6

Termination of the Contract

I want to break free.

—Queen[1]

6.1 INTRO

Both corporate partners and musicians may have valid reasons for wanting to terminate a contract. Forcing them to uphold the contract curbs party agency. Relevant reasons may include the aim of avoiding undue investment in an artist who has proven to be commercially unviable, the wish to escape unfair situations in terms of rights transfer, or cases of (perceived) unfairness in terms of exploitation and/or remuneration.[2] The excessive duration of a contract may in itself also give rise to problems. On a more general level, the exclusive nature of many music industry contracts sits uneasily with the vision of musicians as independent, creative actors.

This chapter reviews how the selected substantive legal regimes affect parties' possibility to terminate the contractual relationship. First, the chapter reviews potentially applicable limitations on contract duration (Section 6.2), as well as grounds for termination on the basis of breach of contract (Section 6.3). Taking a more practical view, the consequences of contract termination are then assessed, in order to gauge whether these consequences may amount to switching costs that prevent the termination of contracts in practice (Section 6.4).

6.2 LIMITATIONS ON CONTRACT DURATION

Music industry contracts usually subject musicians to an obligation of exclusivity that prevents them from seeking other prospects for a period of time. The duration of

[1] Music and lyrics by John Deacon, performance by Freddie Mercury.
[2] See Chapters 4 and 5 respectively.

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exclusive exploitation contracts in the music industry has traditionally been defined by a number of albums, usually consisting of a minimum amount combined with an option clause on the part of the corporate partner for further albums, on contract terms set in advance.[3] As long as such an option is on the table, musicians' freedom to contract with another party is restricted.[4] Traditional exploitation contracts do not foresee any possibility for renegotiation or termination on the part of the musicians, while corporate partners may easily terminate the relationship by not exercising their right of first refusal.

In practice, only successful musicians are able to renegotiate the terms of their relationship with corporate partners.[5] Thus, the large majority of musicians may be locked into contracts and unable to escape some of the unfavourable terms concerning rights transfers and contract performance.[6] This primarily applies to legacy artists. In the course of recent decades, the average duration of music industry contracts has decreased. In parallel, full rights transfers have become less prevalent, as is the case for licences for life of copyright. However, this trend is not omnipresent. In addition, the techniques of cross-collateralisation, multiple rights deals and 360-degree deals lead to a longer contractual relationship in practice, in view of the enhanced degree of recoupment that such arrangements entail.[7]

[3] Richard Caves, *Creative Industries. Contracts between Art and Commerce* (Harvard University Press 2002) 3, 15, 19, 62–64; Phillip W Hall Jr, 'Smells Like Slavery: Unconscionability in Recording Industry Contracts' [2002] Hastings Comm & Ent LJ 189, 216–19; Stan J Liebowitz and Richard Watt, 'How to Best Ensure Remuneration for Creators in the Market for Music? Copyright and Its Alternatives' (2006) 20 Journal of Economic Surveys 513, 535; Norbert J Michel, 'Digital File Sharing and Royalty Contracts in the Music Industry: A Theoretical Analysis' (2006) 3 Review of Economic Research on Copyright Issues 29, 37; Jean-Christophe Lardinois, *Les Contrats Commentés de l'Industrie de La Musique 2.0: Cadre Général et Pratique Contractuelle* (Création Information Communication Pratique 1, 2nd edn, Larcier 2009) 84–85; David Stopps, 'How to Make a Living from Music, Second Edition' (Creative Industries, WIPO 2014) 97; Isabelle De Voldere and others, 'Mapping the Creative Value Chains. A Study on the Economy of Culture in the Digital Age. Final Report' (Publications Office of the EU 2017) <https://op.europa.eu/s/zIa8> 137; Luc Gulinck, *Hier Tekenen! (en Let Niet op de Kleine Lettertjes. . .) Wegwijs in het Juridische en Zakelijke Labyrint van de Muziekwereld* (Academia Press 2019) 197, 252, 276–77, 329; Alan B Krueger, *Rockonomics* (John Murray 2019) 161–62; Donald Passman, *All You Need to Know about the Music Business* (10th edn, Simon & Schuster 2019) 108–12; DCMS Committee, 'Economics of Music Streaming. Second Report of Session 2021–22' (15 July 2021) 28.

[4] Yannick H'Madoun and others, *Auteursrechten en Publishing* (Poppunt vzw 2014) 72; Jan Pauly and Yannick H'Madoun, *Poppuntgids voor muzikant en dj* (Poppunt vzw no date) 197; Passman, *All You Need to Know about the Music Business* (n 3) 110. The option structure makes perfect sense from a commercial point of view, given the inherent uncertainty of the music market; cf Caves, *Creative Industries* (n 3) 63–64.

[5] Stan Soocher, *They Fought the Law. Rock Music Goes to Court* (Schirmer Books 1999) 48.

[6] Séverine Dusollier and others, 'Contractual Arrangements Applicable to Creators: Law and Practice of Selected Member States' (Publications Office of the EU 2014) <https://op.europa.eu/s/zIba> 6, 7.

[7] See Chapter 2, Section 2.4.5.

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In some jurisdictions, rules limiting parties' contractual freedom as to the formation of the contract may lead to the (partial) nullity of the contract under certain circumstances, such as in situations where the grant of rights is restricted when it comes to future music and/or methods of exploitation, or when it is deemed unreasonable on other grounds.[8] Rights that are excessively granted to a corporate partner may be declared non-binding under certain circumstances and may, in case of non-severability, result in the termination of the contract.

Even if the grant is not considered unreasonable in the sense of the restrictions set by law, the long duration of a copyright exploitation contract may sometimes be considered unfair in the rapidly changing market environment of the music industry.[9] By way of illustration, reference may be made to singer-songwriter RAYE, who spoke out against her 2014 contract with Polydor in 2021, claiming that the label refused to support her in recording and releasing her debut album.[10] For many musicians, it is difficult to break loose from early corporate partners, both if their music proves to be commercially successful and if it does not. From the commercially inclined perspective of corporate partners, this makes sense. In case of success, corporate partners may feel that they continue to be entitled to a proportion of revenues garnered by musicians they have nurtured to fame. If the musician did not break through commercially, corporate partners may want to prevent them from seeking success elsewhere, lest another corporate partner benefit from their earlier efforts towards exploitation of the music at issue. Bearing this in mind, artists such as Prince, George Michael, Megan Thee Stallion and Ye have at various points in time described such long-term contracts as a form of professional slavery.[11]

Certain rules of copyright contract law in the chosen jurisdictions may affect the duration of the contracts under review. For example, Dutch law provides that, if the

[8] See Chapter 4, Section 4.4.1.

[9] Cf Dusollier and others, 'Contractual Arrangements Applicable to Creators' (n 6) 11; Giblin and Doctorow, *Chokepoint Capitalism* (n 21) 195.

[10] The contract was terminated in July 2021, see 'Raye and Polydor Split after Claims Record Label Wouldn't Release Debut Album' (*BBC News*, 20 July 2021) <https://bbc.in/3aJv1mD>. See for other examples Rhian Jones, '"I Had No Confidence, No Money": The Pop Stars Kept in Limbo by Major Labels' (*The Guardian*, 11 August 2021) <https://bit.ly/3BTHcco>.

[11] Prince famously branded his (second) record deal with Warner Music as slavery, see 'Top Ten Legal Battles – Prince v Warner' directed by Andy Malt and Chris Cooke (Podcast, Setlist, 16 December 2019) <https://completemusicupdate.com/article/setlist-top-ten-legal-battles-prince-v-warner/>. The same was argued by George Michael relating to his deal with Sony, see Soocher, *They Fought the Law* (n 5) 46. As to the dispute between Megan Thee Stallion and record company 1501 Certified Entertainment, see Bill Donahue, 'Megan Thee Stallion's Bitter Fight with Her Label, Explained by the Lawyers from Both Sides' (*Billboard*, 26 August 2022) <https://bit.ly/3QfcAJ3>. As to the disputes between Ye and his corporate partners, see ia Glenn Litwak, 'Legal Beat: Kanye vs. EMI Litigation' (*Music Connection Magazine*, 20 January 2020) <https://bit.ly/3jbofaW>; Rhian Jones, 'Why Kanye West's Fight for His Masters Marks a Changing Music Industry' (*The Guardian*, 9 October 2020) <https://bit.ly/3j5B4qj>; Mark Savage, 'Kanye Posts Photos of His Record Deal amid Dispute' (*BBC News*, 17 September 2020) <https://bbc.in/3paoGWN>.

