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Author Remuneration in the Streaming Age – Exploitation Rights and Fair Remuneration Rules in the EU

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Abstract

The transition from linear to on-demand consumption of music, films and other copyrighted content on platforms like Spotify, Netflix and YouTube has given rise to the question whether authors and performers receive a fair share of streaming revenues. While these revenues are substantial and right holders may have the opportunity to control access to copyright-protected content on the basis of copyright protection, it is often not the creators themselves who benefit from growing streaming revenue and reinforced access controls. The issue has a global dimension. The Group of Latin American and Caribbean Countries (GRULAC) proposed that the World Intellectual Property Organization (WIPO) undertake an analysis of creators' position – and chances to receive fair remuneration – with regard to digital content earnings. In the EU, the issue of author remuneration featured prominently in the debate on the 2019 Directive on Copyright in the Digital Single Market. It culminated in the harmonization of several aspects of copyright contract law, including the right to fair remuneration, across EU Member States. In February 2024, South Africa passed a Copyright Amendment Bill addressing this issue as well. These initiatives at the international, regional and national level confirm the importance of the remuneration issue in current copyright debates and, more specifically, in streaming contexts.

This analysis sheds light on the European example. As indicated, the EU has introduced several legal mechanisms designed to ensure appropriate and proportionate remuneration of authors and performers in the online environment. Those include, first, rules governing licensing agreements between individual artists and the creative industry, such as ex post contract adjustments, provisions favouring royalties over lumpsum payments, and norms regulating the choice of jurisdiction, among others. Second, a specific liability regime for user-generated content (UGC) on platforms like YouTube seeks to encourage rights clearance initiatives. Additionally,

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Europe utilizes mandatory collective licensing and remunerated copyright exceptions as legal tools to generate revenue streams for authors and performers. To lay groundwork for the discussion of these legal instruments, Section 1 provides an overview of the exclusive rights that apply to the realm of streaming and provide a basis for remuneration claims. Section 2 then introduces the issue of rights clearance and describes the different legal mechanisms used in Europe to ensure fair remuneration for authors and performers: individual licensing agreements; mandatory collective licensing; and remunerated copyright exceptions. Section 3, in addition, examines the situation of European producers who may also find themselves in a weak position in negotiations with large streaming platforms – and at the same time unable to rely on the legal solutions developed for authors and performers. Section 4 summarizes the results of the analysis.

Introduction

Streaming music, films, and TV shows is gradually becoming the dominant way people enjoy entertainment and culture. In 2023, global streaming revenues from recorded music soared to a record-breaking 19.3 billion U.S. dollars, marking a more than sevenfold increase from the 2.6 billion reported in 2015.[3] Streaming now represents over 67 percent of the total

[3] Statista, *Music streaming revenue worldwide from 2005 to 2023*, available at: https://www.statista.com/statistics/587216/music-streaming-revenue/ (accessed July 2024). See also Susan Butler, *Inside the Global Digital Music Market*, World Intellectual Property Organization, 2021, 13, available at:

worldwide revenue from recorded music.[4] The growth of video streaming services like Netflix and Amazon Prime Video is similarly impressive. While the primary source of revenue from the exploitation of audiovisual works still remains traditional television broadcasting in major national markets,[5] video streaming market is projected to generate as much as 100.60 billion Euros in revenue in 2024, reflecting a growth rate of 13.5 percent.[6] It is further anticipated that revenue from global video streaming will grow at an annual rate of 8.53 percent from 2024 to 2027, reaching 128.60 billion Euros by 2027.[7] Much in line with this trend, in Europe, local producers are indicating a rise in their business dealings with streaming platforms and anticipate a growing significance in revenue generation through streaming platforms in the forthcoming years.[8] Conversely, revenue from traditional television and cinema is expected to diminish in importance.[9] Not only are on-demand subscription streaming services increasingly gaining in popularity and revenues, but UGC platforms, such as YouTube, are also engaging millions of users daily.[10] YouTube is the second-largest streaming platform with a 22 percent market share, just after Netflix with its 31 percent share.[11] Revenues on YouTube are growing at an impressive pace, increasing from 1.3 percent in 2022 to 7.8 percent in 2023, reaching 31.5 billion U.S. dollars.[12]

However, a large part of this growing streaming revenue does not necessarily reach authors and performers (jointly referred to as "creators" in the following analysis) of the music, movies, TV shows and other

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https://www.wipo.int/edocs/mdocs/copyright/en/sccr_41/sccr_41_2.pdf (accessed July 2024), observing that music streaming services have become "the dominant form of digital music offerings for recorded music around the globe".

[4] Statista, id.

[5] European Commission, Staff Working Document, "European Media Industry Outlook", Brussels, 1 May 2023,
SWD(2023) 150 final, 38.

[6] Statista, *Video Streaming (SVoD) – Worldwide*, available at: https://fr.statista.com/outlook/dmo/digital-media/video-on-demand/video-streaming-svod/worldwide (accessed July 2024).

[7] Id.

[8] European Commission, Staff Working Document, "European Media Industry Outlook", Brussels, 1 May 2023,
SWD(2023) 150 final, 39, 49. See also European Commission, Directorate-General for Communications Networks, Content and Technology, *Study on contractual practices affecting the transfer of copyright and related rights and the creators and producers' ability to exploit their rights*, No. 2023-031, under Framework Contract CNECT/2022/OP/0036, Brussels, Ares(2023), 19 October 2023, 7.

[9] European Commission, Staff Working Document, "European Media Industry Outlook", Brussels, 1 May 2023,
SWD(2023) 150 final, 39.

[10] Monique Solomons, "90 YouTube statistics: Revenue, marketing, and content", *Linearity*, 20 March 2024, available at: https://www.linearity.io/blog/youtube-statistics (accessed July 2024).

[11] Id.

[12] Id.

copyrighted content that is streamed online. While revenues from streaming are substantial and access to copyright-protected content may be vigorously controlled by right holders, it is often not the creators themselves who benefit from the growing digital content earnings and reinforced access controls.[13] As highlighted by many commentators and also observed by governing institutions, creators, along with users, have largely taken a backseat in shaping current copyright policy, which tends to focus on industry interests – in particular the relationship between the creative industry and content distributors – and may overlook authors and performers.[14]

The issue is truly global in scope. GRULAC has recently called for a WIPO analysis on digital copyright to ensure that creators receive fair remuneration, emphasizing streaming as a primary concern in this respect.[15] In its Proposal for Analysis of Copyright Related to the Digital Environment, GRULAC highlights that "[t]here are several tools, whose form can be adapted to each national legislation, to manage the right to be remunerated of authors and performers", including "the Collective

[13] See, e.g., GESAC Report, *Study on the place and role of authors and composers in the European music streaming market*, September 2022; European Commission, Directorate-General for Communications Networks, Content and Technology, *Study on contractual practices affecting the transfer of copyright and related rights and the creators and producers' ability to exploit their rights*, No. 2023-031, under Framework Contract CNECT/2022/OP/0036, Brussels, Ares(2023), 19 October 2023; Stéphanie Carre, Stéphanie Le Cam, and Franck Macrez, *Buyout contracts imposed by platforms in the cultural and creative sector*, Study Requested by the JURI Committee, European Parliament, November 2023.

[14] European Commission, Directorate-General for Communications Networks, Content and Technology, *Study on contractual practices affecting the transfer of copyright and related rights and the creators and producers' ability to exploit their rights*, No. 2023-031, under Framework Contract CNECT/2022/OP/0036, Brussels, Ares(2023), 19 October 2023; Stéphanie Carre, Stéphanie Le Cam, and Franck Macrez, *Buyout contracts imposed by platforms in the cultural and creative sector*, Study Requested by the JURI Committee, European Parliament, November 2023. See also Jane C. Ginsburg, "The concept of authorship in comparative copyright law", *DePaul Law Review* 52 (2003), 1063 (1063); Christophe Geiger, "Constitutionalising intellectual property law? The influence of fundamental rights on intellectual property in the European Union", *IIC* 37 (2006), 381 (381); Giancarlo Frosio, "Reforming the C-DSM Reform: A User-Based Copyright Theory for Commonplace Creativity", *IIC* 51 (2020) 709 (731); P. Bernt Hugenholtz, "Is Spotify the New Radio? The Scope of the Right to Remuneration for 'Secondary Uses' in Respect of Audio Streaming Services", in: V. Fischer, G. Nolte, M. Senftleben, and L. Specht-Riemenschneider (eds.), *Gestaltung der Informationsrechtsordnung: Festschrift für Thomas Dreier zum 65. Geburtstag* (C.H. Beck, 2022), p. 161; Séverine Dusollier, "Ensuring a Fair Remuneration to Authors and Performers in Music Streaming", *Revue des Juristes de Scienc.es Po* 25 (2024), 34.

[15] WIPO Standing Committee on Copyright and Related Rights, Forty-Third Session, Geneva, 13-17 March 2023, *Proposal for Analysis of Copyright Related to the Digital Environment*, submitted by the Group of Latin American and Caribbean Countries (GRULAC), SCCR/43/7, 13 March 2023, available at: https://www.wipo.int/edocs/mdocs/copyright/en/sccr_43/sccr_43_7.pdf (accessed September 2024).

Management or another mechanism which countries may consider propitious for the [remuneration] rights".[16] Furthermore, in February 2024, South Africa passed the Copyright Amendment Bill, which likewise aims to establish mechanisms to ensure fair remuneration for the country's authors and performers.[17] The Bill introduces provisions guaranteeing authors of literary or musical works and performers of audio-visual works and sound recordings "a fair share of the royalty" received from the exploitation of their works and performances.[18] This right of authors and music performers to a share in the royalties (but, interestingly, not that of actors) is enforceable "subject to any agreement to the contrary".[19] This means that their entitlement to a fair share of royalties can be overridden by contract, which might, for instance, provide for a lumpsum payment instead. In contrast, actors are excluded from this option, which arguably affords them stronger protection under the Bill by mandating their entitlement to royalties in all cases. Yet another clause of the Bill provides that assignment of copyright in a literary or musical work shall only be valid for a period of up to twenty-five years from the date of such assignment, thereby establishing an automatic revocation of a right after this period.[20]

In the EU, several mechanisms have already been put in place, either relatively recently through the harmonized rules of the Directive on Copyright in the Digital Single Market (CDSMD) passed in 2019,[21] or as part of longer-standing practices in individual EU Member States. These mechanisms include, first, rules governing licensing agreements between creators and exploiters of works and performances, such as ex post contract adjustments, provisions favouring royalties over lumpsum payments, norms regulating the choice of jurisdiction, and a number of other provisions of mandatory copyright contract law. Second, Article 17 CDSMD introduced a specific liability regime for UGC platforms like YouTube to encourage rights clearance initiatives. Additionally, the EU utilizes mandatory collective licensing, for instance in the area of so-called "residual remuneration rights" which creators retain even after the contractual transfer of rights to exploiters of their works and performances. Mandatory

[16] Id., para. 8.
[17] Republic of South Africa, Copyright Amendment Bill (B13-2017), available at: https://pmg.org.za/bill/705/ (accessed September 2024). For further in-depth discussion of this legislative instrument, which is still (as of September 2024) awaits presidential approval to become final, see Desmond O Oriakhogba and Eunice O Erhagbe, "The Copyright Amendment Bill: A New Vista for Fair Remuneration for South African Creators and Performers?", *GRUR International* (forthcoming 2024).
[18] Republic of South Africa, Copyright Amendment Bill (B13-2017), id., Sections 6A, 8A, and 9A.
[19] Id., Sections 6A and 9A.
[20] Id., Section 25.
[21] Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC (Text with EEA relevance), OJ L 130, 17 May 2019, p. 92 (CDSMD).

collective licensing also plays an important role in relation to remunerated copyright exceptions.

The following analysis explores individual aspects of this regulatory toolkit. The overview may yield impulses for discussions and policy initiatives seeking to ensure that creators receive a fair share of the revenue accruing from the streaming of their works and performances. Section 1 presents an overview of the exclusive rights that apply to the realm of streaming and provide a basis for remuneration claims. Section 2 then introduces the issue of rights clearance and describes legal mechanisms used in the EU to ensure fair remuneration for authors and performers. The analysis addresses individual licensing agreements, mandatory collective licensing, and remunerated copyright exceptions. Section 3 additionally examines the situation of European producers who may find themselves in a weak position in negotiations with large streaming platforms and, at the same time, unable to rely on the fair remuneration mechanisms developed for authors and performers. Section 4 summarizes the results of the analysis.

1. Exclusive Rights

EU copyright law does not contain a specific definition of "streaming." This silence, however, does not imply that streaming services fall outside the scope of the exclusive rights that have been harmonized at EU level.

1.1 Rights of Communication to the Public and Making Available

With regard to on-demand streaming services, the broad right of communication to the public is of particular relevance that has been granted in Article 3(1) of the Information Society Directive ("ISD"):[22]

> Member States shall provide authors with the exclusive right to authorise or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them.

In line with Article 8 of the WIPO Copyright Treaty,[23] Article 3(1) ISD clarifies that the right of communication to the public encompasses the on-demand dissemination of content, offering the audience flexibility as to the place and time of access. Article 3(2) ISD adds a specific making available right for performers, phonogram producers, film producers and broadcasting organizations. By virtue of Article 15(1) CDSMD, press publishers can also invoke the making available right granted in Article 3(2)

[22] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, OJ L 167, 22 June 2001, p. 10 (ISD).
[23] Cf. Recital 15 ISD.

ISD. On-demand streaming services – offering content in such a way that members of the public are free to choose the place and time of access individually – thus, fall within the province of harmonized EU copyright and related rights law.

The specific regulation of online content-sharing service providers ("OCSSP")[24] in Article 17 CDSMD confirms this finding. According to Article 17(1), an OCSSP performs an act of communication to the public or an act of making available to the public "when it gives the public access to copyright-protected works or other protected subject matter uploaded by its users."[25] Interestingly, streaming has explicitly been mentioned in this context. Recital 62 CDSMD points out that the regulation of OCSSPs seeks to cover:

> only online services that play an important role on the online content market by competing with other online content services, such as online audio and video streaming services, for the same audiences.[26]

Further exclusive rights – and more complex regulations of linear modes of content dissemination – enter the picture when the analysis is extended to live streaming.[27] In the landmark decision *Football Association Premier League ("FAPL")*, the CJEU dealt with territorial licenses which FAPL had granted in respect of broadcasting rights for live transmission of Premier League football matches.[28] As the Court also clarified, football matches do not enjoy copyright protection and football players cannot be qualified as

[24] See the definition in Article 2(6) CDSMD.

[25] Article 17(1) CDSMD. For a more detailed discussion of the question whether this right of communication and making available to the public constitutes a new right that operates outside the framework of Article 3 ISD, see Martin Husovec and João Pedro Quintais, "How to License Article 17? Exploring the Implementation Options for the New EU Rules on Content-Sharing Platforms under the Copyright in the Digital Single Market Directive", *Gewerblicher Rechtsschutz und Urheberrecht – International* 70 (2021), 325 (325-48). For the general qualification of on-demand streaming as a relevant act of "making available to the public," however, the relation between the exclusive rights granted in Article 17(1) CDSMD and Article 3 ISD does not seem decisive.

[26] Recital 62 CDSMD. Cf. Axel Metzger and Martin Senftleben, "Understanding Article 17 of the EU Directive on Copyright in the Digital Single Market – Central Features of the New Regulatory Approach to Online Content-Sharing Platforms", *Journal of the Copyright Society of the U.S.A.* 67 (2020), 279 (284-86).

[27] For a more detailed discussion of differences in the regulation of live streaming and on-demand streaming, see Maurizio Borghi, "Chasing Copyright Infringement in the Streaming Landscape", *International Review of Intellectual Property and Competition Law* 42 (2011), 316 (316-43).

[28] CJEU, 4 October 2011, joined cases C-403/08 and C-429/08, *Football Association Premier League*, paras. 31-32. For a discussion of the fundamental legal issues raised by the territorial restriction of the licenses in the internal market, see Ole-Andreas Rognstad, "Sporting Events as Intellectual Property and Free Movement of Services: The Implications of the *Premier League Case*", in: Martin R.F. Senftleben, Joost Poort et al. (eds.), *Intellectual Property and Sports – Essays in Honour of Bernt Hugenholtz*, The Hague/London/New York: Kluwer Law International 2021, 291 (295-304).

performing artists.[29] However, it seems safe to assume that the rules established in cases concerning sport events are fully applicable to other linear content offers, such as live streams of concerts, theatre plays and opera performances. The question of fair remuneration for authors and performers, thus, can arise in the area of linear content offers.

In *FAPL*, the broadcasting signals were sent, by satellite, to broadcasters with a license which compressed and encrypted the signal before finally transmitting it by satellite to subscribers, who received the signal using a satellite dish and had to employ a decoding device, such as a decoder card, to decrypt and decompress the signal.[30] As the case concerned satellite broadcasting, the Court discussed the transmission of Premier League broadcasting signals to the public in the light of Article 1(2)(a) and (b) of the Satellite Broadcasting Directive ("SBD").[31] The close connection with live streaming, however, became obvious in *ITV Broadcasting* – a case that concerned an internet television broadcasting service permitting users to receive live streams of free-to-air television broadcasts.[32] In *ITV Broadcasting*, the CJEU confirmed the central role of the right of communication to the public granted in Article 3(1) ISD:

> Given that the making of works available through the retransmission of a terrestrial television broadcast over the internet uses a specific technical means different from that of the original communication, that retransmission must be considered to be a "communication" within the meaning of Article 3(1) of Directive 2001/29. Consequently, such a retransmission cannot be exempt from authorisation by the authors of the retransmitted works when these are communicated to the public.[33]

More specifically, the Court clarified that live streaming of broadcasting signals via internet constituted an intervention that had to be separated from the original transmission initiated by the broadcasting organization concerned. As live streaming did not merely aim at maintaining or improving the quality of the original transmission, it could not be considered a mere technical means falling outside the scope of the communication concept underlying Article 3(1) ISD.[34] By contrast, each of the two transmissions – the original terrestrial broadcast and the live streaming of broadcast works over the internet – had to be authorized individually and separately because each of the two transmissions was made

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[29] CJEU, 4 October 2011, joined cases C-403/08 and C-429/08, *Football Association Premier League*, paras. 31-32.
[30] Id. para. 38.
[31] Id., para. 57. See Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission, OJ L 248, 6 October 1993, p. 15.
[32] CJEU, 7 March 2013, case C-607/11, *ITV Broadcasting*, paras. 8-9.
[33] Id., para. 26.
[34] Id., paras. 28-30.

