3

Law and Policy in the Streaming Age

So what better alternative is there
than an agreement between citizens themselves
reached under conditions that are fair for all?

—John Rawls[1]

3.1 INTRO

This chapter crosses the bridge from music industry practice to the analysis of the legal regimes deemed most relevant in securing a fair(er) balance in music contracts in the streaming age. Particular focus lies with the effect of the law on contracts entered into between musicians and record companies and/or music publishers as to individually managed exclusive rights.

First, this chapter analyses the role of the legal framework in achieving this book's policy objective of moving towards a fair(er) balance in the streaming age, fleshing out both the substantive and procedural dimension of what may be perceived as 'fair' in this particular context (Section 3.2). It then goes on to provide a typology of the relevant substantive legal regimes, categorising these limitations to parties' freedom of contract in terms of substantive, geographical and temporal scope and analysing the interplay between them (Section 3.3). Finally, the chapter sets out to establish the appropriate level(s) and method(s) of further potential policy initiatives aimed at contributing to the elusive fair balance that this book advocates (Section 3.4).

[1] John Rawls, *Justice as Fairness: A Restatement* (Harvard University Press 2001) para 6.1.

Downloaded from https://www.cambridge.org/core. UNIVERSIDAD AUTONOMA METROPOLITANA, on 16 Nov 2026 at 18:59:40, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/9781009394666.003

3.2 TOWARDS A FAIR BALANCE IN THE STREAMING AGE

3.2.1 *Balancing Copyright and Other Fundamental Rights*

Copyright falls within the scope of the fundamental right to ownership.[2] Both the material and moral dimensions of copyright are also protected as a sociocultural right.[3] A risk of conflict arises with other fundamental rights, including freedom of expression and information.[4] In this regard, achieving a fair balance is key.[5] Three different dimensions may be discerned.

First, an appropriate balance is required between the protection of copyright as exclusive property and the provision of legal certainty and third parties' freedom to create. This encompasses questions pertaining to (joint) authorship and the creative reuse of existing works.[6] The latter questions the appropriate line between copyright infringement and use that falls within the scope of applicable exceptions and limitations.

The second dimension refers to the balance between copyright owners and users as well as exploiters of content protected by copyright. This brings, inter alia, freedom of commerce, expression and information as well as the right to privacy and data protection into the picture. In the debate concerning the digitised

[2] Art 17 UDHR; Art 1 Prot 1 European Convention on Human Rights (ECHR) <https://bit.ly/3v2xGRL>; Guide on Article 1 of Protocol No. 1 to the European Convention on Human Rights (2020) <https://bit.ly/3v4anqz> 8, 13 and cited case law; Art 17(2) Charter of Fundamental Rights of the European Union [2012] OJ C326/391 (hereinafter: EU Charter).

[3] Art 27(2) UDHR; Art 15(1)(c) ICESCR. See Christophe Geiger, 'Copyright's Fundamental Rights Dimension at EU Level' in Estelle Derclaye (ed), *Research Handbook on the Future of EU Copyright* (Research Handbooks in Intellectual Property, Edward Elgar 2009) 31.

[4] Art 10 ECHR; Art 11 EU Charter; Art 19 UDHR. See Jonathan Griffiths and Uma Suthersanen, *Copyright and Free Speech. Comparative and International Analyses* (Oxford University Press 2005); Reto M Hilty and Sylvie Nérisson (eds), *Balancing Copyright: A Survey of National Approaches* (MPI studies on Intellectual Property and Competition Law 18, Springer 2012); Susy Frankel and Daniel Gervais (eds), *The Evolution and Equilibrium of Copyright in the Digital Age* (Cambridge Intellectual Property and Information Law, Cambridge University Press 2014); Christophe Geiger (ed), *Research Handbook on Human Rights and Intellectual Property* (Research Handbooks in Intellectual Property, Edward Elgar 2016); Oreste Pollicino and others (eds), *Copyright and Fundamental Rights in the Digital Age: A Comparative Analysis in Search of a Common Constitutional Ground* (Edward Elgar 2020); Paul Torremans (ed), *Intellectual Property Law and Human Rights* (Information Law Series 34, 4th edn, Kluwer Law International 2020) pt II; Tatiana-Eleni Synodinou, 'The Desirability of Unification of European Copyright Law' in Eleonora Rosati (ed), *The Routledge Handbook of EU Copyright Law* (Routledge Handbooks, 1st edn, Routledge 2021) 18–38.

[5] Rec 31 InfoSoc Directive; Rec 2 IPRED; Rec 6 DSM Directive; Case C-275/06 *Productores de Música de España (Promusicae) v Telefónica de España SAU* [2008] ECLI:EU:C:2008:54, paras 62–68; Joined Cases C-403/08 and C-429/08 *Football Association Premier League and others* [2011] ECLI:EU:C:2011:631, para 164.

[6] See also Giorgos D Vrakas, 'Does Copyright Support Musical Creativity in a Remix Era?' in Tatiana-Eleni Synodinou and others (eds), *EU Internet Law in the Digital Single Market* (Springer International 2021).

Downloaded from https://www.cambridge.org/core. UNIVERSIDAD AUTONOMA METROPOLITANA, on 16 Nov 2026 at 18:59:40, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/9781009394666.003

entertainment industry, this dimension is linked with the colloquial 'size of the pie' that is, the total revenue stream accruing to the content value chain.

The balance between the artistic and commercial players within this value chain provides the third dimension, which concerns the division of artistic and commercial value between the relevant players – in other words, how the abovementioned 'pie' is 'sliced'.[7] This dimension of the copyright balance is the primary focal point of this book.