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contract includes a right of early termination for the corporate partner, the artist can invoke this right on the same terms[12] – a provision that may in practice have a similar result to a limitation of the duration of the contract. On a more general level, restrictions to the substantive scope of rights granted under copyright contracts on the basis of reasonableness may also lead to a termination right on the part of musicians. By way of example, the Dutch Supreme Court ruled in the case opposing rock band Golden Earring to its music publisher that the restriction of the scope of copyright contracts on the basis of reasonableness under Dutch copyright contract law may under certain circumstances give rise to a reversion right applicable to copyright exploitation contracts of indeterminate duration.[13] Sufficiently serious grounds are required, taking account of the investment made by the corporate partner at issue.[14]

Finally, the prohibition on restrictive agreements set by Article 101 TFEU and under national competition law may constitute a potential avenue for musicians to escape contracts of an excessively long duration that are deemed unreasonable, as may principles of general contract law. Several precedents are available under UK law, under the doctrines of both undue influence and restraint of trade, whereby several musicians sought to terminate a contract on this basis – albeit with varying degrees of success.[15]

[12] Art 25f(3) Dutch Copyright Act *jo* Art 2b Dutch Neighbouring Rights Act; JH Spoor and others, *Auteursrecht. Auteursrecht, portretrecht, naburige rechten en databankenrecht* (Recht en Praktijk, 4th edn, Wolters Kluwer 2019) 581–82.

[13] Dutch Supreme Court 7 July 2017, docket number 15/03787, ECLI:NL:HR:2017:1270; Stef van Gompel and others, 'Evaluatie Wet Auteurscontractenrecht: Eindrapport' (2020) <https://bit.ly/3UBZrh4> 14, 46; Iris Houben and Dirk Visser, 'De Beëindiging van Muziekexploitatieovereenkomsten' [2022] ATR 135, 144–47. An unsuccessful attempt to invoke this provision was made by Dutch rapper Ronnie Flex, see District Court Amsterdam 17 January 2024, docket number C/13/714130 HA ZA 22-167, ECLI:NL:RBAMS:2024:345.

[14] Van Gompel and others, 'Evaluatie Wet Auteurscontractenrecht' (n 13) 14, 46.

[15] On the doctrine of undue influence, see eg *John v James* [1991] *FSR* 397; Edwin Peel, *Treitel on the Law of Contract* (15th edn, Sweet & Maxwell 2020) 512–29. The existence of a restraint of trade was accepted in earlier cases, such as *Macaulay v Schroeder Music Publishing Co Ltd* [1974] 1 WLR 1308, *ZTT v Johnson* [1990] EIRP 175 (re Frankie Goes to Hollywood), *Silvertone v Mountfield* [1993] EMLR 152 (re Stone Roses), but refused in the subsequent case *Panayiotou v Sony Music* [1994] EMLR 229 (re George Michael). As to management contracts, see also *O'Sullivan v Management Agency* [1985] *QB* 428; *William Nicholl v Shaun Ryder* [2000] EMLR 632 (re Happy Mondays); *Samuel v Wadlow* [2007] *EWCA Civ* 155. See Karl Zucconi, 'Freedom: Long Term Recording Agreements and the International Music Industry' (1996) 8 Pace Int'l L Rev 161; Frank Carrigan, 'Here Comes That Rainy Day Feeling Again: Shifts in the Ideology of Contract Law from Tony Macaulay to George Michael' [1997] Law in Context 105; Andrew Evans, 'The Doctrine of Restraint of Trade in Relation to Music Industry Agreements' [2003] Music Law Updates 10; Lardinois, *Les Contrats Commentés de l'Industrie de La Musique* 2.0 (n 3) 39–41; Richard Arnold, *Performers' Rights* (6th edn, Sweet & Maxwell 2021) 276, 291–93; Lionel Bently and others, *Intellectual Property Law* (6th edn, Oxford University Press 2022) 347–51.

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General contract law usually also provides for a right to terminate a contract of indefinite duration upon reasonable notice.[16] Such a right is based on either the right to self-determination and the freedom of commerce and contract, the prohibition of contracts contrary to good morals, or requirements of reasonableness. Thus, music industry contracts that are entered into for an indefinite period may be cancelled by either of the parties. However, given the industry custom of coupling the grant of rights with the applicable term of protection – in combination with the legal regimes applicable to the determination of the scope of rights granted[17] – the application of this rule is bound to remain limited.

A more far-reaching option would be to establish a principled right of withdrawal on the part of musicians, similar to what is the case for CMOs. Above, reference was made to the limited moral right of withdrawal that currently exists under French and German law in case of a change of conviction on the part of the author, the exercise of which leads to the retraction of the work.[18] It may be asked whether such a right should be susceptible to use for economic reasons, too, allowing the artist to switch between potential corporate partners. Such a potential economic right of withdrawal could take the principles established in the CRM Directive as a source of inspiration. As to collective management of copyright, the CRM Directive posits a freedom of choice in CMOs on the part of rightsholders. This freedom of choice affects the type(s) of rights or protected content entrusted to collective management, as well as the relevant territories.[19] It also implies that rightsholders should be able to (partially) withdraw their rights from a CMO in order to manage them individually or to entrust another entity (including another CMO) with their management.[20] This right of withdrawal does not require a change of conviction on the part of the rightsholder, or the payment of a reasonable cost compensation, or an obligation to offer a right of first refusal to the initially chosen CMO. Its scope of application is very broad. Its application through potential legislative intervention to the contracts

[16] See (1) in Belgium: *Hof van Cassatie* (hereinafter: Belgian Supreme Court) 9 March 1973, Arr Cass 1973, 671, Pas 1973, 640; Belgian Supreme Court 22 November 1973, Arr Cass 1973, 327, Pas 1974, 312; Art 5.75(2) new Belgian Civil Code; (2) in Germany: Art 138 German CC; see also ia Art 620 German Civil Code as to services relationships and Art 624 German CC as to employment contracts in particular; (3) in France: Arts 1210–1211 French Civil Code; (4) in the Netherlands: Dutch Supreme Court 28 October 2011, docket number 10/00299, ECLI:NL:HR:2011:BQ9854; Dutch Supreme Court 14 June 2013, docket number 12/01625, ECLI:NL:HR:2013:BZ4163; and (5) in the United Kingdom: *Winter Garden Theatre (London) Ltd v Millennium Productions Ltd* [1948] *AC* 173; *Jackson Distribution Ltd v Tum Yeto Inc* [2009] *EWHC* 982 (QB), [2009] *All ER (D)* 107 (May); Joseph Chitty and Hugh Beale, *Chitty on Contracts* (32nd edn, Sweet & Maxwell 2015) 1118–19, 1668–69; Neil Andrews, *Contract Rules: Decoding English Law* (Intersentia 2016) 264–65. See also Flavie Vermander, *De opzegging van overeenkomsten* (Intersentia 2014) 461–512.

[17] See Chapter 4, Section 4.4.2.

[18] See Chapter 5, Section 5.2.3.

[19] Art 5(2), (7) *jo* Rec 19 CRM Directive. See also Rec 19 CRM Directive.

[20] Art 5(4) *jo* Rec 19 CRM Directive.