"under specific technical conditions, using a different means of transmission for the protected works, and each is intended for a public."[35] Importantly, this means that in the case of live streaming of broadcasting signals, the requirement of a relevant public for assuming a communication to the public in the sense of Article 3(1) ISD is readily fulfilled. It is not necessary to demonstrate that the live stream reaches a "new" public[36] which was not taken into account by the right holder when authorizing the original broadcast.[37]

While *ITV Broadcasting* confirmed the central role of Article 3(1) ISD, it would be premature to jump to the conclusion that, in both streaming scenarios – on-demand streaming and live streaming – the analysis will always lead back to the right of communication to the public that has been harmonized at EU level. *ITV Broadcasting* concerned a copyright claim. In the area of copyright, Article 3(1) ISD recognizes a general right of communication to the public as well as the more specific right of making available to the public which, as explained above, covers situations where the public can freely choose the place and time of access. In the area of related rights, however, the harmonization at EU level is less complete. Article 3(2) ISD only awards performers, phonogram producers, film producers and broadcasting organizations the right of making available to the public – in the sense of a right covering interactive, on-demand transmissions of content giving the audience freedom to choose the place and time of access.[38] Article 15(1) CDSMD adds press publishers to the circle of beneficiaries. In contrast to copyright holders, however, these related right holders do not enjoy a harmonized general right of communication to the public.

The CJEU decision in *C More Entertainment* shed light on this harmonization gap.[39] The case concerned an internet site with links enabling users to circumvent the paywall put in place by the pay-TV station C More

[35] Id., para. 39.
[36] As to the requirement of a new public in broadcasting and cable retransmission cases, see CJEU, 13 October 2011, joined cases C-431/09 and C-432/09, *Airfield and Canal Digitaal*, paras. 72-77; CJEU, 4 October 2011, joined cases C-403/08 and C-429/08, *Football Association Premier League*, para. 197; CJEU, 7 December 2006, case C-306/05, *SGAE/Rafael Hoteles*, paras. 40 and 42. As to the use of this criterion in hyperlinking cases, see CJEU, 13 February 2014, case C-466/12, *Svensson*, para. 24-27; CJEU, 8 September 2016, C-160/15, *GS Media*, paras. 37 and 42-43; CJEU, 26 April 2017, case C-527/15, *Stichting Brein (Filmspeler)*, paras. 33 and 48; CJEU, 14 June 2017, case C-610/15, *Stichting Brein (The Pirate Bay)*, paras. 28 and 45. See also Péter Mezei, "Enter the Matrix: The Effects of the CJEU's Case Law on Linking and Streaming Technologies", *Gewerblicher Rechtsschutz und Urheberrecht – International* (2016), 877 (877-900); Stavroula Karapapa, "The Requirement for a 'New Public" in EU Copyright Law", *European Law Review* 1 (2017), 63 (63-81).
[37] CJEU, 7 March 2013, case C-607/11, *ITV Broadcasting*, para. 39.
[38] Cf. CJEU, 26 March 2015, case C-279/13, *C More Entertainment*, para. 26.
[39] Id., para. 31.

Entertainment. In this way, internet users could obtain free access to live broadcasts of ice hockey matches which C More Entertainment had intended to make available only against payment of a fee.[40] In the absence of valid copyright claims, C More Entertainment could only assert related rights as a broadcasting organization.[41] To invoke protection under Article 3(2)(d) ISD, however, it would have been necessary to demonstrate that the unauthorized use fell within the category of interactive on-demand transmissions – with freedom of place and time for the public. The case, however, concerned live broadcasts. The links could thus be regarded as a specific form of live streaming, but not as a relevant form of on-demand streaming. The requirement of double flexibility – flexibility as to both place and time – was not satisfied.[42]

Considering this fact pattern and the lack of a regulatory response in Article 3(2) ISD, the Court had recourse to the stipulations in the Rental, Lending and Related Rights Directive (RLRD).[43] The title of Article 8 RLRD explicitly refers to "[b]roadcasting and communication to the public." Nonetheless, a harmonized general right of communication to the public for broadcasting organizations is sought in vain. Article 8(3) RLRD only grants broadcasting organizations:

> the exclusive right to authorise or prohibit the rebroadcasting of their broadcasts by wireless means, as well as the communication to the public of their broadcasts if such communication is made in places accessible to the public against payment of an entrance fee.

Against this background, the Court lent weight to the fact that Recital 16 RLRD offers Member States the opportunity to provide for "more far-reaching protection for owners of rights related to copyright than that required by the provisions laid down in this Directive in respect of broadcasting and communication to the public."[44] According to the CJEU, this option implies that:

> the Member States may grant broadcasting organisations an exclusive right to authorise or prohibit acts of communication to the public of their transmissions on conditions different from those laid down in Article 8(3) and in particular transmissions to which members of the public may obtain access from a place individually chosen by them, it still being understood

[40] Id., paras. 10-12.
[41] Id., para. 17.
[42] Id., paras. 25-27.
[43] 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 (codified version) (RLRD), OJ L 376, 27 December 2006, p. 28.
[44] CJEU, 26 March 2015, case C-279/13, *C More Entertainment*, para. 33. Cf. Recital 16 RLRD.

> that, as provided for in Article 12 of Directive 2006/115, such a right must not affect the protection of copyright in any way.[45]

EU Member States are thus free to bestow upon broadcasting organizations a more general right of communication to the public, going beyond the specific rebroadcasting and public communication right in Article 8(3) RLRD.[46] In practice, this means that the impact of related rights on live streaming depends on potentially divergent approaches in EU Member States. The scope of related rights, such as the related rights of broadcasting organizations, may differ from one country to the other. The prejudicial questions underlying the CJEU decision in *C More Entertainment*, for instance, arose from the grant of a broader, more general right of communication to the public in Sweden – a right that was not restricted to acts of making works available on demand in the sense of Article 3(2) ISD.[47]

1.2 Reproduction Right and Exception for Transient Copying

In comparison with the interplay of harmonized rights of communication to the public at EU level and supplementary national solutions in the field of related rights, the legal landscape shaped by harmonized reproduction rules appears rather straightforward. For both copyright and related right holders, Article 2 ISD sets forth a general right of reproduction covering "direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part." As the explicit reference to "temporary" acts of reproduction shows, streaming falls within the province of this exclusive right even if it does not involve more than transient, temporary copying of protected content. EU legislation has counterbalanced this broad grant of control over reproduction in Article 2 ISD by providing, in Article 5(1) ISD, for a mandatory exemption of temporary acts of reproduction:

> which are transient or incidental [and] an integral and essential part of a technological process and whose sole purpose is to enable:
> (a) a transmission in a network between third parties by an intermediary, or
> (b) a lawful use
> of a work or other subject-matter to be made, and which have no independent economic significance, shall be exempted from the reproduction right provided for in Article 2.

Dealing with temporary reproductions performed within the memory of a satellite decoder and on a television screen in *FAPL*,[48] the CJEU highlighted that, despite the continental-European tradition of interpreting copyright

[45] CJEU, id., para. 35.
[46] Id., para. 36.
[47] Id., para. 19.
[48] CJEU, 4 October 2011, joined cases C-403/08 and C-429/08, *Football Association Premier League*, para. 160.

limitations strictly,[49] an interpretation was necessary that enabled the effectiveness of the copyright limitation, ensured the development and operation of new technologies,[50] and safeguarded "a fair balance between the rights and interests of right holders, on the one hand, and of users of protected works who wish to avail themselves of those new technologies, on the other."[51]

Taking these general considerations as a starting point, the Court systematically removed obstacles that could have prevented a finding of compliance with Article 5(1) ISD. In the Court's view, the mere reception of broadcasts – the picking up of broadcasts and their visual display – in private circles did not constitute a restricted act under EU or national legislation. In the context of Article 5(1) ISD, such reception had to be considered lawful. Accordingly, the temporary copying had the sole purpose of enabling a "lawful use" within the meaning of Article 5(1)(b) ISD.[52] Addressing the further requirement of "no independent economic significance," the Court focused on the fact that the temporary acts of reproduction at issue – carried out within the memory of a satellite decoder and on television screen – formed an inseparable and non-autonomous part of the process allowing the reception of broadcasts. Users of the service did not have any influence on the process. They may even be unaware of reproductions taking place. On this basis, the Court concluded that the temporary copying was not "capable of generating an additional economic advantage going beyond the advantage derived from mere reception of the broadcasts at issue."[53]

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[49] Id., para. 162. As to differences between copyright's legal traditions in this regard, see Martin Senftleben, "Bridging the Differences Between Copyright's Legal Traditions – the Emerging EC Fair Use Doctrine", *Journal of the Copyright Society of the U.S.A.* 57 (2010), 521 (522-25).

[50] CJEU, id., paras. 163 and 179. With regard to the particular relevance of this statement in the context of text and data mining, see Thomas Margoni and Martin Kretschmer, "A Deeper Look Into the EU Text and Data Mining Exceptions: Harmonisation, Data Ownership, and the Future of Technology", *CREATe Working Paper* 2021/7, Glasgow: CREATe Centre 2021, 18-19.

[51] CJEU, id., para. 164. As to the more recent recognition that copyright limitations in the EU acquis confer user rights on beneficiaries, see CJEU, 29 July 2019, case C-516/17, *Spiegel Online*, para. 54; CJEU, 29 July 2019, case C-469/17, *Funke Medien NRW*, para. 70. For a more detailed discussion of this point, see Tanya Aplin and Lionel Bently, *Global Mandatory Fair Use: The Nature and Scope of the Right to Quote Copyright Works*, Cambridge: Cambridge University Press 2020, 75-84; Christophe Geiger and Elena Izyumenko, "The Constitutionalization of Intellectual Property Law in the EU and the Funke Medien, Pelham and Spiegel Online Decisions of the CJEU: Progress, but Still Some Way to Go!", *International Review of Intellectual Property and Competition Law* 51 (2020), 282 (292-98).

[52] CJEU, 4 October 2011, joined cases C-403/08 and C-429/08, *Football Association Premier League*, paras. 171-72.

[53] Id., paras. 176-78.

With these findings, the Court had surmounted all hurdles posed by Article 5(1) ISD itself. In addition, however, the issue of compliance with Article 5(5) ISD entered the picture: the "three-step test" permitting reliance on copyright limitations in certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of copyright holders.[54] In this regard, the Court simply stated that, in view of the considerations concerning lawful use and independent economic significance, the temporary copying at issue also satisfied all criteria following from the three-step test.[55] The Court, thus, deduced compliance with the three-step test from compliance with the individual conditions of a specific statutory copyright limitation, namely the exemption of temporary acts of reproduction in Article 5(1) ISD. Evidently, this circular line of reasoning *de facto* neutralizes the three-step test. If compliance with the individual requirements of a statutory copyright limitation automatically implies compatibility with the three-step test, the test no longer plays an independent role in the assessment. As inconsistent as this may appear in the light of the architecture of Article 5 ISD – adding the three-step test as an overarching control instrument in the fifth paragraph[56] – it allowed the CJEU to declare the temporary acts of reproduction permissible without any further scrutiny.[57]

The question of relevant acts of reproduction at the receiving end also featured prominently in *Meltwater*. This case concerned the creation of temporary copies of an internet site on-screen and in the cache of a computer hard disk. More specifically, the CJEU had to determine whether online receipt of monitoring reports stemming from Meltwater's media

[54] For a detailed discussion of these assessment criteria, see Martin Senftleben, *Copyright, Limitations and the Three-Step Test – An Analysis of the Three-Step Test in International and EC Copyright Law* (The Hague/London/New York: Kluwer Law International, 2004), 133-244; Christophe Geiger, Daniel Gervais and Martin Senftleben, "The Three-Step Test Revisited: How to Use the Test's Flexibility in National Copyright Law", *American University International Law Review* 29 (2014), 581 (581-626); Christophe Geiger, Jonathan Griffiths and Reto Hilty, "Declaration on a Balanced Interpretation of the 'Three-Step Test' in Copyright Law", *International Review of Intellectual Property and Competition Law* 39 (2008), 707.

[55] CJEU, 4 October 2011, joined cases C-403/08 and C-429/08, *Football Association Premier League*, para. 181.

[56] For a critique of this regulatory approach ("worst case scenario"), see Martin Senftleben, "The International Three-Step Test – A Model Provision for EC Fair Use Legislation", *Journal of Intellectual Property, Information Technology and E-Commerce Law (JIPITEC)* 1 (2010), 67 (69-74).

[57] CJEU, id., paras. 181-182. The same approach can be observed in CJEU, 17 January 2012, case C-302/10, *Infopaq II*, para. 56. For a more detailed discussion of potential circularity, see Martin Senftleben, "From Flexible Balancing Tool to Quasi-Constitutional Straitjacket – How the EU Cultivates the Constraining Function of the Three-Step Test", in: J. Griffiths and T. Mylly (eds.), *Global Intellectual Property Protection and New Constitutionalism – Hedging Exclusive Rights* (Oxford: Oxford University Press, 2021), 83 (94-95).

monitoring service required a licence covering the reproduction right.[58] As in *FAPL*, the Court adopted a flexible approach seeking to create breathing space for new technologies, products and services. According to the CJEU, it was irrelevant that on-screen copies remained in existence for as long as the internet user kept the browser open and stayed on the website. As the copying was still limited to what was necessary for the proper functioning of the technological process for website viewing, the on-screen copies had to be qualified as "transient" in the sense of Article 5(1) ISD.[59] The Court also established that the cached copies neither existed independently of, nor had a purpose independent of, the technological process at issue. For that reason, they had to be regarded as "incidental."[60] Interestingly, the Court embarked on a more detailed discussion of the additional compliance criteria following from the three-step test in Article 5(5) ISD. The final outcome, however, remained the same: in the Court's view, the on-screen copies and the cached copies satisfied all conditions of the three-step test. Hence, the temporary copying at issue did not amount to acts of reproduction requiring a license.[61]

In the light of this CJEU jurisprudence, it seems safe to assume that the exemption of temporary copying in Article 5(1) ISD covers the reception of streaming content – at least when the streaming service offers lawful access to protected material. The equation is different when the streaming concerns illegal content. In such a case, the three-step test of Article 5(5) ISD is no longer a toothless tiger. The CJEU held in *Filmspeler* that a conflict with a normal exploitation arose from temporary acts of reproducing protected works on a multimedia player with add-ons that provided links to illegal streaming websites because "that practice would usually result in a diminution of lawful transactions relating to the protected works."[62] The Court thus focussed on whether the exemption of temporary acts of copying in Article 5(1) ISD was likely to kill demand for literary and artistic works by acting as a substitute.

However, as long as a streaming service does not provide access to illegal content and refrains from offering download options going beyond mere temporary copying, no rights clearance seems necessary with regard to transient copies made by users who receive streaming content. The central exclusive right to be taken into account in streaming cases is the right of communication to the public, including on-demand making available, that has been harmonized in EU copyright law.[63] In related rights cases, the

[58] CJEU, 5 June 2014, case C-360/13, *Public Relations Consultants Association ("Meltwater")*, paras. 7-10.
[59] Id., paras. 45-46.
[60] Id., para. 50.
[61] Id., paras. 54-62.
[62] CJEU, 26 April 2017, case C-527/15, *Stichting Brein (Filmspeler)*, para. 70.
[63] Article 3(1) ISD. Cf. Irini Stamatoudi, Paul Torremans and Stavroula Karapapa, "The Information Society Directive", in: Irini Stamatoudi and Paul Torremans (eds.), *EU*

harmonization covers the interactive right of making available.[64] A more general right of communication to the public for related right holders – with a broader scope than Article 8(3) RLRD – may follow from domestic legislation in EU Member States.[65]

2. Remuneration Mechanisms

As both live streaming (right of communication to the public) and on-demand streaming (right of making available to the public) fall within the scope of the exclusive rights granted in European or national copyright and related rights legislation, the provision of streaming services, in general, requires the authorization of right holders. However, this result of the analysis is good news for creators only if, as a result of the rights acquisition process, they receive a fair share of the revenue accruing from the streaming of film, TV shows and music productions.

With regard to the legal mechanisms directing revenue streams to different actors, two major scenarios can be distinguished. Firstly, rights clearance may take place at industry level: the streaming industry enters into negotiations with the content industry and agrees on a licensing fee. For creators seeking remuneration, this scenario can pose particular difficulties. If the exploitation contract they concluded with producers does not provide for a fair share of licensing revenue, the content industry may withhold streaming revenue and refuse to pass it on to the individual author or performer – unless the individual creator successfully invokes the fair remuneration rules of EU copyright contract law (2.1).

Another scenario that can contribute to improving remuneration for individual authors and performers involves mandatory collective licensing: where copyright contract law proves ineffective, legislators may ensure that a portion of online streaming revenue flows directly to collective rights management organizations, which then distribute (a part of) these funds directly to creators in accordance with their repartitioning schemes. This flow of revenues to creators can be set in motion by introducing unwaivable residual remuneration rights (2.2). Alternatively, remuneration obligations that accompany copyright exceptions, such as private copying or UGC exceptions, can constitute a source of extra revenue for authors and performers (2.3).