3.2.2 *Conceptualising a 'Fair(er) Balance' in the Streaming Age*

The objective is to contribute to a legal framework that is conducive to a fair(er) balance between the interests of the primary music industry stakeholders in the streaming age.[8] A distinction may be made between substantive and procedural aspects. Substantively speaking, the appropriate allocation of resources within a society comes to the fore. This is associated with the objective of ensuring that stakeholders receive a 'fair share'. Fairness also implies the procedural dimension of 'fair play'. In order to ensure that the allocated share is and remains fair, relevant processes should attain certain procedural benchmarks. Keywords in this context include transparency and legal certainty.

As to the question of 'fair share', the framework provided by varying theories of distributive justice forms a welcome starting point.[9] Theories of distributive justice accord varying weight to considerations such as efficiency, equality, liberty and entitlement in justifying 'their' account of what should be considered as a just allocation of resources. Broadly speaking, a distinction may be made between egalitarian and libertarian schools of thought, whereby the primary focus either lies with securing equality and equal treatment, or autonomy and freedom.

A prevailing (liberalist) egalitarian theory is John Rawls' perspective on justice as fairness.[10] Rawls theorises about a hypothetical scenario in which a group of people

[7] Cf David Felipe Alvarez-Amezquita and Florelia Vallejo-Trujillo, 'Limiting Freedom of Contract' in Jens Schovsbo (ed), *The Exploitation of Intellectual Property Rights: In Search of the Right Balance* (ATRIP Intellectual Property, Edward Elgar 2023) 216–18.

[8] Cf Stefan Scheuerer, 'The Fairness Principle in Competition-Related Economic Law' [2023] GRUR International 1; Giuseppe Mazziotti and Heritiana Ranaivoson, 'Can Online Music Platforms Be Fair? An Interdisciplinary Research Manifesto' [2024] 55 IIC 249–279.

[9] See Serena Olsaretti (ed), *The Oxford Handbook on Distributive Justice* (Oxford University Press 2018).

[10] Rawls, *Justice as Fairness: A Restatement* (n 1); John Rawls, *A Theory of Justice* (original ed, Belknap Press 2005). On other egalitarian theories, see ia Ronald Dworkin, 'What Is Equality? Part 2: Equality of Resources' (1981) 10 Philosophy and Public Affairs 283; Richard J Arneson, 'Equality and Equal Opportunity for Welfare' (1989) 56 Philosophical Studies 77; Gerald A Cohen, 'On the Currency of Egalitarian Justice' (1989) 99 Ethics 906; GA Cohen, *Rescuing Justice and Equality* (Harvard University Press 2008); Lars Lindblom, 'The Structure of a Rawlsian Theory of Just Work' (2011) 101 Journal of Business Ethics 577; Eliane Saadé, *The Concept of Justice and Equality: On the Dispute between John Rawls and*

Downloaded from https://www.cambridge.org/core. UNIVERSIDAD AUTONOMA METROPOLITANA, on 16 Nov 2026 at 18:59:40, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/9781009394666.003

must decide on the modalities of their society – what counts as fair terms of cooperation – without knowing what place they will occupy in it.[11] The chosen principles are to be binding to all and, moreover, irrevocable once the veil of ignorance is lifted. Rawls posits that, starting from this 'original position' and conscious of the irrevocable nature of the choices made in this context, a political and economic basic structure will be unveiled that operates under conditions that are fair for all.[12] In Rawls' view, the principles of justice that participants in his thought experiment would agree upon are twofold. First, each citizen would be guaranteed a set of certain equal basic, fundamental liberties, including freedom of thought and speech and the right to bodily integrity.[13] Second, social and economic inequalities would be attached to positions and offices that are open to all and would moreover work to the advantage of those worst off.[14] The former principle is referred to as 'fair equality of opportunity', while the latter is referred to as the 'difference principle'. This view on society requires a certain degree of direct involvement of the state, whose primary goal is to improve the lot of those least fortunate.[15] Rawls' theory is not free from criticism, including for its individualistic conception of what is good and thus worth pursuing, the ideal setting of the 'original position' thought experiment and the difficulties in operationalising the difference principle.[16]

Gerald Cohen (Practical Philosophy 20, De Gruyter 2015); Richard J Arneson, 'Dworkin and Luck Egalitarianism' in Serena Olsaretti (ed), *The Oxford Handbook of Distributive Justice* (Oxford University Press 2018).

[11] Rawls, *Justice as Fairness: A Restatement* (n 1) paras 6.2–6.4.

[12] See Jean Hampton, 'Contracts and Choices: Does Rawls Have a Social Contract Theory?' (1980) 77 Journal of Philosophy 315.

[13] Rawls does not consider the freedom of contract to be a basic liberty in the sense of this first principle of justice, see Rawls, *A Theory of Justice* (n 10) 62; Josse Klijnsma, 'Contract Law as Fairness' (2015) 28 Ratio Juris 68, 84.

[14] See eg John Rawls, *Political Liberalism* (The John Dewey Essays in Philosophy 4, Columbia University Press 1993) 289–371; Maciej Barczewski and Dorota Pyć, 'Intellectual Property and Sustainable Development: A Distributive Justice Perspective' in Graeme B Dinwoodie (ed), *Methods and Perspectives in Intellectual Property* (ATRIP Intellectual Property, Edward Elgar 2013) 208; Michael Freeman, *Lloyd's Introduction to Jurisprudence* (9th edn, Sweet & Maxwell 2014) 481–92.