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under review here would be disproportionate, given the profound encroachment that this would entail on the freedom of contract and the interests of corporate partners. A right of withdrawal as such should be restricted to exceptional situations.

A second far-reaching option would be to expressly restrict the duration of a grant of rights to a certain time period, combined with a rights reversal at the end of this set time.[21] This would allow contracting parties who are confronted with a contractual setting that they consider to be unfair to renegotiate their deal or to seek new horizons following contract expiry.[22] A limited duration of copyright exploitation contracts could serve as a complement or even an alternative to an indirect duty to exploit or a broader contract adjustment mechanism.[23] Given the shift away from albums as a benchmark for contract duration due to the rise of music streaming[24], the former option appears to be the more fruitful potential avenue.

There are precedents for the restriction of the duration of copyright exploitation contracts by law. First, the 1911 UK regime provided for an automatic rights reversion to the estate of the author twenty-five years after their death.[25] Since the term of copyright protection was, at that time, life of the author plus fifty years, this implied a final twenty-five years during which the author's heirs could freely dispose of the copyright.[26] This reversion mechanism still applies to transfer contracts concluded

[21] Martin Kretschmer and others, 'The Relationship between Copyright and Contract Law' (2010) <https://ssrn.com/abstract=2624945>14; Dusollier and others, 'Contractual Arrangements Applicable to Creators' (n 6) 11–12, 15, 77–80, 104; Séverine Dusollier, 'EU Contractual Protection of Creators: Blind Spots and Shortcomings' [2018] Colum J L & Arts 436, 449, 457; Ruth Towse, 'Copyright Reversion in the Creative Industries: Economics and Fair Remuneration' (2018) 41 Colum J L & Arts 467; 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' [2020] JIPITEC 132, 147; Ula Furgał, 'Interpreting EU Reversion Rights: Why "Use-It-or-Lose-It" Should Be the Guiding Principle' (2021) 43 EIPR 283, 283, 287; Martin Kretschmer and Rebecca Giblin, 'Getting Creators Paid: One More Chance for Copyright Law' (2021) 43 EIPR 279, 280; Rebecca Giblin and Cory Doctorow, *Chokepoint Capitalism: How Big Tech and Big Content Captured Creative Labor Markets and How We'll Win Them Back* (Beacon Press 2022) 180–95. Cf Agnès Lucas-Schloetter, 'The Remuneration of Authors and Performers in Copyright Contract Law' in Paul Torremans (ed), *Research Handbook on Copyright Law* (Research Handbooks in Intellectual Property, 2nd edn, Edward Elgar 2017) 264–65.

[22] Cf Dusollier and others, 'Contractual Arrangements Applicable to Creators' (n 6) 73.

[23] European Copyright Society, 'Comment' (n 21) 147.

[24] Passman, *All You Need to Know about the Music Business* (n 3) 2, 108.

[25] See in more detail Elena Cooper, 'Reverting to Reversion Rights? Reflections on the Copyright Act 191' (2021) 43 EIPR 292, 293–97; Joshua Yuvaraj, 'Copyright Reversion: Debates, Data, and Directions' in Jens Schovsbo (ed), *The Exploitation of Intellectual Property Rights: In Search of the Right Balance* (ATRIP Intellectual Property, Edward Elgar 2023) 165–67.Taking a historical perspective on the earlier regime applicable in the United Kingdom between 1710 and 1814, see also Lionel Bently and Jane Ginsburg, 'The Sole Right Shall Return to the Authors: Anglo-American Authors Reversion Rights from the Statute of Anne to Contemporary US Copyright' (2010) 25 Berkeley Tech LJ 1475, 1480–549.

[26] See Cooper, 'Reverting to Reversion Rights?' (n 25) 293–97.

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before 1 June 1957.[27] The potential establishment of a right to revocation (after twenty years following a transfer or exclusive licence) re-entered the legislative agenda in the United Kingdom following the recent DCMS inquiry, but this potential legislative change did not make it into hard law (as of yet).[28]

The other chosen jurisdictions do not expressly restrict the duration of the contracts under review. Under Belgian and French law, contract parties must specify the scope of their relationship, including on a temporal level.[29] This duty to specify does not imply any substantive limitation on the duration of copyright exploitation contracts. Consequently, such contracts may grant rights to a corporate partner for the entire term of protection, provided that this is made explicit in the contract.[30] Naturally, a more limited duration may also be foreseen.[31]

Second, in 1976, the US legislator enacted an inalienable right for authors to terminate the grant of US publishing rights related to works (other than 'works for hire') for a period of five years under certain circumstances.[32] In a bid to safeguard the interests of corporate partners and not render exploitation impossible, 'derivative works' prepared under authority of the grant before its termination may continue to be exploited under the terms of the grant after its termination.[33] The termination may take place during a five-year window that starts thirty-five years following the grant of the rights, with specific rules applying in case the grant covers the right to publish the work.[34] This right entered into force for creations released from 1978 onwards, leading to the first potential application of this right in 2013.[35] To date, successful applications of this revocation right in the music industry have been

[27] Paul Torremans, 'The Duran Duran Case in Private International Law: Copyright Contracts and the Question Whether 203 US Copyright Act Involves a Form of Reversionary Copyright' [2018] RIDA 81, 85–89.

[28] Arts 2–3 Copyright (Rights and Remuneration of Musicians, Etc.) HC Bill (2021–22) 19, proposing Arts 93F, 191P UK CDPA. See also DCMS Committee, 'Economics of Music Streaming' (n 3) 3, 66–67; Richard Osborne and Hyojung Sun, 'Economics of Streaming: Contract Adjustment and Rights Reversion' (6 February 2023).

[29] See Chapter 4, Section 4.4.2.

[30] Sébastien Raimond, *La Qualification du Contrat d'Auteur* (Le Droit des Affaires. Propriété Intellectuelle 34, LexisNexis 2009) 45; Brigitte Lindner, 'European Union. Part A – Copyright and Contract Law Issues' in René Viljoen (ed), *Cross-Border Copyright Licensing Law and Practice* (Elgar Intellectual Property Law and Practice, Edward Elgar 2018) 65.

[31] As to publishing contracts of definite duration, see eg Art L 132-11 para 5 French IP Code.

[32] Section 203(a) *jo* 304 US Copyright Act; Bently and Ginsburg, 'The Sole Right Shall Return to the Authors' (n 25) 1549–64; Chase Brennick, 'Termination Rights in the Music Industry: Revolutionary or Ripe for Reform?' (2018) 93 NYU L Rev 786, 790–92; Jean-Michel Bruguière, 'La Révision de La Rémunération de l'auteur et de l'artiste-Interprète' [2021] PI 5. See also Jem Aswad, 'FAIR Act to Overturn California's "Seven-Year Statute" Fails in State Senate' (*Variety*, 29 June 2022) <https://bit.ly/3dIrHNo>.

[33] Section 203(b)(1) US Copyright Act; Justin Hughes and Robert Merges, 'Copyright and Distributive Justice' (2016) 92 Notre Dame L Rev 513, 564–65.

[34] Section 203(b)(1) US Copyright Act.

[35] Michael Karas and Roland Kirstein, 'Efficient Contracting under the US Copyright Termination Law' (2018) 54 Int Rev Law Econ 39, 39.

