the transfer itself. But these rules fail to adequately support authors in their claims against the transferees or to empower them to revise the contracts to adapt it to changes of their situation or of the exploitation possibilities.

2. Illustration: The Digital Transition(s)

An "old" issue is the need to adapt the contract to evolving contexts and technologies, as the digital transition has shown in many countries. When digital exploitation became a reality, it was generally necessary to renegotiate the existing contracts with creators to ensure new modes of making available and distribution would be assigned to publishers or producers. In countries that strongly protect creators' contracts, some legal rules (e.g. the strict interpretation of the contract, the obligation to mention the modes of exploitation that are transferred or the prohibition to assign rights in unknown forms of exploitation) have contributed to the uneasy compatibility of existing contracts with digital exploitation.

On the other hand, rights for digital forms of exploitation may have been included in general transfers, without any specification as to the remuneration or conditions for such transfer (as in the case of buyout contracts), which results in authors not being duly associated in new forms of exploitation. Even when contracts have been concluded after the Internet development and have addressed this new context, the digital environment produces constantly changing models of exploitation, with great uncertainties and unpredictability as to revenues streams, margins and benefits, and new modes of remuneration (i.e., subscription or advertising based), which make it difficult to determine criteria for a fair remuneration of authors. Who would have predicted the success of streaming music services a few years ago?

Existing obligations to specify all modes of exploitation for which the rights are transferred have not proven sufficient, as they do not require enough detail in distinguishing digital uses and models. Authors may 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

52. While preparing the study for the European Parliament (*see supra*, note 9), we heard a few stories of filmmakers who tried to get paid more than a previously agreed upon lump sum after their movies became commercially successful, were subsequently blacklisted by the producer, and never made another film in their country.

the revenue streams generated by digital exploitation. The absence, in most countries, of an obligation to exploit the rights that have been assigned, could also mean that producers could own the full extent of economic rights of the authors, whatever the mode of exploitation, but limit their intervention to traditional avenues and neglect digital ones that could be beneficial to the creators. The latter will not have the possibility to reclaim those rights to entrust someone else with digital exploitation.

In some countries, authors are calling for new models of contracts dealing with digital uses that include: (1) distinct contractual provisions and remuneration (possibly fixed by collective bargaining); (2) obligatory digital exploitation, transparency, and reporting; and (3) transfers of rights 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 that better protects authors for digital modes of exploitation of literary works with an obligation of digital exploitation and revision clauses.⁵³ Indeed, French publishers are now required to exploit books in paper and digital formats (specifically, as an e-book on at least two different platforms and in an open format). In case of non or insufficient exploitation, authors can take back their rights for the mode of exploitation that has not been effectively pursued. This prevents the work being kept exclusively by one publisher who does nothing with it and does not effectively provide it to the public. The Netherlands has a similar legal provision that is applicable to all copyright transfers, whatever the type of work, whose sanction is the possible rescinding of the contract by the dissatisfied author. Sweden imposes an obligation of exploitation combined with a limitation in time of copyright transfers, which helps authors to re-negotiate contracts if needed.⁵⁴

A stronger regime of reversion rights could be promoted to help authors repossess their rights when publishers no longer effectively exploit the work, one of the primary reasons for assignment of copyright.

C. THE WEB OF COPYRIGHT CONTRACTS AND ACTORS IN THE EXPLOITATION OF THE WORK

1. Issue

Contractual protection of creators only 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 initially putting the work on the market. This contract, however, is only one element in the many relationships related to the exploitation of the work. First, the author can be a member of and entrust her rights to a collective management organization (“CMO”), which will manage such

53. See *supra* note 45.

54. LAG OM UPPHOVSRÄTT TILL LITTERÄRA OCH KONSTNÄRLIGA VERK §§ 33, 35 (Svensk författningssamling [SFS] 1960:729) (Swed.).

rights on her behalf and collect remuneration for some forms of exploitation.⁵⁵ Second, the scope and modalities of exploitation will be decided through many contracts entered between the first transferee and other exploiters (content providers, broadcasters, authors or producers of derivative works, 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. Third, the remuneration of the author can also result from other contracts (i.e. employment or commission) signed with exploiters of works.