[15] Anupam Chander and Madhavi Sunder, 'Is Nozick Kicking Rawls's Ass? Intellectual Property and Social Justice' (2007) 40 UC Davis Law Review 563, 567; Anthony K Kronman, 'Contract Law and Distributive Justice' in Joel Feinberg and Jules Coleman (eds), *Philosophy of Law* (8th edn, Thomson Wadsworth 2008) 820.

[16] See eg Donald Schroeder, 'John Rawls and Contract Theory' (1973) 56 Soundings: An Interdisciplinary Journal 338; Robert Paul Wolff, *Understanding Rawls – A Reconstruction and Critique of a Theory of Justice* (Princeton University Press 1977); Roberto Alejandro, *The Limits of Rawlsian Justice* (Johns Hopkins University Press 1998); Henry S Richardson and Paul J Weithman (eds), *The Philosophy of Rawls – A Collection of Essays – 3. Opponents and Implications of A Theory of Justice* (A Garland Series. Readings in Philosophy, Garland 1999); Chandran Kukathas (ed), *John Rawls. Critical Assessments of Leading Political Philosophers – Volumes I through IV* (Routledge 2002); Freeman, *Lloyd's Introduction to Jurisprudence* (n 14) 486–87.

Downloaded from https://www.cambridge.org/core. UNIVERSIDAD AUTONOMA METROPOLITANA, on 16 Nov 2026 at 18:59:40, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/9781009394666.003

Libertarianism puts much greater emphasis on personal autonomy, responsibility and respect for individual rights. A minimal state is advanced as the most 'just' way to regulate society. One of the main proponents of libertarianism is the entitlement theory advanced by Robert Nozick.[17] Simply put, a transaction pertaining to certain resources is deemed fair from a libertarian point of view if it is voluntary. Thus, the free-market economy is placed squarely in the centre and state intervention that is labelled as paternalistic and overly intrusive is rejected.

The perspective of egalitarians and libertarians also diverges as to the perceived role of (copyright) contract law. The question thus is whether or not contract law should make a conscious effort to influence the allocation of resources within a society through the regulation of transactions.[18] From a libertarian perspective, the answer is negative. A compulsory transfer of resources is considered theft. A Nozickian libertarian's focus on personal responsibility and the protection of both private property and freedom of contract would bring them to consider the idea of countering the results of voluntary transactions on the basis of considerations of equality as implemented through the provisions of contract law as 'unfair'.[19] Conversely, Rawls' theory of 'justice as fairness' may point towards a different conclusion on the basis of egalitarian considerations of equality and inclusivity. The fundamental perceived need to allocate resources in an inclusive way that duly acknowledges the contributions of relevant actors and secures equal opportunities for all stakeholders steers this book in such a direction.[20] The mere fact that both parties have consented to a certain transaction does not in itself imply that the transaction is actually 'voluntary'.[21] The bargaining power of the parties plays a key role. The 'voluntary' nature of copyright-related transactions in the streaming age – the actual 'freedom of contract' in the real sense of the word – is often merely a mirage.[22]

The Rawlsian principles of distributive justice are meant to shape the institutions that contain the 'basic structure'[23] of society from a macro perspective; they provide for fair background conditions, while allowing members of this society to be as free as possible to pursue their own conception of what is good through micro, voluntary

[17] See eg Robert Nozick, *Anarchy, State, and Utopia* (Basic Books 1974); Freeman, *Lloyd's Introduction to Jurisprudence* (n 14) 492–98. See also Martín Hevia, *Reasonableness and Responsibility: A Theory of Contract Law*, vol 101 (Law and Philosophy Library, Springer Netherlands 2013) 33–44. See on other libertarian perspectives eg Peter Vallentyne and Hillel Steiner, *The Origins of Left-Libertarianism* (Palgrave Macmillan UK 2000).

[18] See Hans-Wolfgang Micklitz, 'Social Justice and Access Justice in Private Law' (EUI Working Papers, 2011); Hevia, *Reasonableness and Responsibility* (n 17) vol 101, p. See also Kronman, 'Contract Law and Distributive Justice' (n 15) 809–10.

[19] Cf Kronman, 'Contract Law and Distributive Justice' (n 15) 811, 820.

[20] See for a more elaborate, convincing argument in the same direction eg Kronman, 'Contract Law and Distributive Justice' (n 15) 809–29.

[21] ibid 812.

[22] See Chapter 2, Sections 2.3–2.4.

[23] See on this concept Rawls, *Political Liberalism* (n 14) 257–88.

Downloaded from https://www.cambridge.org/core. UNIVERSIDAD AUTONOMA METROPOLITANA, on 16 Nov 2026 at 18:59:40, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/9781009394666.003

transactions.[24] It has been argued that Rawls considered this basic structure not to include private contractual relations and that such transactions should remain free from government interference in view of the contracting parties' personal autonomy and responsible agency.[25] The contrary position has also been defended.[26] Independently of the exact appropriate scope of Rawls' 'basic structure', the shaping of contract law should not take place independently of distributive considerations. The mere fact that 'fair' background conditions are available in a given society does not in itself imply that parties will be able to assume personal responsibility and protect themselves against unfair advantage-taking in the context of foreground contractual transactions.[27] There is a risk that less advantaged parties enter into contractual transactions that 'purport to deprive them of resources beyond a Rawlsian sufficiency baseline'.[28] In such cases, the law should intervene, at least to a certain extent. The distributive effects of the relevant contract law framework should not be ignored.[29] If contract law steers away from distributive considerations, it risks losing its moral acceptability.[30]

It would be a bridge too far to assess every individual transaction in terms of its (re) distributive qualities.[31] The original position thought experiment does not require us to presuppose individual parties' intentions and wishes from behind a veil of ignorance. Instead, the presumed veil of ignorance may be said to apply on a more macro level. Rawls' perspective on justice as fairness does not give a definitive answer to the question how a specific rule should be shaped and/or how it should be applied to a particular situation.[32] Instead, it provides a general, overarching thought framework that encourages and guides lawmakers.[33] Micro-level inequalities in bargaining power are deemed relevant for fairness-assessment purposes if they mirror structural inequalities at a more macro level, such as in the case of

[24] Kronman, 'Contract Law and Distributive Justice' (n 15) 821; Lindblom, 'The Structure of a Rawlsian Theory of Just Work' (n 10) 578; Zhong Xing Tan, 'Where the Action Is: Macro and Micro Justice in Contract Law' (2020) 83 Mod Law Rev 725.