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scant.[36] This is undoubtedly influenced by cost considerations and the fear of retaliation, which affect the application of the relevant legal framework in the chosen jurisdictions, but also by the strict conditions accompanying the application of the revocation right and its apparent restrictive interpretation in practice.[37] Among other things, the exact scope of the exceptions for 'works for hire' and 'derivative works' has provided ample food for discussion.[38] A particularly contentious issue is whether this revocation right applies to the master rights in sound recordings – the US equivalent of a phonogram, which is protected by copyright (not a neighbouring right) that is allocated to the record company at the outset.[39] While record companies argue that sound recordings qualify as a work made for hire and are thus not susceptible to revocation, musicians understandably take the diametrically opposite position. It is plausible that superstar musicians use the threat

[36] See eg Dylan Gilbert and others, 'Making Sense of the Termination Right: How the System Fails Artists and How to Fix It' (2019) 20; Joshua Yuvaraj, 'Back to the Start: Re-Envisioning the Role of Copyright Reversion in Australia and Other Common Law Countries' (Monash University 2021). However, see eg *Scorpio Music v Willis* [2012] SD Cal No. 11cv1557 BTM (RBB), whereby the termination by the former lead singer of the Village People was accepted. See also Stella Brown, 'It Takes a Village to Make a Difference: Continuing the Spirit of Copyright' (2014) 12 Nw J Tech & Intell Prop 129, 138–47; Paul J Heald, 'The Impact of Implementing a 25-Year Reversion/Termination Right in Canada' (2021) 28 J Intell Prop L 63, 82–83; Joshua Yuvaraj and others, 'US Copyright Termination Notices 1977–2020: Introducing New Datasets' (2022) 19 Journal of Empirical Legal Studies 250; Mandy Dalugdug, 'Warner Music Settles Lawsuit with Rock Band the Jesus and Mary Chain over Rights Dispute' (*Music Business Worldwide*, 8 March 2023) <https://bit.ly/3Dfouey>; Yuvaraj, 'Copyright Reversion' (n 25) 170–81.

[37] Hughes and Merges, 'Copyright and Distributive Justice' (n 33) 564–70; Jane C Ginsburg, 'The Role of the Author in Copyright' in Ruth L Okediji (ed), *Copyright Law in an Age of Limitations and Exceptions* (Cambridge University Press 2017) 63–64; Gilbert and others, 'Making Sense of the Termination Right' (n 36) i–ii, 12, 21–25; Yuvaraj, 'Copyright Reversion' (n 25) 182.

[38] A wealth of relevant sources is available on this topic. See, by way of example, Corey Field, 'Their Master's Voice?' (2000) Journal of the Copyright Society of the USA J Copyright Soc'y USA 145; Bently and Ginsburg, 'The Sole Right Shall Return to the Authors' (n 25) 1575–80; Bob Donnelly, 'Everything You Need to Know about Copyright Reversions' (2012) 1 St John's Entertainment, Arts and Sports Law Journal 1, 3–10, 27; Guy Rub, 'Stronger than Kryptonite? Inalienable Profit Sharing Schemes in Copyright Law' (2013) 27 Harv JL & Tech 49, 62–64; Amy Gilbert, 'The Time Has Come: A Proposed Revision to 17 USC Section 203' (2016) 66 Case West Reserve Law Rev 807, 810–11, 820–26, 832–37; Brennick, 'Termination Rights in the Music Industry' (n 32) 796–806; Kike Aluko, 'Terminating the Struggle over Termination Rights' (2019) 10 Harvard JSEL 119, 121–31; Gilbert and others, 'Making Sense of the Termination Right' (n 36) 8–10, 14–18; Giblin and Doctorow, *Chokepoint Capitalism* (n 21) 184–86. An additional question is whether and how the termination right applies to 360 degree music industry contracts, see Brennick, 'Termination Rights in the Music Industry' (n 32) 813–15.

[39] Jessica Johnson, 'Application of the Copyright Termination Provision to the Music Industry: Sound Recordings Should Constitute Works Made for Hire' (2013) 67 U Miami L Rev 661; Kate Darling, 'Occupy Copyright: A Law & Economic Analysis of US Author Termination Rights' (2015) 63 Buffalo Law Review 147, 158–59; Brennick, 'Termination Rights in the Music Industry' (n 32) 796–801; 'Top Ten Legal Battles – Prince v Warner' (n 11).

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of commencing litigation on this issue to secure more advantageous contract terms. An example of such a situation playing out is the 2014 deal between Prince and Warner, whereby Prince successfully claimed a significant part of the US master rights, only to licence them back to Warner.[40] Thus, successful artists are able to leverage the legal uncertainty surrounding the exact scope of the revocation right to their benefit. Since the results of such negotiations are usually subject to stringent NDAs, other musicians are unlikely to benefit.[41] A clear court decision on this topic would be desirable.

The restriction of copyright exploitation contracts in time may have certain beneficial economic effects. As is the case for rights reversal mechanisms based on insufficient exploitation,[42] the restriction of contract duration coupled with rights reversion may have a positive impact in terms of accessibility of protected works, since it opens up new avenues of exploitation.[43] The restriction of contract duration may also have negative follow-on consequences for secondary relationships and lead to a less advantageous deal for musicians overall. Corporate partners that only acquire exploitation rights for a short time have fewer incentives to invest in the exploitation of the content at issue and may moreover be less inclined to support emerging, up-and-coming artists in favour of established superstars.[44] It would make sense for corporate partners to manage the risk of a lack of immediate success by offering less advantageous remuneration arrangements to artists, in effect shifting the risk of commercial failure to the artist.[45] The risk of this happening has been analysed for the US reversion regime in relatively close detail, with researchers predicting a degree of internalisation of costs by corporate partners to the disadvantage of artists that may lead to the costs of this reversion regime (as it currently stands) outweighing the distributive and societal benefits.[46]

[40] Aluko, 'Terminating the Struggle over Termination Rights' (n 38) 128–29; 'Top Ten Legal Battles – Prince v Warner' (n 11).

[41] Aluko, 'Terminating the Struggle over Termination Rights' (n 38) 129; Gilbert and others, 'Making Sense of the Termination Right' (n 36) 1, 21.

[42] See Chapter 5, Section 5.2.2.3.

[43] Kretschmer and others, 'The Relationship between Copyright and Contract Law' (n 21) 14; Abdullahi Abdullahi, 'Termination Rights in Music: A Practical Framework for Resolving Ownership Conflicts in Sound Recordings' [2012] U Ill JL Tech & Pol'y 457, 482–83; Heald, 'The Impact of Implementing a 25-Year Reversion/Termination Right in Canada' (n 36) 69–82; Giblin and Doctorow, *Chokepoint Capitalism* (n 21) 187. Cf Kristelia García and Justin McCrary, 'A Reconsideration of Copyright's Term' (2019) 71 Ala L Rev 315, 388–89.

[44] Darling, 'Occupy Copyright' (n 39) 168–75; Karas and Kirstein, 'Efficient Contracting under the US Copyright Termination Law' (n 35) 46; European Copyright Society, 'Comment' (n 21) 147.

[45] Rub, 'Stronger than Kryptonite?' (n 38) 96–99; Brown, 'It Takes a Village to Make a Difference' (n 36) 147; Darling, 'Occupy Copyright' (n 39) 150, 162–68, 200–03; Brennick, 'Termination Rights in the Music Industry' (n 32) 793–94; Karas and Kirstein, 'Efficient Contracting under the US Copyright Termination Law' (n 35) 40.

[46] See eg Rub, 'Stronger than Kryptonite?' (n 38); Darling, 'Occupy Copyright' (n 39); Karas and Kirstein, 'Efficient Contracting under the US Copyright Termination Law' (n 35).

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Similar reservations have been made concerning the right granted to authors under German law to grant an additional licence after ten years.[47] This was also the primary argument against the preliminary proposal in the Netherlands to divide the duration of copyright exploitation contracts into chunks of five years with a rights reversal after five years and ensuing renegotiation of contract terms.[48] It was argued that corporate partners would manage the risk of a lack of immediate success by offering less money.[49] Further, if success were not forthcoming in the first five years, a renegotiation of contract terms would risk leaving the musician significantly worse off. This risk may be materially mitigated by setting a longer duration, such as ten years,[50] twenty-five years,[51] or another term, taking account of the average exploitation period of content in a given sector.[52] If the temporal window of envisaged exploitation matches the duration of the grant, the restriction is unlikely to have a negative effect on the level of remuneration.[53] An important criterion in this regard is the perceived net present value of a piece of music as an asset.[54] However, if the restricted duration corresponds to the exploitation period of the content at issue, providing a termination right would not lead to an increase in musician income either.[55] Indeed, a high depreciation rate of expected revenues from exploitation limits musicians' prospective income upon reclaiming their rights after a certain period of time. In other words, musicians would not benefit from a temporal restriction of copyright exploitation contracts if the set duration is too short or too long. Pinpointing an appropriate one-size-fits-all contract duration appears rather arbitrary and may even prove to be impossible. While the economic value of much music depreciates quite rapidly, a significant number of musical works *doe* stand the test of time. In this regard, reference may be made to the classical music canon, the

[47] Kirstein and Karas, 'Efficient Contracting under the US Copyright Termination Law' (n 35). See also Chapter 4, Section 4.4.1.2.