Copyright Law – A Commentary (2nd ed., Cheltenham: Edward Elgar 2021), §11.18 to §11.20.

[64] Article 3(2) ISD.

[65] CJEU, 26 March 2015, case C-279/13, *C More Entertainment*, para. 36.

2.1 Individual Licensing Agreements

When providers of streaming services do not produce content themselves (and obtain rights as content producers and contracts with authors and performers), they may obtain streaming rights by concluding licensing agreements with the creative industry: film studios, music labels, etc. The rights clearance, thus, becomes a matter of negotiations between industry branches: the streaming industry on the one hand and the producers of streaming content – or holders of larger content repertoires – on the other.[66] Here, in turn, two scenarios can be distinguished: the Netflix/Spotify scenario of fully licensed platforms (2.1.1), and the UGC scenario relating to platforms such as YouTube or Facebook (2.1.2). The following sections discuss each of these major scenarios, assessing the efficacy of licensing agreements in terms of creators' fair remuneration under each of them (2.1.3), particularly when governed by the mandatory copyright contract rules that have been adopted in the EU.

2.1.1 Fully Licensed Platforms

As mentioned already, the payment of licensing fees in the growing streaming segment offers the prospect of a higher income. However, the rise in licensing revenue need not be good news for individual creators. In practice, industry-level licensing agreements can make it particularly challenging for authors and performers to receive a fair share of streaming income. Based on the exploitation contracts concluded with creators – in many cases so-called "buyout" contracts merely offering a lumpsum honorarium without any royalty component[67] – the content industry may be in a position to keep a large part of the licensing revenue.[68] Consequently, creators do not share in the increasing popularity and success of streaming services. In essence, thus, whether the profitability of online streaming improves the financial situation of authors and performers depends on the

[66] European Commission, Directorate-General for Communications Networks, Content and Technology, *Study on contractual practices affecting the transfer of copyright and related rights and the creators and producers' ability to exploit their rights*, No. 2023-031, under Framework Contract CNECT/2022/OP/0036, Brussels, Ares(2023), 19 October 2023; Stéphanie Carre, Stéphanie Le Cam, and Franck Macrez, *Buyout contracts imposed by platforms in the cultural and creative sector*, Study Requested by the JURI Committee, European Parliament, November 2023.

[67] Stéphanie Carre, Stéphanie Le Cam, and Franck Macrez, *Buyout contracts imposed by platforms in the cultural and creative sector*, Study Requested by the JURI Committee, European Parliament, November 2023.

[68] Alarmingly, this practice is becoming predominant in the streaming ecosystem. See French Presidency Report *Effectivité du cadre européen du droit d'auteur* (2022), available at: https://data.consilium.europa.eu/doc/document/ST-10629-2022-INIT/x/pdf (accessed July 2024); European Commission, Directorate-General for Communications Networks, Content and Technology, *Study on contractual practices affecting the transfer of copyright and related rights and the creators and producers' ability to exploit their rights*, No. 2023-031, under Framework Contract CNECT/2022/OP/0036, Brussels, Ares(2023), 19 October 2023, 5-7.

terms of the exploitation contract they sign when transferring their rights to a producer.[69]

Despite the negative effect of buyout practices on the remuneration of individual creators, recent studies indicate their increasing prevalence in the European creative sectors.[70] In the field of music, in particular, the 2023 report by the European Composer and Songwriter Alliance (ECSA) revealed that 53 percent of ECSA members reported licensing based on buyout contracts, while 63 percent reported an increase in such contracts over the last three years.[71] Similar issues arise in the audiovisual sector, where European film and TV directors, along with screenwriters, are increasingly voicing concerns about payment problems in such buyout contracts.[72] Since they often work independently, these creators lack strong negotiation leverage.[73] In addition, the entire industry, as a 2024 study commissioned by the European Parliament indicates, operates on the presumption of authors transferring rights to producers, prevalent in many countries.[74] The producer, responsible for project finances, often seeks extensive rights from creators to ensure future use of the work, with contracts for screenwriters and directors typically being non-negotiable.[75] This, coupled with the sophisticated, costly, and large-scale nature of audiovisual production involving numerous participants,[76] and with the difficulties associated with determining the worth of a lumpsum payment

[69] The weaker contractual position of authors and performers in their contractual relationships with exploiters of their works is explicitly highlighted in Recital 72 CDSMD.
[70] Stéphanie Carre, Stéphanie Le Cam, and Franck Macrez, *Buyout contracts imposed by platforms in the cultural and creative sector*, Study Requested by the JURI Committee, European Parliament, November 2023, 8-9.
[71] European Composer and Songwriter Allience (ESCA), *Navigating the Path to Fair Practice*, Report, available at: https://composeralliance.org/media/1465-ecsa-report-on-fair-practice.pdf (accessed July 2024), 6.
[72] European Commission, Directorate-General for Communications Networks, Content and Technology, *Study on contractual practices affecting the transfer of copyright and related rights and the creators and producers' ability to exploit their rights*, No. 2023-031, under Framework Contract CNECT/2022/OP/0036, Brussels, Ares(2023), 19 October 2023, 12; Stéphanie Carre, Stéphanie Le Cam, and Franck Macrez, *Buyout contracts imposed by platforms in the cultural and creative sector*, Study Requested by the JURI Committee, European Parliament, November 2023, 54.
[73] European Commission, Directorate-General for Communications Networks, Content and Technology, *Study on contractual practices affecting the transfer of copyright and related rights and the creators and producers' ability to exploit their rights*, No. 2023-031, under Framework Contract CNECT/2022/OP/0036, Brussels, Ares(2023), 19 October 2023, 12.
[74] Stéphanie Carre, Stéphanie Le Cam, and Franck Macrez, *Buyout contracts imposed by platforms in the cultural and creative sector*, Study Requested by the JURI Committee, European Parliament, November 2023, 54.
[75] Id.
[76] Id.

early in the creative process,[77] generates a highly unfavourable situation for individual creators in the film sector.

While buyout contracts with creators have been known in the European tradition for a long time, the increasing influence of US law, specifically the so-called "work made for hire" doctrine,[78] in both the music and audiovisual sectors, can be a propelling force that increases the impact of buyout practices.[79] Many large streaming platforms are based in the US, and one in ten of all on-demand services in Europe belong to US companies,[80] which then frequently request the choice of US law in exploitation contracts with European creators.[81]

EU law does not, however, leave creators empty-handed in such situations. With the adoption of Articles 18 to 23 CDSMD, specific copyright contract rules have been introduced to strengthen the position of creators in their contractual relationship with exploiters of their works and performances. Article 18(1) CDSMD establishes the general principle 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.[82]

Several provisions of the Directive give this broad principle a more concrete shape. These include, among others, restrictions on buyouts, emphasizing the exceptional nature of lumpsum payments, ex post contract adjustments, the revocation of rights, transparency obligations seeking to ensure adequate information on streaming revenue, and the regulation of choice of

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[77] European Commission, Directorate-General for Communications Networks, Content and Technology, *Study on contractual practices affecting the transfer of copyright and related rights and the creators and producers' ability to exploit their rights*, No. 2023-031, under Framework Contract CNECT/2022/OP/0036, Brussels, Ares(2023), 19 October 2023, 12.

[78] "Work made for hire" refers to a legal concept in copyright law where a work is created by an employee within the scope of their employment or a work specially commissioned for use in certain categories, such as movies or software. In these cases, the employer or commissioning party is considered the legal author of the work, holding the rights to its use and distribution, rather than the individual creator. See United States Copyright Office, "Works Made for Hire", available at: https://www.copyright.gov/circs/circ30.pdf (accessed September 2024).

[79] Id.; Stéphanie Carre, Stéphanie Le Cam, and Franck Macrez, *Buyout contracts imposed by platforms in the cultural and creative sector*, Study Requested by the JURI Committee, European Parliament, November 2023, 53.

[80] Agnes Schneeberger, *Audiovisual media services in Europe – 2024 edition*, European Audiovisual Observatory, Council of Europe, July 2024, 7.

[81] European Commission, Directorate-General for Communications Networks, Content and Technology, *Study on contractual practices affecting the transfer of copyright and related rights and the creators and producers' ability to exploit their rights*, No. 2023-031, under Framework Contract CNECT/2022/OP/0036, Brussels, Ares(2023), 19 October 2023, 6; European Commission, Staff Working Document, "European Media Industry Outlook", Brussels, 1 May 2023, SWD(2023) 150 final, 38-45.

[82] Article 18(1) CDSMD.

laws. The subsequent exploration of these copyright contract law mechanisms culminates in a discussion of further measures not explicitly mentioned in the CDSMD. These additional measures can be seen as exponents of Article 18's general fair remuneration clause. They include collective bargaining and minimum flat-rate remuneration in cases of a work's commercial failure. Finally, it will be demonstrated that certain provisions of the Audiovisual Media Services Directive, such as the imposition of quotas for funding European production, are also relevant in the context of streaming remuneration.

Regarding, first, the issue of lumpsum payments, Recital 73 CDSMD clarifies that such payment "can also constitute proportionate remuneration but it should not be the rule." In the absence of exceptional circumstances justifying a lumpsum arrangement, a creator's entitlement to "proportionate" remuneration, thus, implies that the exploitation contract should contain a royalty component. This regulatory approach seems comparable to the recently amended South African copyright law mentioned above, which establishes an entitlement for authors and performers to a fair share of the royalty from the exploitation of their works.[83] However, similarly to the new South African legislation that allows the authors' and sound recording performers' royalty entitlement to be overridden by contract, the CDSMD does not categorically prohibit lumpsum payments either. Moreover, the exceptional nature of lumpsum remuneration in the Directive is only pointed out in a recital. It did not find its way into a fully binding article. The Directive does not otherwise restrict buyout practices, thus leaving them largely unharmonized. In practice, this can lead to situations where creators assign their rights in their entirety and for the whole period of protection in exchange for a buyout lumpsum honorarium.

The regulation of specific cases regarding the permissibility of lumpsum payments thus remains largely a national issue, as confirmed by Recital 73, stating that "Member States should have the freedom to define specific cases for the application of lump sums, taking into account the specificities of each sector". In this regard, the French Intellectual Property Code details, for example, that an author's remuneration may be calculated as a lumpsum where: (1) the basis for calculating the proportionate share cannot be practically determined; (2) the means to control the application of participation are lacking; (3) the costs of calculation and control operations would be out of proportion to the results to be achieved; (4) the nature or conditions of the exploitation make it impossible to apply the rule of proportional remuneration, either because the author's contribution does not constitute one of the essential elements of the intellectual creation of the work, or because the use of the work is only incidental to the object exploited; (5) in case of transfer of rights to software; and (6) in certain

[83] Republic of South Africa, Copyright Amendment Bill (B13-2017), Section 6A.

other cases laid down in the Code.[84] Some of these conditions reappear in the Spanish Law of Intellectual Property, which states that a lumpsum remuneration for the author may be set in cases (1) when it is difficult to determine income, or verification is impossible or too costly; (2) when the work is accessory to the main one; or (3) when the work, used alongside others, is not essential to the overall creation.[85] In a somewhat similar manner, the Italian Copyright Act states that a flat-rate remuneration for authors and performers is permitted where the contribution to the work or performance is merely ancillary and the costs of the calculation operations are disproportionate to the purpose.[86]

Apart from the (partial) regulation of lumpsums, the CDSM Directive includes other safeguards for creators' contractual position, the foremost being the *ex post* contract adjustment mechanism. If an exploitation contract fails to offer appropriate and proportionate remuneration, Article 20(1) CDSMD offers the right to a contract adjustment. This additional rule becomes relevant when the exploitation of the work or performance, including via streaming, is successful. Covering all cases of disproportionately low remuneration, it goes far beyond bestseller scenarios where a literary and artistic production has outstanding success. Under Article 20(1), creators can claim:

> additional, appropriate and fair remuneration from the party with whom they entered into a contract for the exploitation of their rights, or from the successors in title of such party, when the remuneration originally agreed turns out to be disproportionately low compared to all the subsequent relevant revenues derived from the exploitation of the works or performances.[87]

The contract adjustment mechanism in Article 20(1) CDSMD, thus, is a legal tool to correct disadvantageous buyout provisions *ex post*.

Further, similar to the new provision in the South African Copyright Amendment Bill which establishes automatic revocation of the assigned copyright after a twenty-five-year period,[88] the CDSM Directive provides for a right of revocation in Article 22(1). This right, however, is not subject to the expiration of a certain term; rather, it is contingent upon the exploitation – or rather lack thereof – of the protected work. Pursuant to Article 22(1) CDSMD, authors and performers have the right to "revoke in

[84] Article L131-4 of the French Intellectual Property Code.
[85] Article 46(2) of the Spanish Law of Intellectual Property 1/1996 of April 12 1996 (Real Decreto Legislativo 1/1996, de 12 de abril, por el que se aprueba el texto refundido de la Ley de Propiedad Intelectual) (TRLPI), as amended by Law 23/2006, available at: https://www.boe.es/buscar/act.php?id=BOE-A-1996-8930 (accessed September 2024).
[86] Article 107(2) of the Italian Copyright Act (Law No. 633 of 22 April 1941, on the Protection of Copyright and Neighbouring Rights).
[87] Article 20(1) CDSMD.
[88] Id., Section 25.

whole or in part the licence or the transfer of rights where there is a lack of exploitation of that work or other protected subject matter." While Recital 80 specifies that the right of revocation is triggered only when rights are "not exploited at all", it has been argued that the ordinary dictionary meaning of "lack of" implies more than mere absence and hence includes, also, insufficient exploitation.[89]

In the realm of streaming audiovisual works, revocation rights, however, may be less effective due to market concentration. Given the few dominant production companies, creators may hesitate to revoke rights from one exploitation company, as this could restrict their options in assigning rights to other producers.[90]

Both in the context of *ex post* contract adjustments and the revocation of rights, the transparency obligation laid down in Article 19(1) CDSMD offers support. It entitles creators to receive annually "up to date, relevant and comprehensive information"[91] on the exploitation of their works and performances from the parties to whom they have licensed or transferred their rights, or their successors in title. This right to information includes "modes of exploitation, all revenues generated and remuneration due."[92] Creators can thus assess whether a claim for additional, appropriate and fair remuneration in the sense of Article 20(1) CDSMD or a claim about the lack of exploitation triggering a revocation right in the sense of Article 22 CDSMD can be successful.

Yet another way to safeguard the remuneration of creators through mandatory copyright contract law is by including provisions on the choice of law. According to a recent report for European Parliament on buyout practices, the main concern voiced by European creators about buyouts is that US law applies to such contracts – in other words, that the protective measures of copyright contract law established in Europe, including the harmonized rules of the CDSMD, are rendered inapplicable to European authors and performers due to the choice of foreign laws reportedly often imposed by foreign (predominantly US-based) streaming platforms.[93] In this context, the choice of law safeguards therefore emerge as particularly important for ensuring fair remuneration for European creators.

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[89] P. Bernt Hugenholtz, "Regulating creator's contracts under the DSM Directive. What we can learn from the Dutch", *NIR* 4 (2022), 467 (474).
[90] P. Bernt Hugenholtz and Séverine Dusollier, "Authors' Rights and Remuneration", Lecture within IViR Summer Course on International Copyright Law and Policy, 4 July 2024.
[91] Article 19(1) CDSMD.
[92] Id.
[93] Stéphanie Carre, Stéphanie Le Cam, and Franck Macrez, *Buyout contracts imposed by platforms in the cultural and creative sector*, Study Requested by the JURI Committee, European Parliament, November 2023, 11, 23, 55.

Safeguards of this kind have already been introduced in certain EU countries.[94] In Germany, for instance, it has been clarified in copyright contract law that the right to equitable remuneration and the related rights to contract adjustments and information about exploitation results (transparency obligation) are compulsory if German law would be applicable to the contract of use in the absence of a choice of law, or to the extent that the agreement covers significant acts of use within the German territory.[95] Similarly, copyright contract law in the Netherlands clarifies that authors and performers cannot contractually waive their right to equitable remuneration and related contract adjustment and information (transparency) rights.[96] Moreover, Dutch law stipulates that – irrespective of the law governing an exploitation contract – the provisions of copyright contract law, including the right to equitable remuneration, are applicable if the agreement would be governed by Dutch law in the absence of a choice of law in the contract, or the exploitation completely or predominantly takes place, or would have to take place, in the Netherlands.[97] Furthermore, the French Intellectual Property Code also stipulates that, regardless of the law chosen by the parties, contracts in which the author of a musical composition for an audiovisual work transfers some or all exploitation rights to the producer cannot deprive the author of certain protective provisions concerning remuneration for the exploitation of the work within the French territory.[98] In case of any disputes regarding the application of these provisions, the author has the right to bring the matter before French courts, irrespective of where the assignee or the author is established, and regardless of any conflicting jurisdiction clauses in the contract.[99]

At EU level, the CDSM Directive attempted to establish a certain level of harmonization in this regard by stating, in Recital 81, that:

> where all other elements relevant to the situation at the time of the choice of applicable law are located in one or more Member States, the parties' choice of applicable law other than that of a Member State does not prejudice the application of the provisions regarding transparency, contract adjustment

[94] European Commission, Directorate-General for Communications Networks, Content and Technology, *Study on contractual practices affecting the transfer of copyright and related rights and the creators and producers' ability to exploit their rights*, No. 2023-031, under Framework Contract CNECT/2022/OP/0036, Brussels, Ares(2023), 19 October 2023, 6; French Presidency Report *Effectivité du cadre européen du droit d'auteur* (2022), available at: https://data.consilium.europa.eu/doc/document/ST-10629-2022-INIT/x/pdf (accessed July 2024).
[95] Section 32b of the German Act on Copyright and Related Rights ("Urheberrechtsgesetz").
[96] Article 25h(1) of the Dutch Copyright Act ("Auteurswet").
[97] Article 25h(2) of the Dutch Copyright Act ("Auteurswet").
[98] Article L. 132-24 CPI.
[99] Id.