The central role of the copyright contract between the author and the first exploiter of the work, within the bigger picture of other actors in the exploitation of the work, should not neglect 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 for the exploitation of an author's work undertaken by subsequent exploiters who acquire rights from her producer or publisher will arguably be influenced by the deal that the latter has obtained with those exploiters. However, authors generally have no say in those subsequent agreements. For example, the distribution of revenues between platforms like Spotify and Amazon has a direct effect on the ultimate share authors receive. Likewise, agreements between these economic actors might also include commercial advantages for producers or publishers and result in further financial flows to the benefit of the latter, but which will not be counted as revenues on which authors' shares are calculated. This is particularly true in audiovisual productions where some payments for exploitations of the movie are substituted with investments in production or preproduction sales that do not appear in the producers' revenues reporting, and are thus excluded from the proportional remuneration calculation. In other words, if the law or the contract secure a piece of the pie for the author, the size of the pie and the way it is cut matter. Intervention of CMOs in the decisions concerning modes of exploitation or management of remuneration also disrupts the traditional picture of an isolated contract as the sole determination of the remuneration for the exploitation of the work. In conclusion, the very first contract in the chain or web of contractual relationships should facilitate the participation of the authors in the benefits generated through the whole value chain, and should not ignore the existing tradition of collective negotiation between CMOs and users (broadcasters, content providers).

Different sectors have different dynamics and business models and also vary internally depending on the kind of work or contract in question. In some industries, remuneration comes from primary uses (books), but in others (music), secondary uses might be more important. Contracts concluded by creators and

55. The model of collective management of copyrights is particularly significant in the European Union and constitutes the primary revenue of many creators. CMOs manage discrete rights on behalf of their members, including remuneration for private copies, cable distribution, public lending, and *droit de suite* (resale royalties) for visual artists.

their modes of remuneration will thus strongly depend on the economic organization of the cultural sector, which requires the consideration of the peculiarities and practices of each when studying the application of contractual rules, the issues faced by the authors, and any suggestion for legal or regulatory intervention. For example, authors of musical works generally assign 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, and the music publisher will collect royalties. Some rights in music (performance and mechanical reproduction) are managed by CMOs, which is unavoidable in the music sector due to the difficulty of individually managing rights for some kinds of music exploitation (i.e., broadcasting and public communication). Further exploitation by content providers will generally have to clear copyright from producers and CMOs.⁵⁶ This collective dimension is less significant for authors of literary works (in the book industry at least) who generally assign their rights to publishers in exchange for publication of the work. If authors can also be represented, depending on the country, by agents or CMOs, this collective management is less present than for music. Visual arts are radically different because 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 license or by assignment (i.e. to insert a photograph in a book). CMOs for visual art might act as a sort of agent, providing the works of their members for use. Another key difference is that a broad part of the revenue perceived by visual artists comes from sources other than remuneration for specific exploitations (i.e. commissions).

2. Illustration: The Copyright Transfer as an Obstacle to Remuneration

When authors belong to CMOs and bring their copyrights to collective management, additional transfer contracts become more complicated. Indeed, two transfers of rights seem to be overlapping: one to collective management societies and one to the producer/publisher. Exploiters of copyrighted content have sometimes used that situation to refuse to pay authors. 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 in most European Union states. When filmmakers are members of a collective management organization, that CMO exercises their rights against users, whereas the producer, by virtue of the presumption of transfer of the exploitation rights, exercises the rights necessary to ensure primary exploitation of the film. Broadcasters or cable operators have sometimes opposed paying CMOs royalties for public transmission of works, on the ground that the rights of remuneration

56. For instance, broadcasters have to pay both the producer of a phonogram and author's CMO for broadcasting songs. Payment is even more complicated 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* 47 (2012).

have been (or are presumed to have been) transferred to the producers and cannot be exercised by the societies representing audiovisual authors. 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. Because authors are only protected in their contractual relationship with producers, they have few weapons to oppose to such secondary exploiters.

Member states have tackled the problem of secondary exploiters differently across the European Union. France has organized cohabitation between the transfer of exclusive rights of exploitation to producers and collective management of remunerations, which both preserves the presumption of transfer of rights of exploitation to the benefit of the producer of audiovisual works and guarantees some remuneration to authors for secondary exploitations of their works.⁵⁷ Belgium recently revised its copyright law to impose a right of remuneration benefiting authors and performers to cable operators and its collection by CMOs, irrespective of the contract of transfer (or presumption thereof) between the latter and the audiovisual producer.⁵⁸

A more sustainable solution might be providing an unwaivable right of fair remuneration that could be opposed by collective management organizations or other authors' representatives to economic actors exploiting the works. This would at least depart from the view of the copyright transfer as a one shot, isolated contract and associate authors in a more permanent and on-going manner with the overall exploitation of works and the financial flows they generate. That could, in turn, lead to a radical revision of authors' economic rights. The right would be dissociated in two parts: (1) exclusivity of the economic right (the producer or publisher would get the exclusive right she needs to exploit the work in her trade and to authorize others to exploit the work); and (2) the right to a fair share of revenues yielded by any exploitation of the work (i.e., the remuneration right attaches to the author and is managed either by her or her representatives against any person exploiting the work, irrespectively of a contract binding such exploiter and the author).