[48] Martin Senftleben, 'Exportschlager Deutsches Urhebervertragsrecht? Het Voorontwerp Auteurscontractenrecht in Duits Perspectief' [2010] AMI 146, 147–49; P Bernt Hugenholtz, 'Towards Author's Paradise: The New Dutch Act on Authors' Contracts' in Gunnar Karnell and others (eds), *Liber Amicorum Jan Rosén* (eddy.se ab 2016) 400; Martin Senftleben, 'More Money for Creators and More Support for Copyright in Society – Fair Remuneration Rights in Germany and the Netherlands' (2018) 41 Colum J L & Arts 413, 432.

[49] Senftleben, 'More Money for Creators and More Support for Copyright in Society' (n 48) 432; European Copyright Society, 'Comment' (n 21) 147.

[50] Cf Kenneth W Barr, 'Music Copyright in the Digital Age. Creators, Commerce and Copyright. An Empirical Study of the UK Music Copyright Industries' (University of Glasgow 2016).

[51] Cf Heald, 'The Impact of Implementing a 25-Year Reversion/Termination Right in Canada' (n 36) 83; Giblin and Doctorow, *Chokepoint Capitalism* (n 21) 190–91.

[52] Cf Martin Kretschmer, 'Short Paper: Copyright Term Reversion and the "Use-It-or-Lose-It" Principle' (2012) 1 IJMBR 44, 44, 49–50.

[53] Heald, 'The Impact of Implementing a 25-Year Reversion/Termination Right in Canada' (n 36) 83.

[54] Darling, 'Occupy Copyright' (n 39) 179–80; Heald, 'The Impact of Implementing a 25-Year Reversion/Termination Right in Canada' (n 36) 83–85.

[55] Rub, 'Stronger than Kryptonite?' (n 38) 107.

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persisting popularity of legacy artists and classics' catalogue such as the Beatles or the Rolling Stones on music streaming services, and the ever-increasing activities of music publishing maverick Hipgnosis.[56]

The difficulties in setting an appropriate duration and the significant potential impact of getting this wrong constitute a significant practical hurdle for the implementation of a temporal restriction of the duration of copyright exploitation contracts. More importantly, such a restriction would not have a significant fairness-enhancing effect, in view of the already existing protective regimes relating to fair scope, exploitation and remuneration in the chosen jurisdictions as partially harmonised at the EU level. Indeed, in case of an excessive rights transfer, several mitigating mechanisms are available – including the German rule that allows the grant of an additional licence after a decade.[57] In terms of exploitation, the indirect duties to exploit as partially harmonised by Article 22 DSM Directive and Article 3(2a) Term Directive may be mentioned, in combination with potential recourse to moral rights protection.[58] Finally, as to the objective of securing fair remuneration over time, applicable contract adjustment mechanisms as harmonised through Article 20 DSM Directive may be mentioned.[59] Granted, these regimes are not (yet) optimal, which is why this book has advanced potential avenues for their incremental amelioration. Provided that high-performing regimes pertaining to fair scope, exploitation and remuneration may be guaranteed, the potential added value of a maximum duration of copyright exploitation contract is limited. This, in turn, may render its implementation a disproportionate encroachment upon the freedom of contract.

6.3 GROUNDS FOR CONTRACT TERMINATION

Now we again move from the formation phase of the contracts under review to their performance, this time focusing on grounds for termination. Chapter 5 analysed the parties' obligations concerning the performance of music contracts. While the primary remedy in case of contractual shortcomings on the part of either party is in principle to claim specific performance, where there is serious breach of contract a right to rescission resulting in rights reversion may be available.[60] If exploitation on the part of the corporate partner is completely lacking or deemed insufficient under the

[56] See <www.hipgnosissongs.com>.
[57] See Chapter 4, Section 4.4.1.2.
[58] See Chapter 5, Section 5.2.2.3.
[59] See Chapter 5, Section 5.3.2.3.
[60] See for the law on breach of contract under national law in the chosen jurisdictions (1) in Belgium: Arts 1134–1155, 1184 Belgian Civil Code; (2) in Germany: Arts 241–292, 320–326 German Civil Code; (3) in France: Arts 1217–1231-7 French CC; (4) in the Netherlands: Arts 6:74–94, 6:265 Dutch Civil Code; and (5) in the United Kingdom: Chitty and Beale, *Chitty on Contracts* (n 16) chs 24, 26–28; Andrews, *Contract Rules* (n 16) 266–364; Peel, *Treitel on the Law of Contract* (n 15) chs 17–21; Mindy Chen-Wishart, *Contract Law* (7th edn, Oxford University Press 2022) 495–614.

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applicable direct/indirect duties to exploit, rights revocation mechanisms as partially harmonised under the use-it-or-lose-it clause of Article 22 DSM Directive may apply.[61]

While available case law is limited, precedents from France and the Netherlands show that a serious breach of contract relating to exploitation and remuneration may give rise to a right of termination. Two specific examples stand out, where the musician(s) sought to terminate the contractual relationship: the case brought by French rapper MC Solaar and the more recent dispute between Dutch gothic and symphonic metal band Epica and their record company.[62]

In the former case, MC Solaar sought the termination (and the associated rights reversion) of his 1993 contract with Polydor,[63] alleging a breach of contract, due to (among other things) the non-respect of certain release commitments.[64] Siding with MC Solaar, the Court of Appeal of Paris rescinded the contract.[65] This judgment was subsequently confirmed by the French Supreme Court.[66] While the context of the MC Solaar case was still largely analogue, the Epica case shows the impact of the digital sphere on corporate partners' commitments in terms of fair remuneration and transparency. In essence, the Epica band members were deprived of revenues from digital exploitation collected via digital aggregator TuneCore for a significant period of time and a total sum exceeding €200,000. In March 2021, the District Court of Amsterdam found, ruling in the context of summary proceedings, that the corporate partner's behaviour was likely to justify termination of the contract, citing both the non-payment of remuneration and the persisting lack of transparency on the part of the corporate partner.[67] In the meantime, this case has been settled under confidential terms. Regardless, the District Court's judgment may provide a valuable precedent for musicians confronted with a corporate partner that is unwilling to fulfil its obligations in terms of exploitation and/or remuneration, especially in the Netherlands.

Musicians may also have certain obligations throughout the course of contract performance, such as the duty to cooperate with exploitation activities.[68] However, as the sanction of specific performance appears to be the more logical and constructive outcome in such a context, it is unsurprising that no relevant case law was retrieved citing musician behaviour as a ground for termination of a contract.

[61] See Chapter 5, Section 5.2.2.3.

[62] See also eg the dispute between Golden Earring and their music publisher, Dutch Supreme Court 7 July 2017, docket number 15/03787; ECLI:NL:HR:2017:1270; Spoor and others, *Auteursrecht* (n 12) 532–33. See also Chapter 5, Section 5.2.2.3.2.

[63] Polydor is part of Universal Music Group.

[64] See also Lardinois, *Les Contrats Commentés de l'Industrie de La Musique* 2.0 (n 3) 73–75.

[65] Court of Appeal Paris 5 April 2002, not published.