[25] See eg Arthur Ripstein, 'Private Order and Public Justice: Kant and Rawls' (2006) 92 Va L Rev 1391, 1393, 1397–98; Kronman, 'Contract Law and Distributive Justice' (n 15) 821.

[26] See eg Kevin A Kordana and David H Tabachnick, 'Rawls and Contract Law' (2005) 73 Geo Wash L Rev 598; Klijnsma, 'Contract Law as Fairness' (n 13); Samuel Scheffler, 'Distributive Justice, the Basic Structure and the Place of Private Law' (2015) 35 Oxford J Legal Stud 213.

[27] Tan, 'Where the Action Is' (n 24) 756.

[28] ibid 757.

[29] Kronman, 'Contract Law and Distributive Justice' (n 15) 822, 826.

[30] Cf ibid 810; Scheffler, 'Distributive Justice' (n 26) 217.

[31] Kronman, 'Contract Law and Distributive Justice' (n 15) 822, 826; Klijnsma, 'Contract Law as Fairness' (n 13) 77. Cf in the context of employment contracts Lindblom, 'The Structure of a Rawlsian Theory of Just Work' (n 10) 586.

[32] Cf Kordana and Tabachnick, 'Rawls and Contract Law' (n 26) 600, 614–15; Ripstein, 'Private Order and Public Justice' (n 25) 1409.

[33] 'Only the complete scheme of all legal and political institutions is directly answerable to the difference principle', see Kordana and Tabachnick, 'Rawls and Contract Law' (n 26) 621.

Downloaded from https://www.cambridge.org/core. UNIVERSIDAD AUTONOMA METROPOLITANA, on 16 Nov 2026 at 18:59:40, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/9781009394666.003

employment or consumer contracts.[34] A party's status as either an employee or a consumer serves as a proxy for their presumed bargaining power. In classifying a group of people in such a way, the costs of excessive fine-tuning are to be balanced against the objective of being sensitive to inequalities in bargaining power.[35] There are structural inequalities in the streaming age that point towards the appropriateness of classifying musicians – in particular legacy artists – as the category of stakeholders that should be considered 'worst off' and which therefore merits specific and sustained attention when shaping the relevant legal framework from the perspective of fairness.

The goal should be to craft a legal regime that allows stakeholders to arrive at an allocation of resources through contractual transactions that acquires its perceived fairness on the basis of the legal regime.[36] Thus, the fairness assessment takes place independently of the intention of the contracting parties.[37] A balance is required between the objective of securing stakeholders' individual autonomy and the need to set certain limits to the freedom of contract from the perspective of securing equality of opportunity and the operationalisation of the difference principle.[38] If contract law is fair, the fairness of contracts entered into within the framework of this law is presumed.

The development of Rawlsian fairness invites us to further flesh out to which resources the distributive perspective of this book applies. In other words, what relevant resources are there to be (fairly) allocated? Again, various theories may offer fruitful ground for further concretisation.

Pierre Bourdieu's 1986 essay on the forms of capital provides a first useful building block.[39] Bourdieu defines capital as an accumulation of labour and uses it as a way to explain how power is divided in a society.[40] He distinguishes three separate but interconnected types of capital, namely economic, cultural and social capital. First, economic capital focuses on direct remuneration and property (how much money one has). The latter two types of capital are more abstract and symbolic, and only have an indirect monetary link.[41] Cultural capital refers to familiarity with culture and is impacted by personal development, interaction with cultural goods (such as

[34] Cf Tan, 'Where the Action Is' (n 24) 738–54.
[35] ibid 742.
[36] Cf Kordana and Tabachnick, 'Rawls and Contract Law' (n 26) 599–600, 620–23; Klijnsma, 'Contract Law as Fairness' (n 13) 69, 77.
[37] Cf Kordana and Tabachnick, 'Rawls and Contract Law' (n 26) 599–600, 620–23; Klijnsma, 'Contract Law as Fairness' (n 13) 69, 77.
[38] Kordana and Tabachnick, 'Rawls and Contract Law' (n 26) 626; Klijnsma, 'Contract Law as Fairness' (n 13) 70.
[39] Pierre Bourdieu, 'The Forms of Capital' in JG Richardson (ed), *Handbook of Theory and Research for the Sociology of Education* (Greenwood Press 1986). The inclusion of Bourdieu's essay on this topic in the analysis was inspired by Juliet Fraser, 'Sharing the Spoils of a Shared Practice' (2019) 73 Tempo 51.
[40] Bourdieu, 'The Forms of Capital' (n 39) 241.
[41] ibid 243.