> mechanisms and alternative dispute resolution procedures laid down in this Directive, as implemented in the Member State of the forum.[100]

In a similar vein, Article 23(1) CDSMD states that "any contractual provision that prevents compliance with Articles 19, 20 and 21 shall be unenforceable in relation to authors and performers." It is notable, however, that the choice of law safeguards are imposed by the Directive only in relation to the transparency obligation (Article 19), the *ex post* contract adjustment mechanism (Article 20) and alternative dispute resolution (Article 21), but not with respect to other copyright contract rules seeking to strengthen the position of creators, such as the general fair remuneration requirement in Article 18 CDSMD and the right of revocation in Article 22 CDSMD.

Seeking to make it easier for authors and performers to provide evidence of a mismatch between the contractually agreed remuneration and appropriate and proportionate remuneration in the sense of the law, several Member States have adopted specific rules on collective bargaining. In France, for example, certain industry initiatives have introduced preliminary standards, such as a minimum digital royalty, with the results of this initiative, however, remaining to be determined.[101] In Germany and the Netherlands, copyright contract law makes it possible to establish common remuneration rules on the basis of negotiations between associations of authors or performers, and associations of exploiters or individual exploiters of their works and performances.[102] At the core of these provisions lies the idea that once agreement has been reached on common, "standard" remuneration rules in a specific creative industry sector, authors and performers can compare their remuneration with the generally agreed common rules, identify cases of insufficient remuneration and use the common remuneration rules as a basis for furnishing proof of their entitlement to additional remuneration.

The jurisprudence of the German Federal Court of Justice indicates that common remuneration rules can be widely applied, even to parties not involved in the original negotiations.[103] These rules can set general standards for fair remuneration in a sector, transforming them into binding legal instruments that impact industry-wide standards.[104] This can benefit authors in sectors lacking agreed remuneration rules by allowing courts to

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[100] Recital 81 CDSMD.
[101] Daniel Johansson, *Streams & Dreams Part 2 – The Impact of the DSM Directive on EU Artists and Musicians* (International Artist Organisation, 2024), 45.
[102] Section 36 UrhG; Article 25c(2), (3) and (4) of the Dutch Copyright Act (Auteurswet).
[103] For further, more detailed discussion, see Martin Senftleben, "More Money for Creators and More Support for Copyright in Society – Fair Remuneration Rights in Germany and the Netherlands", *Columbia Journal of Law and the Arts* 41 (2018), 413.
[104] Id., 425-26.

use standards from related fields.[105] However, the broad application of common remuneration rules can also deter exploiters and creators' associations from negotiating such rules in the first place. Due to the risk of these standards being applied across the entire sector, they may prefer not to enter into negotiations at all.[106] Interested enterprises and associations may also face pressure from other players in the relevant sector who fear the broad implications of these rules.[107]

Despite these difficulties surrounding collective bargaining rules, the CDSM Directive embraced collective agreements as an avenue for ensuring fair remuneration for creators. Several provisions of the CDSM Directive encourage authors' and performers' organizations to negotiate such agreements with industry associations. Recital 73, for instance, specifies that:

> 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.

Recurring references to collective bargaining are also made in Recitals 77 and 78 and in Articles 19(5), 20(1), and 22(5) CDSMD.

Beyond the fair remuneration mechanisms discussed above, there is yet another measure worth considering to secure streaming remuneration for authors and performers. This mechanism pertains to establishing a minimum remuneration for creators who have licensed their rights, in the event of commercial failure in the exploitation of their works.

This concept is already known in the broadcasting sector. For instance, until the legislative reform of 2018, Romania guaranteed a minimum equitable remuneration for right holders (phonogram producers and performers), represented by collective management organizations, irrespective of the revenues obtained or the costs incurred by broadcasting organizations.[108] However, in 2018, this legislative provision was abolished by Law No 74/2018 in response to complaints by local broadcasters, who considered the obligation to pay the minimum flat remuneration in case of insufficient revenues from radio broadcasting overly burdensome. Interestingly, this legislative change led to a recent reference submitted to the CJEU in January 2024[109] with prejudicial questions being asked concerning the

[105] Id.
[106] Id.
[107] Id.
[108] Articles 131 and 131 of Law No. 8/1996.
[109] CJEU, Request for a preliminary ruling, *DADA Music and UPFR*, case C-37/24, 19 January 2024.

interpretation of the provisions on fair remuneration of both the RLR Directive and the Collective Rights Management Directive (CRMD).[110] The provisions at stake are, notably, Article 8(2) RLRD that provides for a right to a single equitable remuneration for the use of phonograms for broadcasting or public communication that is to be shared between the relevant performers and phonogram producers, and Article 16(2), second paragraph, CRMD, in accordance with which right holders must receive "appropriate remuneration for the use of their rights", with tariffs reflecting the economic value of the use of the rights in trade and the service provided by the collective management organization. The referring court quires, more specifically, whether Article 8(2) RLRD and the second paragraph of Article 16(2) CRMD, read in conjunction with Articles 17 (right to property) and 52 (scope and interpretation of rights and principles) of the Charter of Fundamental Rights of the European Union,[111] must be interpreted to prohibit national laws lacking minimum equitable remuneration for phonogram producers, regardless of broadcasters' revenues or costs. It also seeks clarity on criteria for assessing the equity of remuneration for right holders. Interestingly, in its request for a preliminary ruling, the Bucharest Court of Appeal "emphasises the importance of establishing remuneration for right holders which is not derisory, since such a situation would in practice amount to expropriation in the private interest, which would constitute an infringement of Article 17 of the Charter of Fundamental Rights of the European Union."

The CJEU decision in this case may have significant repercussions on fair remuneration obligations of online streaming platforms. As further explained below, arguments have already been developed for the extension of the remuneration regime following from Article 8(2) RLRD to specific aspects of streaming services.[112]

Finally, quotas to secure funding for European productions can also impact the debate on streaming remuneration. Under the Audiovisual Media Services Directive (AVMSD)[113] video-on-demand services must feature at least 30 percent of European works in their programming catalogue and ensure their visibility.[114] A rationale behind this provision is the aim to

[110] Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market Text with EEA relevance, OJ L 84, 20 March 2014, p. 72.
[111] 2012/C 326/02, 26 October 2012.
[112] See the discussion on Section 2.2 below.
[113] Directive (EU) 2018/1808 of the European Parliament and of the Council of 14 November 2018 amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) in view of changing market realities, OJ L 303, 28 November 2018, p. 69.
[114] Article 13(1) of the Audiovisual Media Services Directive. See also the discussion in European Commission, Directorate-General for Communications Networks, Content and

preserve a revenue stream for European creators and producers. However, when rights are held by streamers, it becomes an open question whether the money generated by these mechanisms truly benefit individual creators or, instead, flow back to non-EU streaming services. This raises the question whether content quotas are an appropriate legal tool to achieve the intended goal of supporting European creators and producers.

2.1.2 Platforms for User-Generated Content

In addition to the described remuneration issues that arise in the case of fully licensed streaming platforms, such as Netflix or Spotify, UGC platforms, such as YouTube or Facebook, raise specific remuneration questions. In this case, a so-called "value gap"[115] can arise from the fact that users may upload content containing protected traces of third-party works without obtaining licenses and paying remuneration. Once this type of content populates UGC platforms, the platform provider may derive profit from unlicensed and unremunerated third-party content. Seeking to fill this value gap, the CDSMD clarifies, in Article 17(1), that UGC streaming platforms – "OCSSPs" in the terminology of the Directive[116] – perform an act of communication to the public or an act of making available to the public when they give "the public access to copyright-protected works or other protected subject matter uploaded by its users."[117] According to Article 17(3) CDSMD, this implies that the traditional liability shield for hosting services[118] is no longer available. Instead, OCSSPs are bound to:

Technology, *Study on contractual practices affecting the transfer of copyright and related rights and the creators and producers' ability to exploit their rights*, No. 2023-031, under Framework Contract CNECT/2022/OP/0036, Brussels, Ares(2023), 19 October 2023, 7-8.

[115] Cf. Martin Senftleben, "Institutionalized Algorithmic Enforcement – The Pros and Cons of the EU Approach to Online Platform Liability", *Florida International University Law Review* 14 (2020), 299 (301-302).

[116] See the definition in Article 2(6) CDSMD.

[117] Article 17(1) CDSMD. For a more detailed discussion of the question whether this right of communication and making available to the public constitutes a new right that operates outside the framework of Article 3 ISD, see Martin Husovec and João Pedro Quintais, "How to License Article 17? Exploring the Implementation Options for the New EU Rules on Content-Sharing Platforms under the Copyright in the Digital Single Market Directive", *Gewerblicher Rechtsschutz und Urheberrecht – International* 70 (2021), 325 (325-48). For the general qualification of on-demand streaming as a relevant act of "making available to the public", however, the relation between the exclusive rights granted in Article 17(1) CDSMD and Article 3 ISD does not seem decisive.

[118] Cf. Martin Senftleben, "Institutionalized Algorithmic Enforcement – The Pros and Cons of the EU Approach to Online Platform Liability", *Florida International University Law Review* 14 (2020), 299 (308-12); Axel Metzger and Martin Senftleben, "Understanding Article 17 of the EU Directive on Copyright in the Digital Single Market – Central Features of the New Regulatory Approach to Online Content-Sharing Platforms", *Journal of the Copyright Society of the U.S.A.* 67 (2020), 279 (284-86); Niva Elkin-Koren, "Fair Use by Design", *UCLA Law Review* 64 (2017), 1082 (1093); Martin Husovec, "The Promises of Algorithmic Copyright Enforcement: Takedown or Staydown? Which Is Superior? And Why?", *Columbia Journal of Law and the Arts* 42 (2018), 53 (76-84); Martin Senftleben, "Breathing Space for Cloud-Based Business Models: Exploring the

> obtain an authorisation from the right holders referred to in Article 3(1) and (2) of Directive 2001/29/EC, for instance by concluding a licensing agreement, in order to communicate to the public or make available to the public works or other subject matter.[119]

Accordingly, it no longer matters whether an OCSSP has knowledge of infringement, encourages infringing uploads or fails to promptly remove infringing content after receiving a notification. Instead, the platform provider is directly and primarily liable for infringing content that arrives at the platform. By clarifying that OCSSP activities amount to an act of communication to the public or making available to the public, Article 17(1) CDSMD collapses the traditional distinction between primary liability of users who upload infringing content, and secondary liability of online platforms which encourage or contribute to infringing activities.

In this way, EU legislation seeks to incentivize rights clearance initiatives as one of the measures to safeguard "fair remuneration of creators in their relations with other parties using their content, including online platforms".[120] As already indicated, Article 17 CDSMD was prompted by complaints from right holders who argued that due to the traditional liability shield for hosting services, they were unable to monetize the sharing of protected content on UGC platforms like YouTube.[121] In addition, they advanced the argument that fully licensed platforms, such as Spotify and Netflix, would pay lower licensing fees to stay competitive with UGC platforms.[122]

Matrix of Copyright Limitations, Safe Harbours and Injunctions", *Journal of Intellectual Property, Information Technology and Electronic Commerce Law* 4 (2013), 87; Miquel Peguera, "The DMCA Safe Harbour and Their European Counterparts: A Comparative Analysis of Some Common Problems", *Columbia Journal of Law and the Arts* 32 (2009), 481.

[119] Article 17(1) CDSMD.

[120] European Commission, Communication to the European Parliament, the Council, and the Economic and Social Committee, and the Committee of the Regions, *Online platforms and the digital single market: Opportunities and challenges for Europe* (COM(2016) 288 Final, 25 May 2016), para. 5.II. See also European Commission, Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *A digital single market strategy for Europe* (COM(2015) 192 final, 6 May 2015), para. 2.4.

[121] Giancarlo Frosio, "Reforming the C-DSM Reform: A User-Based Copyright Theory for Commonplace Creativity", *IIC* 51 (2020) 709 (715).

[122] Outlining and highlighting the critique of this line of argument for its lack of robust empirical evidence, see Frosio, id., with further references to Martin Husovec, "EC proposes stay-down & expanded obligation to license UGC services" [Blog post], *Hut'ko's Technology Law Blog*, 1 September 2016, available at: http://www.husovec.eu/2016/09/ec-proposes-stay-downexpanded.htm (accessed July 2024).

Addressing these concerns, Article 17 CDSMD now obliges the platform provider to obtain a license to reduce the liability risk. In practice, this regulatory approach leads to the application of an amalgam of licensing and filtering obligations.[123] If an OCSSP does not manage to conclude sufficiently broad licensing agreements with right holders in line with Article 17(1) and (4)(a) CDSMD, Article 17(4)(b) and (c) CDSMD offers the prospect of a reduction of the liability risk in exchange for content filtering. The OCSSP can avoid liability for unauthorized acts of communication to the public or making available to the public when it manages to demonstrate that it:

> made, in accordance with high industry standards of professional diligence, best efforts to ensure the unavailability of specific works and other subject matter for which the right holders have provided the service providers with the relevant and necessary information [...].[124]

Although the provision contains neutral terms to describe this scenario, there can be little doubt in which way the "unavailability of specific works and other subject matter" can be achieved: the use of algorithmic filtering tools seems inescapable.[125] At the same time, the notification mechanism established in Article 17(4)(b) introduces a central element of industry cooperation. The content licensing and filtering system relies on a joint effort of the creative industry and the UGC streaming industry. To set the filtering machinery in motion, copyright holders in the creative industry must first notify "relevant and necessary information"[126] with regard to those works which they want to ban from user uploads. Once relevant and necessary information on protected works is received, the OCSSP is obliged to include that information in the content moderation process and ensure the

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[123] Martin Senftleben, "Bermuda Triangle: Licensing, Filtering and Privileging User-Generated Content Under the New Directive on Copyright in the Digital Single Market", *European Intellectual Property Review* 41 (2019), 480 (481-85); Martin Husovec and João Pedro Quintais, "How to License Article 17? Exploring the Implementation Options for the New EU Rules on Content-Sharing Platforms under the Copyright in the Digital Single Market Directive", *Gewerblicher Rechtsschutz und Urheberrecht – International* 70 (2021), 325; Matthias Leistner, "European Copyright Licensing and Infringement Liability Under Art. 17 DSM-Directive Compared to Secondary Liability of Content Platforms in the U.S. – Can We Make the New European System a Global Opportunity Instead of a Local Challenge?", *Zeitschrift für Geistiges Eigentum/Intellectual Property Journal* 12 (2020), 123 (123-214); Christophe Geiger and Bernd Justin Jütte, "Towards a Virtuous Legal Framework for Content Moderation by Digital Platforms in the EU? The Commission's Guidance on Article 17 CDSM Directive in the light of the YouTube/Cyando judgement and the AG's Opinion in C-401/19", *European International Property Review* 43 (2021), 625 (625-35).

[124] Article 17(4)(b) CDSMD.

[125] See CJEU, 26 April 2022, case C-401/19, *Poland v. Parliament and Council*, para. 53, where this assumption has been confirmed. For a critique of this regulatory design, see Martin Senftleben, "The Original Sin – Content 'Moderation' (Censorship) in the EU", *Gewerblicher Rechtsschutz und Urheberrecht – International* 69 (2020), 339 (339-40).

[126] Article 17(4)(b) CDSMD.

unavailability[127] of content uploads that contain traces of the protected works. As in the case of fully licensed streaming services, industry negotiations – the streaming industry on the one hand, owners of large content repertoire on the other – thus constitute a central element of the regulatory design and the rights clearance architecture.

Traditionally, collecting societies have a strong position in the EU. As they have far-reaching mandates to administer the rights of copyright and related rights holders, they may also be important partners in the development of licensing solutions for UGC. However, the collecting society landscape is highly fragmented in the EU. The UGC deal available in one Member State may remain limited to the territory of that Member State. Pan-European licenses are the exception, not the rule. If a collecting society offers pan-European licenses for digital use, these licenses will be confined to the specific repertoire, in respect of which the collecting society has a cross-border entitlement.[128]

Against this background, UGC platforms may find it more attractive to obtain licenses directly from copyright holders in the creative industry which can offer a substantially broader and less fragmented territorial scope. Under that scenario, remuneration mechanisms of copyright contract law reviewed above in relation to fully licensed platforms become equally relevant to authors and performers seeking to obtain an appropriate share of the remuneration paid by UGC streaming platforms, such as YouTube. Once platforms seek licenses from the creative industry, copyright contract law norms are activated, providing creators with the same remuneration mechanisms for the use of their works on UGC platforms as those discussed earlier for fully licensed platforms.[129]

2.1.3 Efficacy of Mandatory Copyright Contract Law

Despite all efforts to strengthen the position of creators in their contractual relationship with producers in the content industry, the described rights clearance model – the streaming industry concluding licensing deals with

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[127] Id.

[128] For a detailed analysis of current EU rights clearance challenges in the digital environment, see Sebastian Felix Schwemer, *Licensing and Access to Content in the European Union – Regulation Between Copyright and Competition Law* (Cambridge: Cambridge University Press, 2019). As to previous cases triggered by the rights clearance infrastructure in the EU, see European Commission, "Summary of Commission Decision of 16 July 2008 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case COMP/C-2/38.698 — CISAC)", OJ 2008 C 323, 12; European Commission, 18 May 2005, "Commission Recommendation on Collective Cross-Border Management of Copyright and Related Rights for Legitimate Online Music Services (2005/737/EC)", OJ 2005 L 276, 54. Cf. Kamiel Koelman, "Op naar de Euro-Buma(s): de Aanbeveling van de Europese Commissie over grensoverschrijdend collectief rechtenbeheer", *Tijdschrift voor auteurs-, media- en informatierecht* (2005), 191.