III. CONCLUSION AND RECOMMENDATIONS

Copyright contracts have always been a building block of the exploitation of 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 with the intermediation of a publisher or producer. This is truer than ever in a digital environment that has radically impacted the exploitation of works.

57. The main audiovisual authors' CMO organizes the cohabitation via membership contract, which is accepted by the sector. See SYLVIE NERISSON, *LA LEGITIMITE DE LA GESTION COLLECTIVE DES DROITS DES AUTEURS EN FRANCE ET EN ALLEMAGNE* 230-36 (2013); Gilles Vercken, *La pratique des clauses relatives à la gestion collective dans les contrats individuels portant sur les droits d'auteur*, LEGIPRESSE 108 (Sept. 2002).

58. Art. XI.225 of CODE DE DROIT ECONOMIQUE/WETBOEK VAN ECONOMISCH RECHT (Belg.).

Exploitation has evolved from a static to a dynamic process—or rather that evolution has accelerated. Contract scope and modes of foreseen exploitation were rather easy to define 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 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 required some contract revision, but once adapted and agreed upon, the contract would be sustainable and efficient for many years. With digital technologies, the pace of change constantly speeds up. It is not only the Internet that constitutes a new mode of exploitation, but also 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 seems 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 ongoing need of new modes of exploitation, some agents have changed their policies to sign new artists with all-encompassing contracts transferring all rights to producers or publishers.

There is a growing contradiction between these dynamic modes of exploitation and contracts that are negotiated and agreed upon at some point in time and deemed to validly regulate the relationships of the author and her first exploiter. 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 in 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 (i.e., broadcasting, public retransmissions, rental, public lending). Works are now exploited by many more entities than the first publisher or producer. The contract signed by the author is only one element in a web of contractual relationships that authorize 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 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 difficulty in securing a fair remuneration in digital exploitations, the practice of buyout contracts, and the refusal to pay CMOs

remuneration for authors are illustrative of the shifting elements and power among the stakeholders to the detriment of creators.

The digital economy is based on creative works by authors. Those authors should be associated with the exploitation of their works, 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 ultimate goal of legally protecting authors is ensuring equal participation of authors in the contractual bargains they agreed upon when transferring their rights. Contracts are effective when the work is given to an exploiter to ensure its public transmission and marketing, and revenues are shared between the person who created the work and the person who put it on the market.

The rules existing in some member states to protect the creator aim at guaranteeing such a contractual bargain, on the one hand, by defining 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, by imposing some basic obligations inherent to the bargain itself. These protections are far from homogenous across the European Union and, despite recourse to the general principles of contract law, European authors are not getting richer despite the exponential growth of the consumption of cultural products in the digital environment and the related benefits accruing to cultural industries. European rules of contractual protection for authors, when they exist, prove insufficient or inefficient to secure to creators a fair share of the revenues generated by the exploitation of their works. Reasons thereof are many: (1) legal provisions in most member states pay very little attention to authors' remuneration; (2) the weaker position of the author in enforcement of protective legal provisions is largely ignored; (3) once agreed upon, contracts govern a dynamic and evolving situation usually without any adaptive or corrective measures included; and (4) the obligation of an explicit determination of the scope of transfer of rights proves inefficient in preventing an all-encompassing, perpetual assignment.

The currently discussed draft Directive on Copyright in the Digital Single Market contains two provisions introducing, for the first time at the European Union level, a protection of authors for contractual copyright transfers.⁵⁹ One would require transparent and regular reporting on exploitation of works by the transferees, and the other would allow authors to require a supplementary remuneration in case of success of their work (the "bestseller clause"). Both mechanisms can only be employed after a contract has been concluded (*ex post*). As authors are rarely in a position to litigate against their publishers or producers, for lack of financial means or fear of being blacklisted, such provisions may be of limited use. More comprehensive and effective forms of protection are therefore needed to provide authors with sufficient independence in contractual negotiations and shield them against those who exploit their creations. Creators should be given

59. *Proposal for a Directive of the European Parliament and of the Council on Copyright in the Digital Single Market*, art.14 & 15, COM (2016) 593 final, (Sept. 14, 2016).

the proper means to claim fair remuneration, modify or opt out of unfair contracts, and control the benefits yielded by all exploitations of their works.