Downloaded from https://www.cambridge.org/core. UNIVERSIDAD AUTONOMA METROPOLITANA, on 16 Nov 2026 at 18:59:40, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/9781009394666.003

music) and formal education.[42] In the music industry, some degree of cultural capital appears to be a precondition for entry.[43] Social capital is associated with the credentials of belonging to a certain group and the strength of members of a connected network.[44] Capital begets more capital, in the sense that it enhances the owners' capacity for success. The accumulation of capital over time implies the entrenchment of power relations. In the streaming age, issues arise regarding the division of economic and social capital. Reference may be made to (respectively) the distribution of revenues and the negotiating and/or lobbying position of the various stakeholder groups. The perceived added value of Bourdieu's theory in the context of this book lies in its express acknowledgement that allocable resources can have both a direct and an indirect monetary link and that both aspects have an impact on the position of stakeholders in a society. Thus, the road towards a fair(er) balance in the music industry must take due account of both commercial and other incentives.

The body of literature devoted to the 'capability approach' to social justice adds another dimension.[45] It seeks to empower people to live a full and dignified life, by asking (1) what people are actually able to do and be (what their 'internal capabilities' are), (2) what real opportunities are available to them and, ultimately, (3) how public authorities can aid people in realising their capabilities.[46] The capability approach focuses on people's agency and freedom to choose among various options to achieve certain 'doings and beings' they perceive (with reason) to be valuable.[47]

A final aspect that may be added to the baseline of Rawlsian justice in the contractual sphere is the idea of 'reciprocity', of 'reasonableness'.[48] This relational perspective advances the position that 'others are owed a fair return to what they have given you, just as you are owed a fair return for what you have given others'.[49] It presupposes that contracting parties wish to cooperate on fair terms and goes

[42] ibid 243–48.

[43] This depends on the musical genre, with formal education taking a much prominent place in the field of eg classical music than is the case for popular music.

[44] Bourdieu, 'The Forms of Capital' (n 39) 248–52.

[45] See ia Martha Nussbaum, *Creating Capabilities. The Human Development Approach* (Belknap Press of Harvard University Press 2011); Amartya Sen, *The Idea of Justice* (Penguin Books 2010); Amartya Sen, *Rationality and Freedom* (Belknap Press of Harvard University Press 2004); Amartya Sen, *Commodities and Capabilities* (Oxford University Press India 1999).

[46] See ia Nussbaum, *Creating Capabilities* (n 45) xi, x, 12–14, 18–21, 30–31, 65, 106, 167–69 and 176; Sen, *The Idea of Justice* (n 45) xi, 18, 231 and 233; Justin Hughes and Robert Merges, 'Copyright and Distributive Justice' (2016) 92 Notre Dame L Rev 513, 521–22.

[47] Sen, *Rationality and Freedom* (n 45) 585; Ingrid Robeyns, 'The Capability Approach: A Theoretical Survey' (2005) 6 Journal of Human Development 93; Jonathan Wolff and Avner de-Shalit, *Disadvantage* (Oxford University Press 2007) 21–84, 180; Sen, *The Idea of Justice* (n 45) 19, 227–28, 231, 253; Nussbaum, *Creating Capabilities* (n 45) 10–26, 43.

[48] See in particular Lindblom, 'The Structure of a Rawlsian Theory of Just Work' (n 10); Hevia, *Reasonableness and Responsibility* (n 17) vol 101, p; Tan, 'Where the Action Is' (n 24) 745–49. Cf also Scheffler, 'Distributive Justice' (n 26) 233–35.

[49] Andrea Sangiovanni, 'Global Justice, Reciprocity, and the State' (2007) 35 Philosophy & Public Affairs 3, 26.

Downloaded from https://www.cambridge.org/core. UNIVERSIDAD AUTONOMA METROPOLITANA, on 16 Nov 2026 at 18:59:40, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/9781009394666.003

beyond the aim of advancing the position of those worst off posited by the difference principle.[50]

In sum, contract law should have a capacity-building role and empower stakeholders who find themselves in a context that postdates the original position to both accomplish their goals through (truly) voluntary transactions and have genuine, sufficiently viable options in this regard.[51] Simultaneously, due account must be taken of stakeholders' legitimate, reciprocal claims for a fair return. Only then can an inclusive, equal division of economic, cultural and social capital be attained.

The translation of these ideas to the music industry in the streaming age requires us first to circle back to the interests of the categories of stakeholders analysed in Chapter 2, namely musicians, corporate partners and users. The relevant findings may be summarised as shown in Table 3.1.

On the part of musicians, a clear focus on agency and remuneration may be discerned. As a result, fairness from the perspective of musicians may be seen to require a certain degree of exploitation of their work(s)/performance(s), with due acknowledgement of their contribution and proper remuneration. Corporate partners' commercial focus on the recoupment of their investment, on the other hand, implies that a fair balance may only be attained if there is no disproportionate limitation of the principle of freedom of contract. Swinging the pendulum too much towards either side may lead to detrimental effects in practice. On the one hand, if the legal framework overreaches and provides a framework that is altogether too protective of musicians in a contractual context, the perverse effect may be that their corporate

TABLE 3.1 *Overview of main legitimate interests*

	Musicians	*Corporate partners*	*Users*
Who?	See typology[52]	Publishers/labels	Private users as group/ individuals
What?	Create/perform disseminate; obtain remuneration	Obtain return on investment; (disseminate)	Access; create (UGC)
Why?	Artistic incentives; economic incentives	Primarily economic incentives	Convenience; legal certainty
Fairness	Agency (exploit / acknowledge); remuneration	Focus on investment (commercial); no undue limitation of freedom of contract	Limited interest; enhance knowledge; account of access

[50] Cf Lindblom, 'The Structure of a Rawlsian Theory of Just Work' (n 10) 577, 583–84.

[51] Cf Nicolas Suzor, 'Access, Progress, and Fairness: Rethinking Exclusivity in Copyright' (2013) 15 Vand J Ent & Tech L 297, 328–29; Bhamati Viswanathan, *Cultivating Copyright: How Creators and Creative Industries Can Harness Intellectual Property to Survive the Digital Age* (Routledge 2019) 231.