[129] See Section 2.1.1 above.

the content industry – poses particular difficulties from a creator remuneration perspective. Instead of ensuring that creators directly receive a fair share of streaming revenue, the streaming industry pays licensing fees to the content industry and creators must then find ways of claiming a fair share of the streaming revenue for themselves. The aforementioned rules of copyright contract law function as correction tools in this context. However, they do not change the dependence of creators on the willingness of the content industry to share streaming royalties.

Experiences with German and Dutch precursors of copyright contract rules that have been harmonized in the CDSM Directive show that, very often, the general right to fair remuneration and the contract adjustment mechanism in particular remain a dead letter in practice.[130] First, creators refrain from invoking these copyright contract rights because they fear "blacklisting" in the creative community in which they are active. Insisting on the right to fair remuneration and bringing a case against exploiters of their works and performances, they may win a Pyrrhus victory. As a result of the individual case they have won, they may finally receive a fair share of licensing revenue with regard to past productions. However, they may never be asked to contribute to new productions. Facing a relatively small circle of investors and producers, this risk of blacklisting must be taken seriously. A creator asserting copyright contract rights can easily become a *persona non grata* with whom exploiters do not want to work because of past disputes about insufficient remuneration.[131] Admittedly, anonymous enforcement of copyright contract law may sometimes remedy this situation.[132] It has been suggested, for example, that Article 20(1) CDSMD permits class actions in which creators can be represented anonymously. Following this line of argument, Article 20(1) allows for a contract adjustment claim to be brought by representatives of creators. Recital 78

[130] Martin Senftleben, "More Money for Creators and More Support for Copyright in Society – Fair Remuneration Rights in Germany and the Netherlands", *Columbia Journal of Law and the Arts* 41 (2018), 413 (413-33); Stef J. van Gompel, P. Bernt Hugenholtz, Joost P. Poort, Luna D. Schumacher and Dirk J.G. Visser, *Evaluatie Wet Auteurscontractenrecht. Eindrapport* (2020); P. Bernt Hugenholtz, "Regulating creator's contracts under the DSM Directive. What we can learn from the Dutch", *NIR* 4 (2022), 467 (474-76).

[131] Cf. Stef J. van Gompel, P. Bernt Hugenholtz, Joost P. Poort, Luna D. Schumacher and Dirk J.G. Visser, *Evaluatie Wet Auteurscontractenrecht. Eindrapport* (2020); Martin Senftleben, "More Money for Creators and More Support for Copyright in Society – Fair Remuneration Rights in Germany and the Netherlands", *Columbia Journal of Law and the Arts* 41 (2018), 413 (429). See also, more recently, explaining the creators' "widespread reluctance to engage in contentious interactions with theor contractual counterpart" by the fear of being perceived as "confrontational" or "obstructive", Daniel Johansson, *Streams & Dreams Part 2 – The Impact of the DSM Directive on EU Artists and Musicians* (International Artist Organisation, 2024), 26.

[132] P. Bernt Hugenholtz, "Regulating creator's contracts under the DSM Directive. What we can learn from the Dutch", *NIR* 4 (2022), 467 (472, 476).

CDSMD adds that those representatives "should protect the identity of the represented authors and performers for as long as that is possible."[133]

However, there is yet another obstacle to the full effectiveness of copyright contract law. It must not be overlooked that creators invoking the fair remuneration rights following from Articles 18(1) and 20(1) CDSMD carry the burden of proving that the contractually agreed remuneration is insufficient. In practice, this means that they must demonstrate that the contractually agreed remuneration cannot be regarded as appropriate and proportionate in the sense of Recital 73 CDSMD. In the absence of a clear benchmark and reference point, this burden of proof can pose substantial difficulties. Exploitation contracts in the creative industry may depend on the individual circumstances of the artistic production at issue. The remuneration for creators involved in a project may moreover depend on the specific contribution, success and popularity of the creator. Not surprisingly, Recital 73 CDSMD reflects the need to take into account "the author's or performer's contribution to the overall work or other subject matter and all other circumstances of the case, such as market practices or the actual exploitation of the work."

By contrast to the general right of fair remuneration and the *ex post* contract adjustment mechanism, the situation is reportedly somewhat better in the area of revocation rights. As demonstrated by a 2020 study on the impact and effectiveness of a revocation right introduced into Dutch law in 2015, creators often avail themselves of the revocation option, particularly in the music industry where record labels typically hold extensive collections of songs, many of which are no longer actively marketed or used.[134] However, the study also pointed out that the exercise of the revocation right can remain difficult as long as it is unclear what constitutes sufficient exploitation of a work in the streaming environment. As content can be made available instantly and remain accessible online without any cost, it can be challenging to demonstrate non-use.[135] The study suggests that the permanent findability and promotion of works on digital platforms should be taken into account when evaluating exploitation efforts.[136] These assessment factors, however, have not been established by the EU legislator. Guidance from the European Commission is also sought in vain. As a result, the effectiveness of the right of revocation in its specific application to online streaming remains unclear.[137]

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[133] Id., 472.
[134] Id., 476, with further references to Stef J. van Gompel, P. Bernt Hugenholtz, Joost P. Poort, Luna D. Schumacher and Dirk J.G. Visser, *Evaluatie Wet Auteurscontractenrecht. Eindrapport* (2020).
[135] Id.
[136] Id.
[137] See also in this sense Daniel Johansson, *Streams & Dreams Part 2 – The Impact of the DSM Directive on EU Artists and Musicians* (International Artist Organisation, 2024), 46.

In sum, it can be concluded that, while certain mandatory norms of copyright contract law can be invoked to ensure a fair remuneration of authors and performers for use on online streaming platforms, the effectiveness of these mechanisms may remain limited in practice. In fact, a recent study on the effect of the CDSMD's copyright contract rules on the remuneration which EU performers and musicians receive from online music streaming platforms concludes that the new provisions have had little to no positive impact so far.[138] As the study demonstrates, nearly five years after the CDSMD was adopted, 87.6 percent of creators believe that the distribution of streaming revenue remains unfair.[139] 64.7 percent of signed creators still lack clear information on exploitation results from labels even though Article 19 CDSMD gives them the right to insist on transparency in this regard.[140] Only 4.1 percent of creators have tried, since the implementation of the CDSM Directive into national law, to renegotiate their contract terms to secure an additional remuneration, as envisioned in Article 20 CDSMD[141] (with 36.4 percent out of those succeeding).[142] Less than 6 percent of creators have attempted to revoke their rights in line with Article 22 CDSMD.[143]

In the light of these results, it seems important to go beyond mandatory copyright contract law and explore alternative legal mechanisms that could ensure that creators are fairly remunerated for the online streaming of their works and performances.

2.2 Mandatory Collective Licensing

As an alternative to individual contractual agreements and copyright contract law as a tool to ensure fair remuneration, mandatory collective licensing can play an important role in the streaming ecosystem. At the international level, collective management as a mechanism for ensuring fair remuneration for creators was emphasized, among other aspects, in GRULAC's WIPO Proposal for Analysis of Copyright Related to the Digital Environment mentioned above.[144] At EU level, Articles 19(5) and (6), 20, 22(5) and Recital 78 CDSMD reflect the option of including collective licensing mechanisms in legislation seeking to ensure appropriate and proportionate remuneration. This decision at EU level confirms that mandatory collective licensing constitutes an avenue that must not be overlooked in the remuneration debate.

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[138] Daniel Johansson, *Streams & Dreams Part 2 – The Impact of the DSM Directive on EU Artists and Musicians* (International Artist Organisation, 2024).
[139] Id., 20.
[140] Id., 21.
[141] Id., 27.
[142] Id.
[143] Id., 30.
[144] Id., para. 8.

As discussed above, Article 8(2) RLRD already provides for a right to a single equitable remuneration for the use of phonograms for broadcasting or public communication that is to be shared between the relevant performers and phonogram producers.[145] With regard to the role of this provision in the music sector, arguments have been developed to extend the field of application of this statutory remuneration rule to certain aspects of streaming services.[146] Spotify's offer of pre-determined playlists, for instance, could potentially be deemed comparable with traditional phonogram broadcasts to such an extent that they may trigger a payment obligation under Article 8(2) RLRD and an opportunity for collecting societies administering the equitable remuneration right to collect money from the streaming service.[147]

Interestingly, a similar tendency of recourse to mandatory collective licensing has led to the introduction of so-called "residual" remuneration rights that, unlike Article 8(2) RLRD, do not substitute an exclusive right by a remuneration right (or, as it is also referred to sometimes, a liability rule[148]), but co-exist with it as an unwaivable remuneration component.[149] This remuneration mechanism is called "residual" or "additional" because it applies *in addition to* any other compensation agreed upon by authors and performers when transferring their economic rights to producers in exploitation contracts.[150] Residual remuneration rights are typically

[145] See also, at the international level, Article 12 of the 1961 Rome Convention on neighbouring rights and Article 15(1) of the WIPO Performances and Phonograms Treaty (WPPT).

[146] P. Bernt Hugenholtz, "Is Spotify the New Radio? The Scope of the Right to Remuneration for 'Secondary Uses' in Respect of Audio Streaming Services", in: V. Fischer, G. Nolte, M. Senftleben, and L. Specht-Riemenschneider (eds.), *Gestaltung der Informationsrechtsordnung: Festschrift für Thomas Dreier zum 65. Geburtstag* (C.H. Beck, 2022), p. 161.

[147] Id.

[148] Guido Calabresi and A. Douglas Melamed, "Property Rules, Liability Rules, and Inalienability: One View of the Cathedral", *Harvard Law Review* 85 (1972), 1089. See also, more recently, Mark A. Lemley and Philip J. Weiser, "Should Property or Liability Rules Govern Information?", *Texas Law Review* 85 (2007) 783.

[149] Raquel Xalabarder Plantada, "The Principle of Appropriate and Proportionate Remuneration for Authors and Performers in Art.18 Copyright in the Digital Single Market Directive. Statutory residual remuneration rights for its effective national implementation", *InDret* 4 (2020), 1, available at: https://indret.com/wp-content/uploads/2020/10/1591.pdf (accessed July 2024), 36; Raquel Xalabarder Plantada, "The equitable remuneration of audiovisual authors: A proposal of unwaivable remuneration rights under collective management", *R.I.D.A.* 256 (2018), 56.

[150] For an extensive discussion of the nature of residual remuneration rights, see Raquel Xalabarder Plantada, *International legal study on implementing an unwaivable right of audiovisual authors to obtain equitable remuneration for the exploitation of their works*, May 2018, available at: https://www.cisac.org/sites/main/files/files/2020-11/AV%2BRemuneration%2BStudy-EN.pdf (accessed July 2024), 45-46. See also Raquel Xalabarder Plantada, "The Principle of Appropriate and Proportionate Remuneration for Authors and Performers in Art.18 Copyright in the Digital Single Market Directive. Statutory residual remuneration rights for

non-waivable and non-transferable and are enforced through mandatory collective rights management.[151] At EU level, a prototype of this right to fair remuneration can be found in Article 5 RLRD, which provides for an unwaivable "right to obtain an equitable remuneration for the rental" that "may be entrusted to collecting societies" and that is retained by the author or performer who has transferred or assigned their rental right concerning a phonogram or an original or copy of a film to a phonogram or film producer.[152]

At the national level, Spain has long provided for such an unwaivable, collectively administered residual remuneration right in the area of video on demand (VOD) services.[153] Analogous long-standing remuneration mechanisms for authors and performers via residual remuneration rights also exist in Italy[154] and Poland.[155] More recently, Belgium introduced a similar residual remuneration right for both the film and music sector in relation to fully licensed streaming platforms and UGC platforms alike,[156] and Germany introduced such a right in relation to the use of copyrighted material on UGC streaming platforms only.[157] In all of these countries, domestic legislation states that the streaming of audiovisual and/or music content triggers an obligation to pay equitable remuneration. Authors and performers can only exercise this remuneration right via a collecting society.[158] These developments give rise to the question whether the

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its effective national implementation", *InDret* 4 (2020), 1 (36) available at: https://indret.com/wp-content/uploads/2020/10/1591.pdf (accessed July 2024); and Raquel Xalabarder Plantada, "The equitable remuneration of audiovisual authors: A proposal of unwaivable remuneration rights under collective management", *R.I.D.A.* 256 (2018), 56.

[151] Id.

[152] Article 5(1)-(3) RLRD.

[153] Articles 88, 90(4),(6),(7) and 108(3),(6) TRLPI.

[154] Article 46bis-2 of the Italian Law No. 633 on the Protection of Copyright and Neighboring Rights of 22 April 1941 (as amended up to Law No. 142 of 21 September 2022).

[155] Article 95.1 of the Polish Act on Copyright and Related Rights of 4 February 1994 (amended up to Act of 11 March 2022).

[156] Articles XI.228/4 and XI.228/11 of Law transposing Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the digital single market and amending Directives 96/9/EC and 2001/29/EC, 19 June 2022, available at : https://www.ejustice.just.fgov.be/cgi/article_body.pl?language=fr&pub_date=2022-08-01&caller=list&numac=2022015053 (accessed July 2024).

[157] Section 4 of the Act on the Copyright Liability of Online Content Sharing Service Providers of 31 May 2021 (UrhDaG or OCSSP Act 2021), Federal Law Gazette I, p. 1204, 1215, available (in English translation by the Federal Ministry of Justice) at: https://www.gesetze-im-internet.de/englisch_urhdag/englisch_urhdag.html (accessed July 2024).

[158] This is with the exception of Italy, where the law does not formally require mandatory collective management for the exercise of residual remuneration rights, although, in practice, these rights are anyway managed on a collective basis by local society SIAE. See CISAC, "Italian's audiovisual sector: fair remuneration and economic growth", available at: https://www.google.nl/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&v

introduction of residual remuneration rights, subject to mandatory collective management, can ensure that authors and performers receive a fair remuneration for the use of their works and performances on streaming platforms.

2.2.1 Residual Remuneration Rights on Fully Licensed Platforms: Spanish and Belgian Examples

With regard to fully licensed audiovisual streaming services, such as Netflix, the Spanish Intellectual Property Act (TRLPI) grants, as mentioned, authors and performers with additional, mandatorily collectively administered remuneration rights for the making available online of their audiovisual works in on-demand format.[159]

As observed by some commentators, the implementation of this model, where fair remuneration rights are retained by creators upon the transfer of their copyright and related rights, collectively administered and cannot be waived, has demonstrated practical effectiveness when contrasted with efforts to achieve similar goals through mandatory individual copyright contract law, particularly in Member States with a robust tradition of collective rights management.[160] It thus offers a functioning statutory alternative to royalties set by individual, collective or other agreements.[161]

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[159] Articles 90(4),(6),(7) and 108(3),(6) TRLPI.

[160] Matthias Leistner, "The Implementation of Art. 17 DSM Directive in Germany – A Primer with Some Comparative Remarks", *GRUR International* 71 (2022), 909 (913); Raquel Xalabarder Plantada, "The Principle of Appropriate and Proportionate Remuneration for Authors and Performers in Art.18 Copyright in the Digital Single Market Directive. Statutory residual remuneration rights for its effective national implementation", *InDret* 4 (2020), 1 (35), available at: https://indret.com/wp-content/uploads/2020/10/1591.pdf (accessed July 2024). See also, observing that such a solution "would require a high level of efficiency and transparency of CMOs, in compliance with the collective Management Directive, to mitigate the possible cost of collective management", The European Copyright Society, "Comment of the European Copyright Society Addressing Selected Aspects of the Implementation of Articles 18 to 22 of the Directive (EU) 2019/790 on Copyright in the Digital Single Market", *JIPITEC* 11 (2020), 133 (142, note 32).

[161] Raquel Xalabarder Plantada, "The Principle of Appropriate and Proportionate Remuneration for Authors and Performers in Art.18 Copyright in the Digital Single Market Directive. Statutory residual remuneration rights for its effective national implementation", *InDret* 4 (2020), 1 (28), available at: https://indret.com/wp-content/uploads/2020/10/1591.pdf (accessed July 2024). Likewise arguing in favour of a residual remuneration rights solution for the exploitation of creators' works on on-demand streaming platforms, see Séverine Dusollier, "Ensuring a Fair Remuneration to Authors and Performers in Music Streaming", *Revue des Juristes de Scienc.es Po* 25 (2024), 34.