[66] French Supreme Court 21 June 2004, docket number 02-43.793 <https://bit.ly/44vD4yF>. See also 'Universal défait par MC Solaar' (*Le Monde*, 8 April 2004) <https://bit.ly/3lOXnCs>.

[67] District Court Amsterdam 9 March 2021, docket number C/13/696035 / KG ZA 21-32, ECLI:NL:RBAMS:2021:1041.

[68] See Chapter 5, Section 5.2.3.

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The remedy of contract termination may also be an option if the circumstances surrounding the contract have changed significantly and attempts at renegotiation are unsuccessful, either in application of a contract adjustment mechanism or the doctrine of changed circumstances as applicable at the time of writing in Belgium, France, Germany and the Netherlands.[69] If all efforts at renegotiation fail, the parties may commence judicial proceedings. The judge called upon to rule on the dispute may not only have the competence to revise the contract terms in a reasonable manner, but may under certain circumstances also decide to terminate the contract.[70] Thus, the parties may avail themselves of the termination of the contract as a last resort, if the circumstances so require. Partial termination could be used to limit the termination of the contract to specific methods of exploitation, such as streaming.

In Germany, judicial intervention is not required for the remedy of termination to be available to the parties under general contract law: if contract revision is impossible or legitimately unacceptable to one of the parties, that party may terminate the contract.[71] Furthermore, also under German contract law, each party may terminate a contract that relates to a continuing obligation – such as the exploitation of protected music under a licence agreement and/or the royalty payment as remuneration – without a notice period, provided that there is a compelling reason for them to do so.[72] Such a reason is deemed to be present if continued performance cannot be legitimately expected from them.[73] This requirement is analogous to the substantive condition set by the doctrine of changed circumstances under German law.

For publishing contracts in particular, a ground of termination may arise if there are no longer any copies of the work(s) (Belgium,[74] France,[75] Germany[76]).

[69] See Chapter 5, Section 5.3.2.3.

[70] See (1) in Belgium: Art 5.74 new Belgian Civil Code; (2) in France: Art 1195 French Civil Code; and (3) in the Netherlands: Art 6:258 Dutch Civil Code.

[71] Art 313(3) German Civil Code.

[72] Art 314(1) German Civil Code; Basil S Markesinis and others, *The German Law of Contract. A Comparative Treatise* (2nd edn, Hart 2006) 436–37; Dieter Medicus and Stephan Lorenz, *Schuldrecht I. Allgemeiner Teil* (Juristische Kurz-Lehrbücher, 21st edn, CH Beck 2015) 302–04; Wolfgang Fikentscher and Andreas Heinemann, *Schuldrecht: Allgemeiner und Besonderer Teil* (De Gruyter Studium, 11th edn, De Gruyter 2017) 350–52. See in the context of copyright exploitation contracts in particular Gerhard Schricker, *Urheberrecht. Kommentar* (3rd edn, CH Beck 2006) 646–54.

[73] Markesinis and others, *The German Law of Contract* (n 72); Medicus and Lorenz, *Schuldrecht I. Allgemeiner Teil* (n 72); Fikentscher and Heinemann, *Schuldrecht* (n 72); Schricker, *Urheberrecht* (n 72).

[74] According to Art XI.199(1) Belgian CEL, the author has the right to terminate the publishing contract if the publisher destroys all the copies.

[75] According to Art L 132-17(1) French IP Code, the publishing contract expires if the publisher destroys all the copies of the work(s). See Christophe Caron, *Droit d'Auteur et Droits Voisins* (6th edn, LexisNexis 2020) 449–50. See also Code des Usages et des Bonnes Pratiques de l'Edition des Œuvres Musicales (4 October 2017) s 5.2.

[76] According to Art 29(1) German Publishing Act, if the publishing contract is limited to a certain number of editions or copies, in principle the contractual relationship terminates when the editions or copies are out of print.

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Finally, a particular concern arises where the corporate partner becomes insolvent. As already detailed above in the context of the formation of secondary relationships, many copyright exploitation contracts have an *intuitu personae* or *intuitu firmae* nature.[77] In order to ensure party agency, parties have a clear interest in maintaining control over the identity of their contractual counterparties. Allowing for copyright exploitation contracts to be fully maintained throughout insolvency proceedings clearly risks thwarting this objective.

Specific rules apply where the publisher becomes insolvent (Belgium,[78] France,[79] Germany[80]), including a potential termination right on the part of the author. No equivalent rule of copyright contract law exists in the chosen jurisdictions for non-publishing contracts.[81] However, restrictions on the transfer of rights in the context of secondary relationships may provide a solution for this.[82]

6.4 CONSEQUENCES OF TERMINATION

Even if it is clear in what circumstances the contracts under review may be terminated, the potential consequences of such termination add an additional layer of complexity. Contract termination leads to issues relating to the fate of rights[83] and/or revenues[84] as well as physical copies and digital files of the music that falls within the scope of the contract, including the follow-on consequences for music added to streaming services,[85] the (continued) access to relevant audience

[77] See Chapter 4, Section 4.5.

[78] Art XI.200 Belgian CEL grants the author the right to terminate the publishing contract if the publisher goes bankrupt or goes into receivership. The author obtains a right of first refusal to buy all remaining copies.

[79] Art L 132-15 para 4 French IP Code grants the author the right to terminate the publishing contract if the publisher ceases its activities for a period of three months or a judge pronounces its liquidation. In such a case, the author obtains a right of first refusal to buy all remaining copies, see Art L 132-15 paras 5–6 French IP Code. See also Code des Usages et des Bonnes Pratiques de l'Edition des Œuvres Musicales (n 75) s 5.2.

[80] Under the regime set by Art 36 German Publishing Act, upon insolvency of the publisher, the insolvency administrator may insist upon contract performance by the author. If reproduction has yet to commence at the time insolvency proceedings are opened, the author may withdraw from the publishing contract.

[81] Cf P Bernt Hugenholtz and Lucie Guibault, 'Auteurscontractenrecht: Naar Een Wettelijke Regeling?' (2004) <https://bit.ly/3UvnwGx> 72–74.

[82] See Chapter 4, Section 4.5.

[83] For example, in the Netherlands, as to the consequences of a successful application of the use-it-or-lose-it mechanism, see draft amendment to Art 25e Dutch Copyright Code <https://bit.ly/4407vot>.

[84] For example, it may be asked whether a musician may stake a claim in a share of the revenues garnered by a corporate partner through the sale of equity in DSPs that postdates contract termination, see Cooke, *Dissecting the Digital Dollar* (n 86) 101.

[85] See eg the dispute between artist Four Tet and corporate partner Domino Records in the United Kingdom, which (among other things) involved the removal by Domino Records of Four Tet's music from streaming services, see Chris Cooke, 'Four Tet Allowed to Add New Legal Claims over Album Takedowns in Domino Dispute' (*CMU*, 17 December 2021)

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data,[86] and even musicians' ability to perform music that falls within the scope of the initial contract in a post-contractual context. Contract provisions risk preventing musicians from reclaiming any rights. Again, the risk of unfairness is greater for legacy artists, in view of the larger scope of rights transfers in legacy deals.[87]

A first issue is how contract termination affects the scope of rights initially granted. Regulatory approaches differ. Moreover, instances of retroactive and non-retroactive contract termination are to be distinguished. While the former – such as contract nullity and rescission – are usually associated with automatic rights reversion to the benefit of the initial rightsholder, the latter – such as contract expiry and termination in common agreement – are usually not.

The former situation arises in case of shortcomings in the formation of the contract and in the event of a serious breach of contract. An example of the latter situation is provided by the case opposing French singer Johnny Hallyday and Universal Music. The singer unsuccessfully sought to obtain the master rights to the music he recorded while the contract with Universal Music was ongoing.[88] It was held that the termination in principle only has effects for the future, unless there is a contractual provision to the contrary. Thus, the transfer of rights to the corporate partner effectuated through the contract remains valid.[89] If the musician has only granted a licence to the corporate partner, this licence no longer produces any effects following contract termination. This results in a full return of exploitation rights to the musician if the licence was exclusive.[90]

Given the importance of secondary relationships to the streaming music ecosystem, it bears relevance to ascertain the follow-on consequences of the potential termination of the primary contract.[91] Again, national regulatory approaches differ.