[52] See Chapter 2, Section 2.2.2.1.

Downloaded from https://www.cambridge.org/core. UNIVERSIDAD AUTONOMA METROPOLITANA, on 16 Nov 2026 at 18:59:40, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/9781009394666.003

partners cut back on, or even cease, their investments in the music industry ecosystem. This could in turn leave all parties involved in a worse position than before, begging the question whether a 'bad' contract is better than no contract at all. On the other hand, overtly and fully championing the principle of freedom of contract, allowing the free market to fully run its course, could lead to equally (if not more) perverse effects. Given the rightful central position that the artist holds under the basic tenets of copyright law, such an outcome is undesirable. Finding a fruitful, reciprocal middle ground that does not unduly violate stakeholders' basic liberties in the Rawlsian sense and contributes to the improvement of the situation of the category of stakeholders least well off must therefore be the objective. Third, while users only have a limited interest in the division of resources within the content value chain, this does not mean that their perspective should be cast aside. Instead, a fair(er) balance in the streaming age requires consumer education, while taking account of users' interest in gaining convenient access to protected content. Concomitantly, reference may be made to the presumptive resulting increase in the dissemination of creative works and the enhancement of cultural heritage, which is beneficial to users.

In essence, the objective is to achieve a more balanced contractual playing field in relation to all three stages of the contracts under review.[53] In the contract formation stage, detailed in Chapter 4 below, the keyword in this regard will be a 'fair scope' of rights granted. The transfer of rights to a corporate partner is not considered to be inherently problematic. The question is rather whether the musician receives sufficient return. Thus, in relation to the performance phase of the contract, the focal point of Chapter 5, the question will be whether the contract leads to both 'fair exploitation' and 'fair remuneration'. If either is deemed not to occur, a fair balance requires the musician to be able to either retain or reclaim the relevant rights.[54] Chapter 6 therefore seeks to increase fairness as to the termination of the contracts under review.

The procedural aspect of fairness may be linked with the concept of 'fair play'. It implies due attention to legal certainty and transparency.[55] Here, again, the legal

[53] Cf Ananay Aguilar, '"We Want Artists to Be Fully and Fairly Paid for Their Work": Discourses on Fairness in the Neoliberal European Copyright Reform' [2018] JIPITEC 160, 162; Nikita Malevanny, *Online Music Distribution – How Much Exclusivity Is Needed? A Study of International, European, German and US Copyright Systems and Their Objectives*, vol 12 (Munich Studies on Innovation and Competition, Springer Berlin Heidelberg 2019) 317–39.

[54] Cf 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) 70.

[55] Cf P Bernt Hugenholtz and Lucie Guibault, 'Auteurscontractenrecht: Naar Een Wettelijke Regeling?' (2004) <https://bit.ly/3UvnwGx> 25, 77; Commission, 'Impact Assessment on the Modernisation of EU Copyright Rules Accompanying the Document Proposal for a Directive of the European Parliament and of the Council on Copyright in the Digital Single Market and Proposal for a Regulation of the European Parliament and of the Council Laying Down Rules on the Exercise of Copyright and Related Rights Applicable to Certain Online Transmissions of Broadcasting Organisations and Retransmissions of Television and Radio Programmes' (Staff Working Document) SWD (2016) 301 Final (14 September 2016) 134.

Downloaded from https://www.cambridge.org/core. UNIVERSIDAD AUTONOMA METROPOLITANA, on 16 Nov 2026 at 18:59:40, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/9781009394666.003

framework and technological developments must work in tandem. Relevant provisions must be well-structured and clear. Vague concepts that are difficult to apply in practice should be avoided. For musicians, such vagueness, combined with a weaker relative bargaining power, increases the risk of disadvantageous clauses in practice. For corporate partners, legal uncertainty leads to increased transaction costs and a more difficult investment climate.[56]

Moreover, rules must be set at the appropriate level. First, regulatory measures must be suitably divided between the international, EU and national level. Second, focus must not only lie with options for legislative amendments that lead to hard law, but also with the possible value of soft law alternatives. These aspects contribute to a streamlined, transparent regulatory framework that provides legal certainty for all interested parties. This is necessary for its impact on the freedom of contract to be as limited as possible while simultaneously securing protection for musicians as the weaker contracting party.

Further, in order to ensure both substantive and procedural fairness, the application of the legal framework in practice must be secured. In this context, this book supplements Rawlsian idealism with ambitious pragmatism. Unfair situations in the music industry are exacerbated by its characteristics as a high-risk, high-reward concentrated marketplace with a pronounced inclination towards superstars. Precisely those characteristics lead to obstacles between the legislator's objectives and their translation into practice – in other words: between the 'law in the books' and the 'law in action'. This explains the express focus on the application of the legal framework in practice in Chapter 7 below.

3.3 TYPOLOGY OF THE SELECTED SUBSTANTIVE LEGAL REGIMES

3.3.1 *General Limitations to Freedom of Contract*

The freedom of contract is a central tenet of contract law.[57] It implies parties' freedom to (not) enter into a contractual relationship with one another, as well as

[56] Cf Aguilar, 'We Want Artists' (n 53) 167.