While Spain had already incorporated a residual remuneration right into its legal system long before the adoption of the CDSM Directive, the transposition of the 2019 Directive into Belgian law lead to the introduction of such a right for authors and performers of both musical and audiovisual works. The Law of 19 June 2022[162] grants two residual remuneration rights for the use of works and performances on streaming platforms: one with respect to UGC streaming platforms;[163] one with respect to fully licensed services. The latter right was introduced by Article 62 of the Law of 19 June 2022, which added a new Article XI.228/11 to the Belgian Code of Economic Law. According to this provision, if an author or performer of a sound or audiovisual work has assigned their right to authorize or prohibit the communication to the public, including making available to the public, by an information society service provider whose primary objective or one of the main objectives is the profit-oriented offering of a significant quantity of sound and/or audiovisual works, to a producer, they still retain the right to receive remuneration for such communication by the said information society service provider.[164]

Similar to the Spanish model, the Belgian legislator made this residual remuneration right for authors and performers mandatory,[165] non-transferable and non-waivable.[166] The remuneration right is also subject to mandatory collective rights management[167] unless there already exists a collective agreement that offers authors and performers fair remuneration.[168]

2.2.2 Residual Remuneration Rights on UGC Platforms: Belgian and German Examples

In addition to introducing the described residual remuneration right in relation to fully licensed on-demand services, Belgium included in its Code of Economic Law Article XI.228/4 (introduced by Article 54 of the Law of 19 June 2022) which specifically deals with use on UGC platforms in the sense of Article 17 CDSMD.[169] If authors or performers assign the right to make their works or performances available to the public via an OCSSP platform, Article XI.228/4 ensures that they retain the right to receive remuneration for such use.[170] Just like the other residual remuneration right

[162] Law transposing Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the digital single market and amending Directives 96/9/EC and 2001/29/EC, 19 June 2022, available at: https://www.ejustice.just.fgov.be/cgi/article_body.pl?language=fr&pub_date=2022-08-01&caller=list&numac=2022015053 (accessed July 2024).
[163] Discussed below in Section 2.2.2.
[164] Article XI.228/11(1) of the Code of Economic Law.
[165] Article XI.228/11(4) of the Code of Economic Law.
[166] Article XI.228/11(2) of the Code of Economic Law.
[167] Article XI.228/11(3) of the Code of Economic Law.
[168] Id.
[169] Article 54 of the Law of 19 June 2022.
[170] Article XI.228/4(1) of the Code of Economic Law.

for the use on fully licensed platforms, this residual remuneration right is mandatory,[171] non-transferable, non-waivable,[172] and subject to mandatory collective rights management.[173]

In addition to Belgium, Germany also introduced a residual remuneration right for use on UGC platforms when transposing Article 17 CDSMD into national law. However, unlike Belgium, Germany focused on a mandatory collective licensing solution specifically for content shared on UGC platforms. The German legislation does not contain a corresponding provision dealing with fully licensed streaming services.

The German residual remuneration right followed from the Act on the Copyright Liability of Online Content Sharing Service Providers of 31 May 2021 (UrhDaG or OCSSP Act 2021).[174] Pursuant to Section 4(1)-(2) of this Act, service providers that manifestly communicate to the public content "in more than minor quantities" are "obliged to undertake their best efforts to acquire the contractual rights of use for the communication to the public of copyright-protected works."[175] Importantly, paragraph 3 of Section 4 then goes on to provide the authors who have granted a third party the right of communication to the public of their works with an additional right to "appropriate remuneration". This residual entitlement of authors to direct remuneration is non-waivable and may only be exercised via a collecting society.[176]

The residual right to fair remuneration laid down in Section 4 is limited to cases where the third party to whom the author has given the right of communication to the public is not a collecting society or a "digital distributor".[177] As Matthias Leistner observes, this limitation is expected to significantly mitigate the practical implications of this residual remuneration right in certain sectors where the management of relevant OCSSP rights is largely overseen by collecting societies, such as in the case

[171] Article XI.228/4(4) of the Code of Economic Law.
[172] Article XI.228/4(2) of the Code of Economic Law.
[173] Article XI.228/4(3) of the Code of Economic Law.
[174] Act on the Copyright Liability of Online Content Sharing Service Providers of 31 May 2021 (UrhDaG or OCSSP Act 2021), Federal Law Gazette I, p. 1204, 1215, available (in English translation by the Federal Ministry of Justice) at: https://www.gesetze-im-internet.de/englisch_urhdag/englisch_urhdag.html (accessed July 2024). For a detailed analysis of Germany's model of national implementation of Article 17 CDSMD, see Matthias Leistner, "The Implementation of Art. 17 DSM Directive in Germany – A Primer with Some Comparative Remarks", *GRUR International* 71 (2022), 909.
[175] Section 4(1) OCSSP Act 2021.
[176] Section 4(4) OCSSP Act 2021.
[177] Section 4(3) OCSSP Act 2021. The term "digital distributor" seems to refer to a service provider that helps creators manage their digital exploitation contracts without directly exploiting the rights granted to them. See Matthias Leistner, "The Implementation of Art. 17 DSM Directive in Germany – A Primer with Some Comparative Remarks", *GRUR International* 71 (2022), 909 (914).

of composers and musicians represented respectively by GEMA and GVL.[178] In these instances, the relevance of the claim is expected to be very limited.[179] However, significant opportunities for invoking the residual remuneration right may still exist on the market for royalty-free music and music featured in computer games, which currently operate outside the sphere of collecting societies.[180] According to Leistner, the non-contractual remuneration right might afford collecting societies the opportunity to establish an independent supplementary income stream for authors and performers in these domains, without significantly disrupting established contract-based market dynamics.[181] Outside the music sector, authors of visual works could also benefit from the introduction of the residual remuneration right, contingent upon relevant collecting societies effectively integrating the management of this right into their operations.[182]

2.2.3 Permissibility of Residual Remuneration Rights under EU Law

Residual remuneration rights are contested. In Spain, for example, the argument has been made that residual remuneration rights are illegitimate because they amount to de facto paying twice for the same content.[183] However, Spanish courts have rejected this argument, affirming that statutory remuneration rights for performers making their performances available online comply with EU and international law without constituting "double payment".[184] Regarding the conformity of residual remuneration rights with international copyright treaties, it has been noted in Spain that international agreements do not prohibit national legislators from enacting such rights, provided these rights do not replace an exclusive right but, instead, compensate for its exercise (transfer and exploitation).[185]

A more recent wave of objections emerged with the introduction of residual remuneration rights in Belgium. In early 2023, Google, Spotify, Meta, Sony, and the local Belgian audiovisual streaming service Streamz challenged both Belgian residual remuneration rights – the right concerning UGC platforms (Article XI.228/4) and the right relating to fully licensed services

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[178] Id., 913.
[179] Id.
[180] Id.
Id.
[181] Id., 913-14.
[182] Id., 914.
[183] Raquel Xalabarder Plantada, "The Principle of Appropriate and Proportionate Remuneration for Authors and Performers in Art.18 Copyright in the Digital Single Market Directive. Statutory residual remuneration rights for its effective national implementation", *InDret* 4 (2020), 1 (36, with further case-law references), available at: https://indret.com/wp-content/uploads/2020/10/1591.pdf (accessed July 2024).
[184] Id.
[185] Id., 28.

(Article XI.228/11) – before the country's Constitutional Court.[186] The plaintiffs argue, among other things, that these provisions lack any basis in EU law (including Articles 18 and 17 CDSMD), create a high risk of double payment, impermissibly partition the rights of communication and making available under Article 3 ISD, run contrary to the freedom to provide services under Article 56 TFEU, are inefficient in achieving the goal of improving the remuneration of authors and performers, and, finally, violate several fundamental rights, among which the freedom to conduct a business features particularly prominently.

Concerning the potential grounding of both remuneration rights in Article 18 CDSMD, the plaintiffs contend that this provision does not establish any general principle of remuneration outside the contractual sphere.[187] According to them, Article 18 CDSMD only applies to direct contractual relationships between authors and performers and their contracting parties (such as record labels or producers), and therefore cannot be extended to cover extra-contractual relationships between online platforms on the one hand and authors/performers on the other.[188] It is also argued that Article 18 CDSMD precludes legislation resulting in double payment,[189] whereas, according to the plaintiffs, both contested residual remuneration rights create a significant risk of such over-payment.[190] More specifically, the plaintiffs point out that, due to residual remuneration rights, authors and performers could receive two streams of payment for the same exploitation: contractual remuneration, which must already be "appropriate and proportionate" pursuant to Article 18 CDSMD, and extra-contractual remuneration, paid in addition to what is provided contractually.[191]

Regarding the remuneration right introduced for UGC platforms such as YouTube, and the potential grounding of this right in Article 17 CDSMD, the plaintiffs argue that this provision constitutes a measure of maximum harmonization and, as such, does not permit the introduction of additional rules, such as a special right benefiting authors and performers.[192] This was reportedly also the position of the European Commission during the drafting stage of the Belgian legislation, where the Commission services concluded that Article 17 does not allow Member States to introduce a

[186] Belgian Constitutional Court, judgment no. 98/2024, 26 September 2024, available (in French) at: https://www.const-court.be/public/f/2024/2024-098f.pdf (accessed September 2024).
[187] Id., para. A.35.1.2.
[188] Id., paras. A.35.1.2, A.39.4, A.48.6, A.69.1.
[189] Id., para. A.69.3.
[190] Id., paras. A.35.2.3, A.41.2.3, A.69.2.
[191] Id., paras. A.41.2.3, A.69.3, A.71.2.1.
[192] Id., paras. A.35.1.1, A.79.1. Arguing among the same lines, see also an academic opinion authored at the request of the plaintiffs: Eleonora Rosati, "Assessment of the Belgian additional remuneration rights for authors and performers (Articles 54 and 62 of the Law of 19 June 2022) in light of EU law", *European Intellectual Property Review* 46(3) (2024), 142 (144).

remuneration right on online streaming platforms of the type eventually implemented in Belgium.[193]

The plaintiffs argue, further, that the residual remuneration right for uses by fully licensed streaming services such as Netflix and Spotify unduly divides the scope of the exclusive right in Article 3 ISD into (1) a right to authorize and, correspondingly, prohibit on the one hand, and (2) a right to remuneration on the other.[194] According to the plaintiffs, however, these two rights are intrinsically linked and cannot be separated.[195] The plaintiffs further observe that the contested remuneration right does not fall within the scope of any of the permissible exceptions and limitations listed in Article 5(3) ISD[196] (which, somewhat surprisingly, they believe it should).

Yet another ground relied upon by the plaintiffs is that the remuneration rights interfere with the freedom to provide services under Article 56 TFEU without sufficient justification as, pursuant to the plaintiffs, residual remuneration rights fail to achieve the objective of improving the remuneration situation of authors and performers.[197] By contrast, according to the plaintiffs, the new residual remuneration rights even weaken the bargaining position of creators: since they can no longer assign their remuneration rights, holders of derivative rights are likely to reduce their royalty payments, given the limited scope of authors' and performers' rights.[198] In addition, the introduction of residual remuneration rights creates, according to the plaintiffs, uncertainty in the price discussions between holders of derivative rights and streaming providers, which may result in lower overall payments.[199] It is also asserted that the *travaux préparatoires* of the Law of 19 June 2022 that transposed the CDSM Directive into Belgian legislation do not reference any expert studies or other foundations supporting the necessity of creating residual remuneration rights to ensure appropriate remuneration.[200]

Finally, the plaintiffs invoke several fundamental rights in the Charter of Fundamental Rights of the EU ("CFR")[201] to contest both residual remuneration rights. More specifically, they argue that the contested residual remuneration rights violate the freedom to conduct a business in Article 16 CFR by requiring streaming platforms and services to enter into

[193] Belgian Constitutional Court, id., paras. A.37.1, B.42.3.
[194] Id., paras. A.79.1, A.35.1.3.
[195] Id., para. A.35.1.3.
[196] Id., para. A.48.3.
[197] Id., paras. A.71.2.1, A.87.1.
[198] Id., para. A.43.2.
[199] Id., paras. A.43.2, A.81.2.
[200] Id., para. A.83.1.
[201] Charter of Fundamental Rights of the European Union, *Official Journal of the European Communities* 2000 C 364, 1.

two agreements, rather than one, for the same right.[202] The first agreement is with the holders of derivative rights, to whom the authors and performers have assigned their right of communication or making available to the public.[203] The second agreement is with collective management organizations representing authors and performers, covering these new inalienable and non-transferable remuneration rights.[204] As a result, pursuant to the plaintiffs, UGC platforms and fully licensed streaming services face increased transaction costs and uncertainty, requiring measures with significant administrative and financial impacts – circumstances that, in the plaintiffs' opinion, contradict the essence of the freedom to conduct a business.[205]

The plaintiffs also advance the claims of equality of treatment and non-discrimination under Articles 20 and 21 CFR, arguing that the new Belgian legislation treats service providers differently, so that one category remains able to conclude cross-border contracts without restrictions, while another category, specifically streaming platforms covered by Belgian law, is no longer able to do so.[206]

On 26 September 2024, the Belgian Constitutional Court stayed the proceedings in this case and referred the above issues to the CJEU in ten prejudicial questions.[207] Whereas it remains to be seen how the CJEU will assess the arguments advanced by the plaintiffs, it is already clear that the judgment will not be an easy one. This is partly because several third parties who intervened in the proceedings before the Belgian Constitutional Court submitted valid observations that counter each of the plaintiffs' arguments against residual remuneration rights.

The interveners argue, in particular, that Article 17 CDSMD cannot be considered a measure of maximum harmonization with regard to issues it does not regulate, such as the arrangements for negotiating, concluding, and obtaining authorisations by OCSSPs.[208] Furthermore, they state that, in any case, the basis of the Belgian right to remuneration for use on UGC platforms is not Article 17, but Article 18 CDSMD.[209] The latter provision – in this view serving as the legal foundation for the residual remuneration

[202] Belgian Constitutional Court, judgment no. 98/2024, 26 September 2024, available (in French) at: https://www.const-court.be/public/f/2024/2024-098f.pdf (accessed September 2024), para. A.41.1.
[203] Id., para. A.41.1.
[204] Id., para. A.41.1.
[205] Id., para. A.41.1.
[206] Id., para. A.51.3.2.
[207] Belgian Constitutional Court, judgment no. 98/2024, 26 September 2024, available (in French) at: https://www.const-court.be/public/f/2024/2024-098f.pdf (accessed September 2024).
[208] Id., paras. A.111.1, A.141.4, A.141.5, A.159.2.
[209] Id., paras. A.116.3.1, A.121.2, A.133.1, A.133.3, A.141.4, A.155.2, A.158.2, A.159.2, A.163.2.

rights relating to both UGC platforms and fully licensed streaming services – explicitly authorizes Member States to employ different mechanisms to implement the right of authors and performers to receive appropriate and proportionate remuneration, including residual remuneration rights.[210] The third parties add that collecting societies are considered by the European legislator to be key players in the copyright economy and that the setting of tariffs by collecting societies is strongly regulated, at European and national levels.[211] They also observe that EU law, including the CDSM Directive, encourages the collective management of copyright which has also been the subject of numerous CJEU judgments.[212] In this regard, the third parties stress that collective management does not present itself as a choice that would pose risks of arbitrary remuneration tariffs but, on the contrary, allows for control that aims precisely to ensure that remuneration tariffs are appropriate and non-discriminatory.[213] It is also noted that many countries in Europe, including Spain, have introduced residual remuneration rights, which must be managed collectively, following the same model that underlies the new Belgian legislation, and that none of these remuneration rights, some of which were established years before the CDSM Directive came into effect, have been declared incompatible with EU law.[214] In addition, the third parties submit that, contrary to the plaintiffs' claims, Article 18 CDSMD does not only target record labels and producers exploiting the rights of authors and performers. By contrast, its general wording allows Member States to interpret it more broadly and extend its proportional remuneration obligation to streaming platforms.[215]

Concerning the double-payment argument, the interveners claim that there is no evidence of residual remuneration rights giving rise to overpayment when they are exercised via collecting societies.[216] On the contrary, according to them, the factual data on the functioning of the market confirm the need to provide creators with a non-transferable right to remuneration.[217] It is noted further that the rights to remuneration provided for by the contested Belgian provisions do not give rise to a double payment but to two separate payments, namely (1) the payment to the assignee for the exclusive right of communication to the public; and (2) the payment of remuneration to authors and performers.[218] Regarding the claim concerning the partitioning of the exclusive right of communication to the public, it is submitted that a residual remuneration right for use on fully licensed

[210] Id., paras. A.141.4, A.155.2, A.114.1, A.132, A.163.2, A.165.3, A.167.3.
[211] Id., para. A.132.4.
[212] Id., paras. A.132.4, A.163.2.
[213] Id., para. A.132.4.
[214] Id., paras. A.132.4, A.163.2. See also paras. A.122.2, A.132.2, A.155.2, A.163.2, A.167.3.
[215] Id., para. A.167.2. See also paras. A.112.1, A.160.2, A.165.3.
[216] Id., para. A.133.4.
[217] Id.
[218] Id., para. A.144.3. See also paras. A.114.1, A.119.2, A.127.2, A.167.4.

platforms falls outside the scope of this right under Article 3 ICD, and instead pertains to the method of its exercise.[219]

Regarding the plaintiffs' concerns about an unjustified restriction of the freedom to provide services in Article 56 TFEU, the intervening parties observe that this freedom may be limited for overriding reasons of public interest, and that guaranteeing appropriate and proportionate remuneration to authors and performers falls within such reasons.[220] The interveners further point out that it is highly unlikely that the additional remuneration mechanism would lead to a reduction in the income of authors and performers.[221] On the contrary, they assert that this mechanism is the most (if not the only) effective means of ensuring fair remuneration,[222] and that several studies and legal doctrines support its efficacy.[223]

With regard to violations of fundamental rights, the intervening parties submit that, just as the freedom to provide services can be limited, the freedom to conduct a business under Article 16 CFR can also be restricted to ensure appropriate and proportionate remuneration for authors and performers.[224] Furthermore, the third-party interveners argue that residual remuneration rights do not, in themselves, lead to an increase in transaction costs, since it is possible to conclude a single agreement with one collecting society.[225] In this sense, according to the interveners, residual remuneration rights are even beneficial for streaming platforms because they alleviate the burden of addressing authors and performers individually, which would entail much higher costs.[226] Additionally, the interveners reiterate that the collective management of residual remuneration rights is subject to a strict legal framework. Even if the new remuneration rights may introduce some financial uncertainty, this uncertainty is inherent in the conduct of services and not unusual when new legislation is adopted.[227]

Concerning, finally, the claim of difference in treatment and discrimination, it is submitted that the plaintiffs do not set out in a clear and unequivocal manner what categories of persons, in the context of the discrimination they seek to demonstrate, must be compared precisely, or in what way the contested provisions discriminate against one of these categories of persons in relation to other groups.[228]

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[219] Id., paras. A.123.2, A.155.2.
[220] Id., paras. A.120.2, A.134.1, A134.2, A.141.7, A.156.2, A.156.3, A.161.2, A.162.2, A.164.2, A.166.2, A.168.3.
[221] Id., para. A.130.2.
[222] Id., para. A.141.6.
[223] Id., paras. A.141.6, A.156.3.
[224] Id., paras. A.119.2, A.123.2, A.161.2
[225] Id., paras. A.119.2, A.161.2
[226] Id., para. A.165.2.
[227] Id., para. A.119.2.
[228] Id., paras. A.141.1, A.141.2, A.141.4, A.141.5, A.141.6, A.141.7, A.144.1, A.165.4, A.168.3.