Two key objectives should guide any legal 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 other contractual relationships and exploitations undertaken by all stakeholders. This leads to the following recommendations.

As far as the *contractual bargain* is concerned, minimal formalities should be imposed on contracts transferring copyright from authors to publishers or producers to ensure the informed consent of the authors (i.e., a written form, mandatory determination of the exact scope of the transfer, and due remuneration). An obligation of exploitation for each mode of exploitation that has been transferred should be imposed, in order to defeat buyout contracts or the excessive scope of transferred rights. The “use it or lose it” clauses included in contracts between performers and record companies, according to the Term of Protection Directive of 2011⁶⁰, demonstrate 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 their works and either find another exploiter willing to make use of their works or do it themselves. However, a single obligation to exploit the work is insufficient. 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 undeveloped mode of exploitation.

There can be no obligations without means to ensure compliance. To that end, reporting obligations should be imposed on the transferees of copyright, regularly detailing the exploitations undertaken and the revenues thereof. Some transparency should also be required from 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.⁶¹ Revenues and profit

60. Directive 2011/77/EU of the European Parliament and of the Council of 27 Sept. 2011 Amending Directive 2006/116/EC on the Term of Protection of Copyright and Certain Related Rights, 2011 O.J. (L 265).

61. A user’s 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

margins of digital content providers must be known to adequately share the value generated by those services along the value chain.

Finally, the European Union consumer protection model demonstrates one way to correct the possible imbalance in the contractual bargain between creators and economic exploiters.⁶² 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: (1) certain clauses are automatically considered null and void if they appear in a consumer contract; and (2) 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.”⁶³ 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 clauses stipulating an indefinite duration without giving the author the possibility to review the contract, clauses providing an unreasonably low remuneration for the transfer of rights, and clauses covering unknown forms of exploitation without a separate remuneration for the author.

As far as *fair remuneration of authors* is concerned, contracts should require a specific determination of remuneration for *each* mode of exploitation, including the mode of calculation and types of revenue upon which it is based. That remuneration should be fair, meaning it should be based on the actual revenue generated by the exploitation (including subscription-based or advertising-based models), not just on the number of copies sold. Remuneration 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 where a supplementary royalty should be paid after a defined period of time.⁶⁴ Where the contract applies to unknown forms of exploitation, authors should also be entitled to additional fair remuneration when they emerge. 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, to be able to get a comprehensive picture of the financial flows related to exploitation of creative content. This would be the only way authors could genuinely be associated to the revenues generated by their creation and claim their fair share. Finally, an unwaivable right of remuneration should be considered for some forms of exploitation, notably for digital ones, and possibly subject to collective management.

Copyright and Related Rights and Multi-Territorial Licensing of Rights in Musical Works for Online Uses in the Internal Market. Council Proposal No. 15695/13 of 5 Nov. 2013, art. 15a.

62. Council Directive 93/13/EEC of 5 April 1993 1993 O.J. (L 95).

63. *Id.*

64. Council Directive 2011/77, art. 3.2b & 3.2c, 2011 O.J. (L 265).

In order to accommodate the *dynamic process of copyright contracts*, 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, business models, or models of consumption of works. In any case, contracts should be subject to a revision clause for change of circumstances in the exploitation market or of commercial success of the work (“bestseller clause”). Likewise, 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, such as lack of exploitation, of payment of the foreseen remuneration, or 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.

Some *collective dimension of management and enforcement of copyright* could beneficially be recognized in copyright law. Collective agreements, model contracts, and standard contractual practices should be encouraged to secure a fair protection and remuneration of authors in individual contracts, in conformity with competition law. Collective negotiation may be the most sustainable way to guarantee protection of authors’ interests. Collective negotiation helps adapt agreements to market and technological changes (as shown by the French agreement on digital exploitation) and the specific economic and cultural sector concerned. Collective action may also be useful to enforce authors’ contractual rights. Individual litigation is difficult for authors. 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.

Copyright contracts will not be a panacea to the economic situation of creators. However, contracts might make that economic situation 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 favor 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. The cultural life of our societies largely depends on creators and producers alike. Creators are at the source of the music, movies, books, plays, and works of art we enjoy—they deserve to be treated better.