[57] See eg (1) in Belgium: Art 1134 Belgian CC; Sophie Stijns, *Verbintenissenrecht. Boek 1* (die Keure 2005) 37–54; Ignace Claeys and Thijs Tanghe, *Algemeen Contractenrecht. Handboek voor Nu en Straks* (Intersentia 2021) 43–53; (2) in France: Art 1102 French CC; Yvaine Buffelan-Lanore and Virginie Larribau-Terneyre, *Droit Civil. Les obligations* (16th edn, Sirey 2018) 294–96, 331–34; François Terré and others, *Droit Civil. Les Obligations* (Précis. Droit privé, 12th edn, Dalloz 2019) 34–38, 159–61; (3) in Germany: Art 2(1) *Grundgesetz für die Bundesrepublik Deutschland* (in English: 'German Basic Law') <www.gesetze-im-internet.de/gg/BJNR000010949.html>; Basil S Markesinis and others, *The German Law of Contract. A Comparative Treatise* (2nd edn, Hart 2006) 43–46; Dieter Medicus and Stephan Lorenz, *Schuldrecht I. Allgemeiner Teil* (Juristische Kurz-Lehrbücher, 21st edn, CH Beck 2015) 26–32; Wolfgang Fikentscher and Andreas Heinemann, *Schuldrecht: Allgemeiner und Besonderer Teil* (De Gruyter Studium, 11th edn, De Gruyter 2017) 70–90; (4) in the Netherlands: Art 6:248 Dutch CC; Hugenholtz and Guibault, 'Auteurscontractenrecht' (n 55) 77; Carel Asser,

Downloaded from https://www.cambridge.org/core. UNIVERSIDAD AUTONOMA METROPOLITANA, on 16 Nov 2026 at 18:59:40, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/9781009394666.003

their freedom to determine a contract's content. Parties' freedom of contract is limited on several fronts. The general limitations under contract law in the continental European jurisdictions under review in this book are included in the main civil codes.[58] A first general limitation is provided by the principle of good faith that applies in contractual situations.[59] This principle implies that contract parties' behaviour is subjected to an obligation of loyalty and limited to what befits a reasonable participant of society.[60] The principle of good faith may provide a legal basis to set aside contractual provisions that are excessive, unreasonable, unacceptable and thus deemed contrary to good faith.[61] In a way, this leads to an objectification of parties' expected behaviour. No articulated general contractual duty to perform in good faith applies under UK law.[62]

Associated limitations stem from the rules concerning vitiated consent and the general prohibition of abuse of law. Parties may not exploit the vulnerability or the inferior position of their counterparty in a way that leads to a manifest disproportion between the obligations of the contracting parties.[63] Parties' freedom of contract is also limited by the requirements of public policy and good morals.[64] For the United

Verbintenissenrecht. Algemeen Overeenkomstenrecht (Asser Serie 6.III*, 13th edn, Kluwer 2008) 33–50; Jac Hijma and others, *Rechtshandeling en Overeenkomst* (Studiereeks burgerlijk recht 3, 9th edn, Kluwer 2019) 14; and (5) in the United Kingdom: Joseph Chitty and Hugh Beale, *Chitty on Contracts* (32nd edn, Sweet & Maxwell 2015) 22–24; Neil Andrews, *Contract Rules: Decoding English Law* (Intersentia 2016) 3–6; Edwin Peel, *Treitel on the Law of Contract* (15th edn, Sweet & Maxwell 2020) 3–4; Mindy Chen-Wishart, *Contract Law* (7th edn, Oxford University Press 2022) 14–15. See also Giuseppina D'Agostino, 'Contract Lex Rex: Towards Copyright Contract's Lex Specialis' in Graeme Dinwoodie (ed), *Intellectual Property and General Legal Principles* (Edward Elgar 2015) 6–10.

[58] See (1) in Belgium: '*Burgerlijk Wetboek*'/'*Code Civil*' (commonly abbreviated as 'BW'/'CC', with ongoing codification of the existing '*oud Burgerlijk Wetboek*'/'*ancien Code Civil*', hereinafter: Belgian CC), full text at <www.ejustice.just.fgov.be>; (2) in France: '*Code Civil*' (commonly abbreviated as CC, hereinafter: French CC), full text at <https://bit.ly/3ArdSIM>; (3) in Germany: '*Bürgerliches Gesetzbuch*' (commonly abbreviated as BGB, hereinafter: German CC), full text at <www.gesetze-im-internet.de/bgb>; and (4) in the Netherlands: '*Burgerlijk Wetboek*' (commonly abbreviated as BW or NBW, hereinafter: Dutch CC), full text at <https://wetten.overheid.nl>.

[59] See (1) in Belgium: Art 1134 para 3 old Belgian CC; Art 5.73 new Belgian Civil Code; (2) in France: Art 1104 French CC; (3) in Germany: Art 242 German CC; and (4) in the Netherlands: Arts 6:2, 6:248 Dutch Civil Code.

[60] Lucie Guibault, *Copyright Limitations and Contracts: An Analysis of the Contractual Overridability of Limitations on Copyright* (Information Law Series 9, Kluwer Law International 2002) 146; Lucie Guibault and P Bernt Hugenholtz, 'Study on the Conditions Applicable to Contracts Relating to Intellectual Property in the European Union' (2002) <https://bit.ly/4bzdGud> 13.

[61] Guibault, *Copyright Limitations and Contracts* (n 60) 146.

[62] Chitty and Beale, *Chitty on Contracts* (n 57) 35–38; Andrews, *Contract Rules* (n 57) 15–16; Peel, *Treitel on the Law of Contract* (n 57) 2–3; Chen-Wishart, *Contract Law* (n 57) 619–21.

[63] See eg (1) in Belgium: Art 1134(3) Belgian CC; (2) in France: Art 1104 French CC; (3) in Germany: Art 226 *jo* 242 German CC; and (4) in the Netherlands: Art 3:13 *jo* 6:248 Dutch CC.