Depending on the position the CJEU ultimately adopts in this case, the judgment may have far-reaching consequences for streaming remuneration systems in Europe. Next to its direct impact on the Belgian system, the decision may influence the assessment of the validity of the regulatory models developed in Spain and Germany, and comparable legislative solutions in other EU Member States, such as Italy and Poland.

2.3 Remunerated Copyright Exceptions

New regulatory approaches, such as the introduction of a residual remuneration right, are not the only area where collective rights management can play an important role. Collective rights management is also a central element of remunerated copyright exceptions that generate extra income for authors and performers – income that does not depend on individual exploitation contracts.[229] The analysis has already shed light on copyright limitations that play an important role in the regulation of streaming services in the EU. As explained in section 1.2, the impact of the right of reproduction granted in Article 2 ISD is limited from the outset because the reception of streaming content falls with the ambit of the exemption of temporary copying in Article 5(1) ISD as long as a streaming service does not offer access to illegal content and refrains from offering download options going beyond mere temporary, transient copying. Traditionally, this exemption of temporary acts of reproduction does not require the payment of remuneration in EU law.

Focusing on remunerated copyright limitations, the present section now takes a closer look at copyright limitations that may become relevant in streaming cases and do require the payment of remuneration. In addition to private copying rules that are typically accompanied by levy systems in EU Member States (2.3.1), transformative use exceptions enter the picture. Implementing Article 17 CDSMD, Germany has introduced a remuneration requirement for quotations, parodies and pastiches that populate UGC platforms (2.3.2).

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[229] Cf. German Federal Court of Justice, 11 July 2002, case I ZR 255/00, "Elektronischer Pressespiegel", 14-15; G. Westkamp, "The 'Three-Step Test' and Copyright Limitations in Europe: European Copyright Law Between Approximation and National Decision Making", *Journal of the Copyright Society of the U.S.A.* 56 (2008), 1 (55-59); J.P. Quintais, *Copyright in the Age of Online Access – Alternative Compensation Systems in EU Law*, Alphen aan den Rijn: Kluwer Law International 2017, 335-336, 340-341, 347-349 and 356-357; European Copyright Society, *Opinion on Reprobel*, European Copyright Society 2015, available at: https://europeancopyrightsociety.org/opinion-on-reprobel/; C. Geiger, "Promoting Creativity through Copyright Limitations: Reflections on the Concept of Exclusivity in Copyright Law", *Vanderbilt Journal of Entertainment and Technology Law* 12 (2010), 515 (532-533); R.M. Hilty, "Verbotsrecht vs. Vergütungsanspruch: Suche nach Konsequenzen der tripolaren Interessenlage im Urheberrecht", in: A. Ohly/M. Lehmann et al. (eds.), Perspektiven des Geistigen Eigentums – Festschrift für Gerhard Schricker zum 70. Geburtstag, Munich: C.H. Beck, 325 (325-353).

2.3.1 Private Copying

With regard to streaming services that include download options, national private copying regimes that exempt the making of copies for private study and enjoyment can be sources of additional income for authors and performers. In the EU catalogue of permissible copyright limitations, Article 5(2)(b) ISD provides that the development of national private use privileges is possible:

> in respect of reproductions on any medium made by a natural person for private use and for ends that are neither directly nor indirectly commercial, on condition that the right holders receive fair compensation which takes account of the application or non-application of technological measures referred to in Article 6 to the work or subject matter concerned.

Depending on the configuration of national private use legislation, downloads made in connection with the use of streaming services may fall within the scope of the private copying exemption. To fulfil the requirement of fair compensation, many national copyright systems impose an obligation on manufacturers and importers of relevant blank media and copying devices – for example, smartphones in the case of streaming services – to pay copyright levies to a collecting society.[230] The manufacturers and importers are supposed to pass on these levy costs to end users (beneficiaries of the exemption of private copying) by adding these costs to the price of their products.[231]

This private copying solution, however, has its limits. In particular, the invocation of the private copying rule is only conceivable when the underlying streaming service offers access to legal sources. In *ACI Adam*, the CJEU made it clear that it was not possible to "whitewash" downloads from an illegal file-sharing website by invoking the exemption of digital private copying in Article 5(2)(b) ISD.[232] In this case, prejudicial questions had arisen from the Dutch regulation of private copying which, at the time, concerned the whole spectrum of literary and artistic works, was applicable to private users in general, and covered all kinds of sources, including unlawful sources, such as content offered on The Pirate Bay.[233] Declaring

[230] CJEU case law reflects this configuration of many national private copying systems in the EU. See CJEU, 27 June 2013, joined cases C-457/11 to C-460/11, *VG Wort*, paras. 76-77; CJEU, 11 July 2013, case C-521/11, *Amazon v. Austro-Mechana*, para. 24; CJEU, 10 April 2014, case C-435/12, *ACI Adam*, para. 52; CJEU, 5 March 2015, case C-463/12, *Copydan Båndkopi v. Nokia*, para. 23.

[231] CJEU, 21 October 2010, case C-467/08, *Padawan v. SGAE*, para. 49; CJEU, 27 June 2013, joined cases C-457/11 to C-460/11, *VG Wort*, paras. 76-77.

[232] CJEU, 10 April 2014, case C-435/12, *ACI Adam*, paras. 38-41.

[233] For a detailed analysis of the evolution of a broad private copying privilege in Dutch copyright law, see Dirk J.G. Visser, "Private Copying", in: P. Bernt Hugenholtz, Antoon

this broad private copying rule impermissible, the Court found that a private use privilege that permitted the making of personal copies from an unlawful source:

> would encourage the circulation of counterfeited or pirated works, thus inevitably reducing the volume of sales or of other lawful transactions relating to the protected works, with the result that a normal exploitation of those works would be adversely affected.[234]

Even within the realm of copying from lawful sources, however, things are far from clear. For instance, little clarity exists at the moment regarding which types of copies produced in connection with the use of online streaming services should be (or can be) subject to the private copy levy. In France, for example, the government report on private copying compensation, published in October 2022,[235] highlights that although some right holders believe that "offline streaming copies" – i.e., copies that allow users to access the online streaming services' content even when they are offline – should qualify as private copies requiring compensation, these "downloads" are currently not covered by the private copying exception.[236] According to the report, in the absence of a court ruling on this issue, evidence suggests that these "convenience copies" likely fall outside the scope of private copying that causes harm and warrants compensation.[237]

The question of private copying levies for offline streaming copies also arose in the Netherlands where the Court of Appeal of The Hague – based on specific statements made by the Dutch legislator during the implementation of the 2001 InfoSoc Directive – ruled that tethered downloads do not fall under the private copying regulation and, therefore, do not support a remuneration claim, if a commercial streaming provider carries out the download on behalf of a private person. The Court lent weight to the fact that streaming providers may have the option of deleting the downloads from the devices of subscribers, for example at the end of the contract.[238] As already indicated, this judgement is based on specific statements made by the Dutch legislator when transposing the InfoSoc Directive into national law. Nonetheless, it may have broader repercussions. In July 2024, the Dutch Supreme Court has referred prejudicial questions to

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Quaedvlieg and Dirk J.G. Visser (eds.), *A Century of Dutch Copyright Law – Auteurswet 1912-2012* (Amstelveen: deLex 2012), 413 (413-41).

[234] CJEU, 10 April 2014, case C-435/12, *ACI Adam*, para. 39.

[235] French Ministry of Economy, Finance and Industrial and Digital Sovereignty, and Ministry of Culture, *Report on private copying compensation*, October 2022, prepared by O. Alaoui et al. (14).

[236] Id.

[237] Id.

[238] Court of Appeal of The Hague, 22 March 2022, HP Nederland, Dell and Stobi/SONT and Stichting de Thuiskopie, ECLI:NL:GHDHA:2022:2289, para. 4.6-4.11.

the CJEU in this case.[239] The Dutch Supreme Court seeks clarification on whether national legislation can exclude offline streaming copies from the lumpsum remuneration scheme for private copying. The Court also wonders whether it is relevant in this context that copyright holders receive remuneration per offline streaming copy made or, alternatively, based on the number of times an offline streaming copy is played by the user of the streaming service.[240] In the light of existing CJEU case law on cloud copies (private copying subject to remuneration affirmed),[241] it cannot be ruled out that the CJEU – unlike the Court of Appeal of The Hague – arrives at the conclusion that tethered downloads fall under the levy scheme for private copying and trigger an obligation to pay remuneration.

2.3.2 Transformative Use Exceptions

As already indicated, the implementation of the CDSM Directive into national law has led to a proliferation of obligations to pay remuneration for copyright limitations that support transformative use. At the core of this regulatory approach lies Article 17(7) CDSMD which leaves little doubt that algorithmic content moderation must not submerge areas of freedom that support the creation and dissemination of transformative amateur productions that are uploaded to OCSSP platforms:[242]

> The cooperation between online content-sharing service providers and right holders shall not result in the prevention of the availability of works or other subject matter uploaded by users, which do not infringe copyright and related rights, including where such works or other subject matter are covered by an exception or limitation.

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[239] Dutch Supreme Court (Hoge Raad), 12 July 2024, SONT/HP Nederland, Dell and Stobi and Stichting de Thuiskopie/HP Nederland, Dell and Stobi, ECLI:NL:HR:2024:1074, para. 5-6.

[240] Reporting on the reference in this case, which has not yet been made available on the CJEU's Curia, see Arnout Groen at: https://www.linkedin.com/feed/update/urn:li:activity:7217524162653777920/?updateEntityUrn=urn%3Ali%3Afs_updateV2%3A%28urn%3Ali%3Aactivity%3A7217524162653777920%2CFEED_DETAIL%2CEMPTY%2CDEFAULT%2Cfalse%29 (accessed July 2024).

[241] CJEU, 24 March 2022, case C-433/20, Austro-Mechana/Strato, paras. 30-33.

[242] Cf. Martin Senftleben, "Bermuda Triangle: Licensing, Filtering and Privileging User-Generated Content Under the New Directive on Copyright in the Digital Single Market", *European Intellectual Property Review* 41 (2019), 480 (485-86). As to the transformative character of UGC, see João Pedro Quintais, *Copyright in the Age of Online Access – Alternative Compensation Systems in EU Law* (Alphen aan den Rijn: Kluwer Law International 2017), 157-58; Jean-Paul Triaille, Séverine Dusollier et al., *Study on the Application of Directive 2001/29/EC on Copyright and Related Rights in the Information Society*, Study prepared by De Wolf & Partners in collaboration with the Centre de Recherche Information, Droit et Société (CRIDS), University of Namur, on behalf of the European Commission (DG Markt) (Brussels: European Union 2013), 522-527 and 531-534; P. Bernt Hugenholtz and Martin Senftleben, *Fair Use in Europe. In Search of Flexibilities* (Amsterdam: Institute for Information Law/VU Centre for Law and Governance, 2011), 29-30.

> Member States shall ensure that users in each Member State are able to rely on any of the following existing exceptions or limitations when uploading and making available content generated by users on online content-sharing services:
> (a) quotation, criticism, review;
> (b) use for the purpose of caricature, parody or pastiche.

Arguably, Article 17(7) CDSMD is capable of generating new revenue streams by combining the application of exceptions for "quotation, criticism, review" or "caricature, parody or pastiche" with the payment of equitable remuneration. Currently, only three exceptions in the EU copyright acquis explicitly require the payment of "fair compensation" to right holders.[243] These exceptions pertain to reprography (Article 5(2)(a) ISD), broadcasts by social institutions pursuing non-commercial purposes (Article 5(2)(e) ISD), and the above-discussed private copying (Article 5(2)(b) ISD). However, Recital 36 ISD makes it clear that "[t]he Member States may provide for fair compensation for right holders also when applying the optional provisions on exceptions or limitations which do not require such compensation." In line with this statement, national lawmakers in the EU are free to evaluate case-by-case whether they find it necessary to soften the impact of a copyright limitation by combining some exceptions, such as the exceptions for "quotation, criticism, review" and "caricature, parody or pastiche" with the obligation to pay a fair remuneration to right holders in streaming scenarios.[244]

The idea of imposing a fair remuneration obligation faced opposition from commentators who speculated that the payment obligation could constitute an impermissible limitation of internet users' freedom of expression.[245] Indeed, none of the national transpositions of the CDSM Directive resulted in the introduction of online quotation levies. With regard to caricatures,

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[243] For further discussion, see Christophe Geiger, Franciska Schönherr, and Bernd Justin Jütte, "Limitation-based Remuneration Rights as a Compromise Between Access and Remuneration Interests in Copyright Law: What Role for Collective Rights Management?", in: Daniel Gervais and João Pedro Quintais, *Collective Management of Copyright and Related Rights* (4th edn, Kluwer International, forthcoming 2024), available at SSRN: https://ssrn.com/abstract=4714080 or http://dx.doi.org/10.2139/ssrn.4714080 (accessed July 2024).

[244] For an extensive discussion of how unremunerated copyright exceptions may be turned into a limitation-based right to remuneration and still remain compliant with international treaty norms, see Christophe Geiger and Oleksandr Bulayenko, "Creating Statutory Remuneration Rights in Copyright Law: What Policy Options Under the International Legal Framework?", in: Henning Grosse Ruse-Khan and Axel Metzger (eds.), *Intellectual Property Ordering Beyond Borders* (Cambridge, Cambridge University Press, 2022), p. 408 (446 et seq.).

[245] See, e.g., Maximilian Becker et al., "Positionspapier der Urheberrechtswissenschaft Zitate und Parodien müssen vergütungsfrei bleiben!", available at: https://www.uni-trier.de/fileadmin/fb5/prof/ZIV014/Positionspapier_der_Urheberrechtswissenschaft_Keine_Verg%C3%BCtungspflicht_f%C3%BCr_Zitate_und_Parodien.pdf (accessed July 2024).

parodies, and pastiches of protected third-party content that are uploaded to streaming platforms for UGC, however, Germany followed the "remunerated exception" model. Section 5(2) of the OCSSP Act 2021 stipulates that providers of UGC streaming platforms must pay appropriate remuneration for the communication to the public of (parts of) copyright-protected works which are contained in caricatures, parodies and pastiches uploaded by platform users. Section 21(1) OCSSP Act 2021 extends this obligation to pay remuneration to the field of related rights. The entitlement to remuneration is unwaivable. It can only be exercised via a collecting society.[246]

As already indicated, this German solution is controversial from the perspective of freedom of expression online. However, a less radical alternative is conceivable. This would involve distinguishing between traditional parodies and caricatures which would remain free,[247] and the much broader category of pastiche which would require the payment of remuneration.[248] Under this model, the pastiche exception would need to be broadly defined as any form of transformative online use that extends beyond what is already covered by parody, caricature, and quotation.[249]

A number of scholars have consistently emphasized advantages of levied exceptions for transformative uses as a compromise solution[250] that balances

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[246] Section 5(2) OCSSP Act 2021.

[247] Cf. CJEU, 1 December 2011, case C-145/10, Painer, para. 133; CJEU, 3 September 2014, case C-201/13, Deckmyn, para. 23-26.

[248] Martin Senftleben, "Institutionalized Algorithmic Enforcement – The Pros and Cons of the EU Approach to UGC Platform Liability", *Florida International University Law Review* 14 (2020), 299.

[249] Id. The CJEU's definition of pastiche is currently pending together with the reference in the *Pelham II* judgment (C-590/23), which aims to clarify whether this concept could serve as a "catch-all" provision for artistic use of copyright-protected subject-matter and whether this exception is subject to limiting criteria, such as the requirement of humour, stylistic imitation or tribute. See the first prejudicial question in *Pelham II* by the German Federal Court of Justice (Bundesgerichtshof, BGH), Request for a preliminary ruling, *Pelham*, C-590/23, 25 September 2023, available at: https://curia.europa.eu/juris/showPdf.jsf?text=&docid=280562&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=3145681 (accessed July 2024). With regard to the pastiche debate in EU copyright law, see Martin Senftleben, "User-generated content – towards a new use privilege in EU copyright law", in: Tanya Aplin (ed.), *Research handbook on IP and digital technologies* (Cheltenham: Edward Elgar, 2020), p. 136; Emily Hudson, "The pastiche exception in copyright law: a case of mashed-up drafting?", *Intellectual Property Quarterly* 4 (2017), 346; and Sabine Jacques, "The parody exception: revisiting the case for a distinct pastiche exception" [Blog post], *Kluwer Copyright Blog*, 5 October 2023, available at: https://copyrightblog.kluweriplaw.com/2023/10/05/the-parody-exception-revisiting-the-case-for-a-distinct-pastiche-exception/ (accessed July 2024).