<https://bit.ly/3B7TzCd>. This dispute was later settled, with the label committing to pay a 50 per cent royalty rate for digital exploitation, see Laura Snapes, 'Four Tet Settles Historic Royalty Rate Dispute with Domino Records' (*The Guardian*, 20 June 2022) <https://bit.ly/3RXyULu>.

[86] This refers to audience data, as well as data concerning social media, a band website and so forth, see Chris Cooke, *Dissecting the Digital Dollar* (3rd edn, Music Managers Forum and CMU Insights 2020)165.

[87] See Chapter 2, Section 2.4.5.

[88] See Court of Appeal Paris, 12 April 2005 <https://bit.ly/3FsfFB2>; French Supreme Court 20 December 2006, docket number 05–43.057 <https://bit.ly/4bw4giQ>. In 2008, Hallyday and Universal Music reached a settlement.

[89] Caron, *Droit d'Auteur et Droits Voisins* (n 75) 640.

[90] In case of a non-exclusive licence, the musician also has the right to exploit prior to the termination of the licence. Therefore, the termination of a non-exclusive licence does not really imply a 'return' of rights.

[91] For detail on the legal regimes applicable to the follow-on consequences of the termination of a contract on the validity of connected contracts, see Sanne van Dongen, *Groepen van Contracten* (Onderneming en Recht 95, Wolters Kluwer 2016); Tâm Dang Vu, 'Verbonden Overeenkomsten' (KU Leuven 2017). The former volume focuses on French, German and Dutch law, while the latter also includes an analysis of Belgian law.

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In principle, the retroactive termination of the primary contract negatively affects the validity of secondary contracts, since the primary corporate partner then is deemed never to have been granted any exploitation rights.[92] However, under Belgian law, the rescission of a publishing contract upon the author's request does not prejudice secondary exploitation contracts that were validly concluded by the publisher.[93] In such a case, the author may directly claim remuneration from the secondary exploiter at issue.[94] No specific corresponding provisions of copyright contract law were found in any of the other chosen jurisdictions, or as to contracts with performers under Belgian law. In the absence of applicable *leges speciales*, general contract law applies.[95] In this context, the potential incidence of the third party's good faith on the validity of the secondary contract is noted. In any case, if the termination is non-retroactive, the validity of the secondary contract remains unaffected.

The consequences of contract termination on the scope of rights granted in turn also affect the possibilities in terms of further exploitation. In case of non-retroactive termination and subject to rights reversion, the corporate partner retains exploitation rights that were transferred, but can no longer invoke any exploitation rights for the future under a terminated licence. Further, if the termination has retroactive effect, logic dictates that no further exploitation be allowed on the part of the corporate partner.

[92] Cf Alain Berenboom, *Le Nouveau Droit d'Auteur et les Droits Voisins* (Création Information Communication 1, 3rd edn, Larcier 2005) 221–22; 236; Dang Vu, 'Verbonden Overeenkomsten' (n 91) 492–95; Pierre-Yves Gautier, *Propriété Littéraire et Artistique* (11th edn, Presses Universitaires de France 2019) 573, 602–06. See under Dutch law Art 6:229 Dutch Civil Code. A contract that intends to build further upon an already existing primary contractual relationship is voidable if the primary relationship is absent, unless the nature of the contract, common practice or the circumstances dictate otherwise. See also Dang Vu, 'Verbonden Overeenkomsten' (n 91) 281–92; Jac Hijma and others, *Rechtshandeling en Overeenkomst* (Studiereeks burgerlijk recht 3, 9th edn, Kluwer 2019) 190–91.

[93] Art XI.199(3) Belgian CEL; Fernand De Visscher and Benoît Michaux, *Précis du Droit d'Auteur et des Droits Voisins* (Bruylant 2000) 352–53; Berenboom, *Le Nouveau Droit d'Auteur et les Droits Voisins* (n 92) 234; Hendrik Vanhees, *De wettelijke regeling inzake auteurscontracten* (Recht en Praktijk 69, Kluwer 2012) 44–45; Hendrik Vanhees, 'Art XI.195' in Fabienne Brison and Hendrik Vanhees (eds), *Hommage à Jan Corbet Huldeboek* (3rd edn, Larcier 2018) 319.

[94] De Visscher and Michaux, *Précis du Droit d'Auteur et des Droits Voisins* (n 93); Berenboom, *Le Nouveau Droit d'Auteur et les Droits Voisins* (n 92); Vanhees, *De wettelijke regeling inzake auteurscontracten* (n 93); Vanhees, 'Art XI.195' (n 93).

[95] See eg under German law: Silke von Lewinski, 'News from Germany. Developments in Germany from Mid-2005 until the End of 2010. Part I' [2011] RIDA 164, 213–15; Jan Bernd Nordemann, 'Die Beendigung urheberrechtlicher Verträge: Automatischer Rechterückfall? Das Urhebervertragsrecht nach BGH M2Trade, Take Five und Reifen Progressiv' in Kirsten-Inger Wöhrn and others (eds), *Festschrift für Artur-Axel Wandtke zum 70 Geburtstag am 26 März 2013* (Walter De Gruyter 2013) 187–97; Patrick Zurth, *Rechtsgeschäftliche und gesetzliche Nutzungsrechte im Urheberrecht. Eine dogmatische Analyse der Rechtsnatur und der vertraglichen Gestaltungsmöglichkeiten* (Studien zum Privatrecht 54, Mohr Siebeck 2016).

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In the physical realm, specific legal arrangements have been made regarding the further sale of unsold stock in the context of publishing contracts.[96] Belgian law expressly allows the publisher to sell remaining stock at a 'normal' price in case of contract termination for a period of three years, unless the author wants to buy the stock to sell themselves.[97] A similar rule applies under French law following the expiry (that is, non-retroactive termination) of a publishing contract of definite duration.[98] Conversely, subsequent to the German Publishing Act, if the publishing contract is concluded for a definite duration, the publisher is in principle no longer entitled to distribute remaining stock after its expiry.[99]

As to digital exploitation, the main consequences of contract termination relate to secondary relationships with DSPs. If termination of the initial contract results in termination of the secondary contract, exploitation by the DSP must – in theory – cease, subject to national regimes based on good faith.[100] To the extent that this may cut musicians off from their audience, this consequence may run counter to the interests of both musicians and users. Moreover, an initial corporate partner that actively pulls music off of music streaming platforms following contract termination may be held to act counter to good faith and may therefore be estopped from doing so.[101] In any case, a full cessation of online exploitation activities following contract termination appears unlikely in practice and, moreover, unwarranted. The conclusion of a direct contractual link between musicians and DSPs, most likely through the intervention of a digital distributor and/or a publishing administrator, would arguably be a beneficial alternative in such a case.

An additional layer to this debate stems from the fact that phonogram producers also acquire a neighbouring right of their own upon taking the initiative and the

[96] Cf Brigitte Dauwe, 'Overeenkomsten in het Oude en in het Nieuwe Auteursrecht' in Frank Gotzen (ed), *Belgisch Auteursrecht van Oud naar Nieuw Le Renouveau du Droit d'Auteur en Belgique* (CIR 11, Bruylant 1996) 264.

[97] Arts XI.197 *jo* XI.199(2) Belgian CEL; Hendrik Vanhees, 'Auteurscontracten en de Problematiek inzake Werken Gemaakt in Opdracht of in Uitvoering van een Arbeidsovereenkomst of Statuut' in Frank Gotzen (ed), *Belgisch Auteursrecht van Oud naar Nieuw Le Renouveau du Droit d'Auteur en Belgique* (CIR 11, Bruylant 1996) 322; De Visscher and Michaux, *Précis du Droit d'Auteur et des Droits Voisins* (n 93) 352; Vanhees, 'Art XI.195' (n 93) 319. The possibility for authors to buy remaining stock also applies in case the publisher goes bankrupt, see Art XI.199(2) Belgian CEL.