[250] Jane C. Ginsburg, "Fair Use for Free, or Permitted-but-Paid?", *Berkeley Technology Law Journal* 29(3) (2015), 1383; Christophe Geiger, "Statutory Licenses as Enabler of Creative Uses", in: R.M. Hilty and K.-C. Liu (eds.), *Remuneration of Copyright Owners* (Berlin/Heidelberg, Springer, 2017), p. 305; Christophe Geiger, Franciska Schönherr, and

the extremes of exempting certain uses from remuneration obligations altogether and requiring licensing for others, which can potentially limit the scope of permissible online uses and increase the risk of right holders blocking content. Indeed, while imposing a requirement to pay remuneration to right holders for exceptions such as quotations (and even parodies and caricatures) might, in fact, be disproportionate given their limited impact on the normal exploitation of the work[251] and their crucial role in facilitating freedom of expression and artistic creativity, the same may not apply to the same degree to a broad exception for (digital) pastiches. Subordinating this exception to a payment obligation might not necessarily disadvantage online users seeking to rely on it.[252] On the contrary, linking such UGC uses to a fair compensation requirement could expand the scope of permissible uses from a copyright perspective. This is because, without such a compensation, these uses might be considered disproportionately encroaching upon the property rights of copyright holders, potentially leading legislators or courts to block them entirely.[253] In essence, then, remunerating right holders has the potential to mitigate conflicts between transformative copyright exceptions, including the freedom of expression interests they represent, and the material interests of copyright holders, thereby increasing the likelihood of permitting such transformative uses.[254]

Bernd Justin Jütte, "Limitation-based Remuneration Rights as a Compromise Between Access and Remuneration Interests in Copyright Law: What Role for Collective Rights Management?", in: Daniel Gervais and João Pedro Quintais, *Collective Management of Copyright and Related Rights* (4th edn, Kluwer International, forthcoming 2024), available at SSRN: https://ssrn.com/abstract=4714080 or http://dx.doi.org/10.2139/ssrn.4714080 (accessed July 2024).

[251] Matthias Leistner, "The Implementation of Art. 17 DSM Directive in Germany – A Primer with Some Comparative Remarks", *GRUR International* 71 (2022), 909 (914). Cf., however, Christophe Geiger and Oleksandr Bulayenko, "Creating Statutory Remuneration Rights in Copyright Law: What Policy Options Under the International Legal Framework?", in: Henning Grosse Ruse-Khan and Axel Metzger (eds.), *Intellectual Property Ordering Beyond Borders* (Cambridge, Cambridge University Press, 2022), p. 408 (447, note 189) arguing that, "[i]f the purpose of copyright law is to facilitate […] creative uses while rewarding creators, then the legal security created by a remuneration right might be more favourable to creators (of the original work and the derivative) than the uncertain and case by case-dependent quotation right, and thus should be allowed in a functional and purposive understanding of copyright law".

[252] Christophe Geiger, "Statutory Licenses as Enabler of Creative Uses", in: R.M. Hilty and K.-C. Liu (eds.), *Remuneration of Copyright Owners* (Berlin/Heidelberg, Springer, 2017), p. 305.

[253] Id.

[254] Martin Senftleben, "User-Generated Content – Towards a New Use Privilege in EU Copyright Law", in: Tanya Aplin (ed.), *Research Handbook on IP and Digital Technologies*, Cheltenham: Edward Elgar 2020, 136-162; Jane C. Ginsburg, "Fair Use for Free, or Permitted-but-Paid?", *Berkeley Technology Law Journal* 29(3) (2015), 1383; Christophe Geiger, "Statutory Licenses as Enabler of Creative Uses", in: R.M. Hilty and K.-C. Liu (eds.), *Remuneration of Copyright Owners* (Berlin/Heidelberg, Springer, 2017), p. 305; Christophe Geiger and Elena Izyumenko, "Towards a European 'fair use' grounded in freedom of expression", *American University International Law Review* 35 (2019), 1 (57-58); Stavroula Karapapa, "Remunerated Exceptions", in: *Defences to Copyright*

In addition, the statutory nature of remuneration derived from the transformative pastiche-grounded digital UGC exception would make it impossible for right holders to oppose such uses, because the exclusive right (to control the use of a work) is herewith replaced with a right to remuneration.[255] This contrasts with the situation in voluntary licensing agreements. Remunerated UGC exceptions are hence capable of alleviating the blocking effect of exclusive rights, allowing ample room for creative derivatives of copyrighted content without compromising, at the same time, the rights of creators to benefit from the protection of their material interests.[256]

The implementation of the model under which certain forms of transformative online uses of copyright-protected works is subjected to an obligation to pay fair remuneration is, of course, not without practical difficulties. For instance, in Germany, following the introduction of fair remuneration obligations relating to user-generated parodies, caricatures and pastiches, a concern was expressed that, in practical terms, the differentiation made between unremunerated quotation and remunerated parody, caricature and pastiche will raise difficult delineation issues in terms of the specification and management of the collective claim to remuneration.[257] Analogous difficulties might then arise under the proposed model based on distinguishing between remunerated online pastiches and other forms of (unremunerated) UGC online. However, it must not be

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Infringement: Creativity, Innovation and Freedom on the Internet (Oxford, 2020; online edn, Oxford Academic, 21 May 2020).

[255] Jane C. Ginsburg, "Fair Use for Free, or Permitted-but-Paid?", *Berkeley Technology Law Journal* 29(3) (2015), 1383 (1416); Christophe Geiger, "Statutory Licenses as Enabler of Creative Uses", in: R.M. Hilty and K.-C. Liu (eds.), *Remuneration of Copyright Owners* (Berlin/Heidelberg, Springer, 2017), p. 305; Stavroula Karapapa, "Remunerated Exceptions", in *Defences to Copyright Infringement: Creativity, Innovation and Freedom on the Internet* (Oxford, 2020; online edn, Oxford Academic, 21 May 2020); Martin Senftleben, 'Bermuda Triangle: Licensing, Filtering and Privileging User-Generated Content Under the New Directive on Copyright in the Digital Single Market', *European Intellectual Property Review* (EIPR) 41, No. 8 (2019), 480-490; Christophe Geiger, Franciska Schönherr, and Bernd Justin Jütte, "Limitation-based Remuneration Rights as a Compromise Between Access and Remuneration Interests in Copyright Law: What Role for Collective Rights Management?", in: Daniel Gervais and João Pedro Quintais, *Collective Management of Copyright and Related Rights* (4th edn, Kluwer International, forthcoming 2024), available at SSRN: https://ssrn.com/abstract=4714080 or http://dx.doi.org/10.2139/ssrn.4714080 (accessed July 2024), 11.

[256] Martin Senftleben, 'User-Generated Content – Towards a New Use Privilege in EU Copyright Law', in: Tanya Aplin (ed.), *Research Handbook on IP and Digital Technologies*, Cheltenham: Edward Elgar 2020, 136-162; Jane C. Ginsburg, "Fair Use for Free, or Permitted-but-Paid?", *Berkeley Technology Law Journal* 29(3) (2015), 1383 (1416); Christophe Geiger, "Statutory Licenses as Enabler of Creative Uses", in: R.M. Hilty and K.-C. Liu (eds.), *Remuneration of Copyright Owners* (Berlin/Heidelberg, Springer, 2017), p. 305.

[257] Matthias Leistner, "The Implementation of Art. 17 DSM Directive in Germany – A Primer with Some Comparative Remarks", *GRUR International* 71 (2022), 909 (914).

overlooked in these discussions that the remuneration system is based on a lumpsum approach. In practice, it is conceivable to calculate the average share of parodies, caricatures and pastiches in user uploads. Based on this general assessment, an appropriate lumpsum remuneration can be determined.

A final problem linked to subjecting online UGC exceptions, such as pastiche, or, in the case of current German implementation, also parody and caricature, to the requirement of fair compensation is a disparity within the copyright framework that it creates. Within this model, by contrast to offline uses, where compensation is not mandated for parody, caricature, and pastiche, online counterparts are required to compensate right holders. This inconsistency in treatment may pose a challenge in maintaining a coherent copyright system. As Leistner observes commenting on the German model:

> this seems hardly justifiable and leads to contingent results in a number of relevant use scenarios, such as for example the production of samples (where the adaptation as well as reproduction and non-OCSSP use of such samples is now entirely free, if covered by the new exceptions, whereas the new remuneration claim will only apply to OCSSP uses).[258]

Assessing the German solution, however, it must not be overlooked that the remuneration claim arose in a specific context and served the purpose of solving a specific policy dilemma: the value gap problem that lies at the core of Article 17 CDSMD.[259] The specific focus on remuneration obligations relating to online parodies, caricatures and pastiches uploaded to UGC platforms, thus, can be justified against the background of active UGC exploitation in the online environment. Accordingly, it is consistent to oblige providers of UGC platforms to pay a fair remuneration for the dissemination of parodies, caricatures and pastiches that have been uploaded by users. They can finance the fair remuneration from advertising revenue or pass on the costs by charging users for platform use.[260] At least with regard to analogue parody, caricature and pastiche scenarios, it may be difficult to demonstrate a comparable need for fair remuneration when considering the systematic exploitation of this type of UGC on online platforms.

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[258] Id.

[259] Cf. Martin Senftleben, "Institutionalized Algorithmic Enforcement – The Pros and Cons of the EU Approach to Online Platform Liability", *Florida International University Law Review* 14 (2020), 299 (301-303).

[260] Cf. Martin Senftleben, 'User-Generated Content – Towards a New Use Privilege in EU Copyright Law', in: Tanya Aplin (ed.), *Research Handbook on IP and Digital Technologies*, Cheltenham: Edward Elgar 2020, 136-162.

3. Producers' Situation

Recent studies indicate that not only individual authors and performers, but also independent EU producers may likewise be confronted with a weak bargaining position and an unfavourable remuneration situation, including buyout contracts.[261] Indeed, rights clearance at industry level may make it difficult not only for individual authors and performers, but also for producers to obtain a fair return on their investment of time and money in the production process. If its bargaining position is weak, a production company may have to accept unfavourable licensing terms, such as buyout provisions precluding extra income from royalties in the case of considerable commercial success.

In the EU debate, this unfavourable situation for local producers has been linked to the surge in the audiovisual streaming market led by certain global players.[262] Independent producers, lacking the negotiating leverage and economic resources of their larger counterparts, reportedly often find themselves at a disadvantage during contract negotiations, being compelled to accept unfavourable terms for potential exposure to wider audiences.[263] The European Media Industry Outlook, prepared by the European Commission in the context of its "Media and Audiovisual Action Plan"[264] and published in May 2023, highlighted a common practice among European producers of relinquishing all intellectual property rights to their productions in buyout contracts.[265] Producers also conveyed a perception

[261] See recent discussions at EU level and in several Member States: European Commission, Staff Working Document, "European Media Industry Outlook", Brussels, 1 May 2023, SWD(2023) 150 final, 5; European Commission, Directorate-General for Communications Networks, Content and Technology, *Study on contractual practices affecting the transfer of copyright and related rights and the creators and producers' ability to exploit their rights*, No. 2023-031, under Framework Contract CNECT/2022/OP/0036, Brussels, Ares(2023), 19 October 2023, 7; Stéphanie Carre, Stéphanie Le Cam, and Franck Macrez, *Buyout contracts imposed by platforms in the cultural and creative sector*, Study Requested by the JURI Committee, European Parliament, November 2023, 53.

[262] European Commission, Directorate-General for Communications Networks, Content and Technology, *Study on contractual practices affecting the transfer of copyright and related rights and the creators and producers' ability to exploit their rights*, No. 2023-031, under Framework Contract CNECT/2022/OP/0036, Brussels, Ares(2023), 19 October 2023, 5.

[263] European Commission, Directorate-General for Communications Networks, Content and Technology, *Study on contractual practices affecting the transfer of copyright and related rights and the creators and producers' ability to exploit their rights*, No. 2023-031, under Framework Contract CNECT/2022/OP/0036, Brussels, Ares(2023), 19 October 2023, 7; European Commission, Staff Working Document, "European Media Industry Outlook", Brussels, 1 May 2023, SWD(2023) 150 final, 39, 45.

[264] Communication from the Commission, Europe's Media in the Digital Decade: An Action Plan to Support Recovery and Transformation, COM/2020/784 final, 3 December 2020.

[265] European Commission, Staff Working Document, "European Media Industry Outlook", Brussels, 1 May 2023, SWD(2023) 150 final, 5, 41.

that non-EU streamers were more inclined to retain intellectual property rights than their EU counterparts.[266] In addition to buyouts, producers indicated that long-term licensing contracts with streaming platforms were occurring as frequently as full intellectual property transfers with, however, similar negative effects on the producers' ability to fully exploit their productions through streaming.[267] The majority of producers stated that performance-based additional remunerations were rarely granted, a fact supported by responses from the streamers themselves.[268] This unfavourable situation for producers is worsened by the scarce transparency regarding the performance of streamed content.[269] According to seventy percent of producers, streaming platforms seldom provide detailed information on the commercial success of productions.[270] The Commission expressed concerns about such a retention of copyright and related rights by streamers over the audiovisual works of European producers.[271] It indicated that this practice could undermine the position of European audiovisual producers and allow non-EU players to gain exclusive control over the exploitation of European works.[272]

While the concerns outlined above seem serious, the provisions of copyright contract law in the CDSM Directive are inapplicable to producers. They address remuneration and transparency issues experienced by authors and performers.[273] Indeed, Articles 18 to 23 CDSMD are designed specifically for creators and do not target producers. This raises the policy question whether similar protections should be developed for producers who are in a weak bargaining position. Ultimately, this is a matter for lawmakers to consider. Of note, however, is the fact that in the pending case *Dada Music and UPFR*, the CJEU might seize the opportunity to discuss the applicability of minimum flat-rate remuneration to right holders in the broadcasting sector, specifically producers.[274] If the CJEU concludes that EU law prohibits national laws that lack minimum equitable remuneration for phonogram producers, irrespective of broadcasters' revenues or costs, such an outcome may have repercussions on the relationship between European producers and online streaming platforms.

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[266] Id., 5, 42.
[267] Id., 43.
[268] Id., 44.
[269] Id.
[270] Id.
[271] European Commission, Directorate-General for Communications Networks, Content and Technology, *Study on contractual practices affecting the transfer of copyright and related rights and the creators and producers' ability to exploit their rights*, No. 2023-031, under Framework Contract CNECT/2022/OP/0036, Brussels, Ares(2023), 19 October 2023, 7.
[272] Id.
[273] Id., 10.
[274] CJEU, Request for a preliminary ruling, *DADA Music and UPFR*, case C-37/24, 19 January 2024.

If collectively managed residual remuneration rights are deemed effective in ensuring fair compensation for authors and performers, legislators could also explore the viability of extending these rights to producers. Insofar as remuneration from copyright exceptions is at stake, particularly in the field of private copying, collected money is already being distributed not only to authors and performers but also to producers.[275]

4. Conclusion

As online streaming services evolve rapidly and generate significant revenue from cultural consumption, it is imperative that copyright law keeps pace and ensures fair remuneration for those creating the cultural productions that underpin the success of the streaming machinery. Against this background, regulatory steps have been taken in the EU to ensure that authors and performers receive a fair remuneration for the exploitation of their works on both fully licensed streaming platforms and platforms for the dissemination of UGC. With the adoption of Articles 18 to 23 CDSMD, mandatory remuneration rights and safeguards have been introduced in copyright contract law. Article 17 CDSMD adds a specific liability and licensing regime for UGC streaming services.

However, the analysis has shown that the beneficial effects of these tools – copyright contract law and extended licensing obligations – remains limited in practice. The burden of proving an insufficient remuneration and fears of blacklisting in small creative communities often thwarts the objective to redistribute streaming revenue in favour of individual creators. Instead of ensuring that authors and performers directly receive a fair share of streaming revenue, copyright contract law forces creators to claim a larger share from exploiters of their works. The harmonized remuneration rules predominantly serve as corrective instruments *ex post*. With authors and performers hesitating to enforce fair remuneration rights, the practical impact remains limited. Much depends on the willingness of the creative industry to share streaming royalties with creators.

In contrast to copyright contract law, mandatory collective licensing seems to have a remarkable potential to channel streaming revenue directly to individual creators. Once remuneration rights are mandatory, unwaivable, non-transferable and subject to collective rights management, authors and performers no longer have to claim fair remuneration individually from exploiters of their works and performances on which they may depend for future work. Mandatory collective licensing obligations can ensure that streaming revenue flows directly to authors and performers in accordance

[275] See, e.g., Hester Wijminga, Wouter Klomp, Marije van der Jagt, and Joost Poort, *International Survey on Private Copying – Law and Practice 2016*, World Intellectual Property Organization and Stichting de Thuiskopie, 2017, available at: https://www.wipo.int/publications/en/details.jsp?id=4183 (accessed July 2024).

with the repartitioning schemes of collecting societies. From this perspective, mandatory collective licensing is more promising than abstract fair remuneration rights set forth in copyright contract law. In the EU, mandatory collective licensing has been employed as a vehicle to secure a fair remuneration for authors and performers in national copyright systems that have implemented residual remuneration rights.

Mandatory collective rights management also plays a central role in the area of remunerated copyright exceptions. In streaming contexts, particular attention should be devoted to levy systems for private copying that cover offline streaming copies, and lumpsum remuneration schemes for pastiche rules that exempt user-generated content mashups from the control of right holders. Admittedly, the effectiveness of collecting society operations can vary from country to country. Considering the broader worldwide discussion, it seems important to recognize that the differences across regions may be considerable. Nevertheless, the analysis indicates quite clearly that it is crucial to further develop collective management and enforcement tools for fair remuneration claims, next to fair remuneration rules in copyright contract law.

Finally, recent studies highlight that, similar to authors and performers, producers may have a weak bargaining position in the streaming ecosystem. Consequently, they may have to accept unfavourable remuneration terms, including buyout clauses. Further research seems necessary to clarify whether fair remuneration mechanisms that have been developed for authors and performers should be adapted and extended to producers.