[98] Art L 132–11 para 6 French IP Code; Alexis Boisson, *La Licence de Droit d'Auteur* (Bibliothèque de Droit de l'Entreprise 86, LexisNexis 2013) 676–77; Gautier, *Propriété Littéraire et Artistique* (n 92) 639–41.

[99] Art 29(3) German Publishing Act; Friedrich Karl Fromm and Wilhelm Nordemann, *Urheberrecht. Kommentar zum Urheberrechtsgesetz, zum Verlagsgesetz und zum Urheberrechtswahrnehmungsgesetz* (Rechtswissenschaften und Verwaltung, 10th edn, Kohlhammer 2008) 2114–15.

[100] Cf Boisson, *La Licence de Droit d'Auteur* (n 98) 676.

[101] On the principle of good faith in a post-contractual context as applicable to copyright exploitation contracts (under French law), see Julie Groffe, *La Bonne Foi en Droit d'Auteur* (Institut Universitaire Varenne Collection des Thèses 106, LGDJ – lextenso éditions 2015) 275–78.

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investment for the fixation of the phonogram(s) at issue.[102] Therefore, even if the termination has a retroactive effect and thus results in a rights reversion to the benefit of the performer(s), these do not acquire full exploitation rights to the phonogram(s). An inevitable risk of stalemate ensues, with both former contract parties in principle having the right to veto further exploitation, even though neither party would benefit – and nor, for that matter, would the audience – from either the exercise of this right, or the lack of exploitation that this would entail. This risk is expressly acknowledged in the Epica decision of the District Court of Amsterdam.[103] Instead of ordering a transfer of rights from the record company to the band, as requested by Epica, the Court ordered them to cooperate with the further exploitation of the phonograms at issue via TuneCore, lest penalty payments be imposed.[104] This situation was set to continue at least until contractual negotiations led to an outcome satisfactory to both parties, or until a court decision on the merits was handed down. The Court held that a refusal by the record company to cooperate at this stage would amount to an abuse of rights.[105] This pragmatic solution takes account of the interests of all parties and deserves support. In the meantime, the parties have reached a settlement.

In any case, if further exploitation post-termination is allowed, this should be accompanied by (fair) remuneration for all parties. An express legal provision in this sense has been included in the German Publishing Act.[106] Reference may also be made to the direct claim for remuneration arising under Belgian law to the benefit of artists vis-à-vis secondary exploiters in case the primary publishing contract is rescinded.[107]

A final important aspect of the consequences of contract termination is associated with ownership and/or access to data. The transparency of data flows regarding exploitation and remuneration in the course of contract performance is often problematic. The active reporting obligation set by Article 19 DSM Directive seeks to remedy this.[108] This reporting obligation ceases when exploitation no longer takes place.

However, also at the time of contract termination, issues regarding access to relevant data arise, especially as to data that allows direct contact with listeners, such as a mailing list with fans' contact details compiled over the years, a band website filled with relevant content and aggregated audience data collected by

[102] See Chapter 2, Section 2.2.3.2.
[103] District Court Amsterdam 9 March 2021, C/13/696035 / KG ZA 21–32, ECLI:NL:RBAMS:2021:1041, paras 5.20–5.22.
[104] As long as no final decision was reached, the remuneration obtained through such exploitation was to be divided according to the original contract (namely a 40/60 division between Epica and the record company), see ibid para 5.22.
[105] ibid para 5.22.
[106] Art 36(2) German Publishing Act; Fromm and Nordemann, *Urheberrecht* (n 99) 2147–53.
[107] Art XI.199(3) Belgian CEL.
[108] See Chapter 5, Section 5.3.3.2.

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platforms concerning the identity and listening behaviour of their fans.[109] The economic value of such data is undeniable and increasing. Such information is usually managed by corporate partners, save in a true DIY context. While corporate partners may also have a legitimate interest in retaining such data following contract termination, (continued) access to it on the part of the musician is vital in order to enable them to nurture and enhance their fanbase.[110]

Yet, such data is not usually causally linked with the exploitation of music and/or the ensuing remuneration. This makes it difficult to argue that it would fall within the scope of corporate partners' reporting obligations. Moreover, musicians' interest in obtaining such data only spikes after the contract has been terminated. As long as the corporate partner takes good care of the band newsletter, the band has little to gain by accessing the mailing list. An additional dimension is added by the potential qualification of audience data as trade secrets.[111]

In an ideal world, considerations pertaining to data are discussed and regulated in a balanced contractual clause.[112] However, differences in relative bargaining power may prevent full data transparency in practice. Musicians who wish to seek new horizons may understandably feel constrained by the prospect of losing direct access to their fanbase and data that may help them grow their audience. Thus, exclusive access to data risks functioning as a switching cost that may lock in musicians, leaving the promise of autonomy and musician agency to sound rather hollow. The contrast with the right to data portability under data protection law, as protected under Article 20 GDPR,[113] is remarkable. As yet, beyond the general principle of good faith in contractual situations,[114] the legal framework does little to further musicians' interests in this context.

6.5 OUTRO

This chapter analysed various issues connected with the termination of music contracts in the streaming age. In essence, it treated the issue of whether the parties to the contracts under review have the opportunity to terminate a contract if instances of unfair scope, exploitation and/or remuneration arise. Several findings are noted, such as the absence of an express restriction on the duration of copyright exploitation contracts in the chosen jurisdictions (as yet), a wide and diverging array of potential grounds for termination on the basis of breach of contract, and clear

[109] See in detail Cooke, *Dissecting the Digital Dollar* (n 86) 158–79.
[110] Stopps, 'How to Make a Living from Music' (n 3) 103, 160, 166; Cooke, *Dissecting the Digital Dollar* (n 86) 5.
[111] See Chapter 7, Section 7.3.
[112] Cf in more detail Cooke, *Dissecting the Digital Dollar* (n 86) 161–62, 165, 175, 177–78.
[113] Regulation 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC [2016] OJ L119/1.
[114] See Chapter 3, Section 3.3.1 and sources referenced there.

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shortcomings of the legal framework as to the consequences of contract termination. Consequently, depending on the applicable law, musicians' theoretical rights to terminate a contract differ, with predictable negative results as to procedural fairness. Also on a substantive level, the framework pertaining to the actual possibility to terminate the contracts under review may fall short.[115]

In the context of the consequences of contract termination, the two main issues are that it is not always fully clear how this affects (1) corporate partners' right to exploitation and musicians' ensuing right to remuneration or (2) musicians' right to access audience and other relevant data. As to the former, the existing rules appear to offer a more or less satisfactory solution, provided it is accepted that the principle of good faith and the prohibition of abuse of law curb the possibility for primary corporate partners to immediately pull music off streaming platforms following contract termination. However, the follow-on effects of termination on secondary contracts as affected by general contract law regimes merit further research. In any case, further exploitation in a post-contractual context, be it by a primary or secondary corporate partner, should result in (fair) remuneration, as already expressly confirmed by under Belgian and German law for publishing contracts.

As to the latter, an extension in scope of active reporting obligations for all types of audience data, including but not limited to demographic information and mailing lists, would be desirable. The inclusion of such data within the scope of active reporting obligations would imply a continuous stream thereof throughout the course of contract performance – thus also safeguarding musicians' right to access such data in a post-contractual context.

[115] For a more general, theoretical analysis that goes into the nature of appropriate remedies for breach of contract from a Kantian and Rawlsian perspective, see Martín Hevia, *Reasonableness and Responsibility: A Theory of Contract Law*, vol 101 (Law and Philosophy Library, Springer Netherlands 2013) 83–89.

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