[64] See eg (1) in Belgium: Arts 2, 1133 Belgian Civil Code; (2) in France: Arts 6, 1162 French Civil Code; (3) in Germany: Art 138 German Civil Code; (4) in the Netherlands: Art 3:40(1) Dutch

Downloaded from https://www.cambridge.org/core. UNIVERSIDAD AUTONOMA METROPOLITANA, on 16 Nov 2026 at 18:59:40, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/9781009394666.003

Kingdom in particular, the doctrines of undue influence and restraint of trade are noted.[65]

Theoretical restrictions on parties' behaviour set by general principles of contract law are only applied in exceptional situations, with judges traditionally favouring the freedom of contract.[66] Moreover, the open-ended nature of many of these restrictions makes it hard to predict their application in practice, which in turn leads to legal uncertainty.[67] In view of this, the intervention of more specific substantive legal regimes may be desirable. In order to fill this perceived gap, parties' contractual freedom is additionally curtailed by specific legal regimes, the scope of which is analysed in the next section.

3.3.2 *Scope of Selected Substantive Legal Regimes*

3.3.2.1 Structure

The following chapters of this book analyse the relevant substantive provisions of copyright contract law and the law of unfair B2B contract terms and trade practices, as well as their interplay with the main relevant provisions of general contract law.

Before delving into the substantive analysis of these provisions in Chapters 4–6, it is important to have a clear view on the scope of and interplay between these seemingly diverse fields of law. Following an overview of the relevant legislative sources of copyright contract law and the law of unfair B2B contract terms and trade practices, the substantive scope of the selected legal regimes in the chosen jurisdictions is analysed. This analysis not only focuses on the scope of *ratione materiae* and *ratione personae* – that is, based on the object of and the parties to the contract respectively – but also on the interplay between these fields of law. Then, this section analyses the geographical scope of the selected legal regimes. Finally, the temporal scope of the applicable legal regimes is reviewed.

3.3.2.2 Overview of Legislative Sources

The relevant provisions of copyright contract law are included in the acts that provide the national copyright framework in the chosen jurisdictions: the Belgian

Civil Code; and (5) in the UK: Chitty and Beale, *Chitty on Contracts* (n 57) 1235–40; Andrews, *Contract Rules* (n 57) 64–97; Chen-Wishart, *Contract Law* (n 57) 488–90.

[65] Chitty and Beale, *Chitty on Contracts* (n 57) ch 8, 16; Andrews, *Contract Rules* (n 57) 81–84, 130–33; Peel, *Treitel on the Law of Contract* (n 57) 512–29, 605–32; Lionel Bently and others, *Intellectual Property Law* (6th edn, Oxford University Press 2022) 347–52.

[66] Hugenholtz and Guibault, 'Auteurscontractenrecht' (n 55) 30, 76; Alexandre Cruquenaire, *L'Interprétation des Contrats en Droit d'Auteur* (Création Information Communication 11, Larcier 2007) 411; Barbara Baarsma and Nicole Rosenboom, 'Oneerlijke Handelspraktijken. Voldoet Bestaande (Zelf)regulering?' (2013) 21; 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 51.

[67] Cf Baarsma and Rosenboom, 'Oneerlijke Handelspraktijken' (n 66) 20–21, 24.

Downloaded from https://www.cambridge.org/core. UNIVERSIDAD AUTONOMA METROPOLITANA, on 16 Nov 2026 at 18:59:40, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/9781009394666.003

CEL, the French IP Code, the German Copyright Act, and the Dutch Copyright Act and Act on Neighbouring Rights. Under German law, a separate act provides a specific, albeit largely contractually waivable regime for publishing contracts that applies to works of literature and music, namely the *Verlagsgesetz* (in English: Publishing Act).[68] It is referred to below as the German Publishing Act.

The United Kingdom is the 'odd one out' here, as no specific copyright contract law applies to exploitation contracts.[69] Instead, the law of contracts applies.[70] However, change may be on the horizon, even though the UK legislator decided not to proceed with the implementation of the DSM Directive subsequent to Brexit.[71] At the close of 2021, a bill was introduced in the UK Parliament that sought to establish a number of limitations on parties' freedom in relation to copyright exploitation contracts, partially mirroring certain requirements set by the DSM Directive.[72] This bill, referenced below as the 'Brennan Bill', did not materialise into hard law.[73] However, the UK Intellectual Property Office (UKIPO) provided extensive additional support for potential legislative action in the form of a report published in February 2023.[74] This issue therefore appears still to be on the agenda of the UK legislator.

The contractual relationships under review may also be affected by legal regimes concerning unfair B2B contract terms and trade practices. Specific legal provisions in the chosen jurisdictions prohibit the inclusion of unfair terms in contract, as well as certain trade practices labelled as unfair.[75] As opposed to what is the case in B2C situations,[76] the law of unfair B2B contract terms and trade practices largely lacks

[68] *Gesetz über das Verlagsrecht*, full text at <www.gesetze-im-internet.de/verlg>. See Wirt Soetenhorst, *De bescherming van de uitgeefprestatie* (WEJ Tjeenk Willink 1993); Ludwig Delp, *Der Verlagsvertrag. Handbuch für die Praxis* (8th edn, CH Beck 2008).

[69] Although some specific legislative measures have been maintained subsequent to Brexit, specifically those accompanying the increased duration of protection for phonograms, see Chapter 5, Sections 5.2.2.3.1 and 5.3.2.2.1.

[70] Richard Arnold, *Performers' Rights* (6th edn, Sweet & Maxwell 2021) 275, 280; Lionel Bently and others, *Intellectual Property Law* (6th edn, Oxford University Press 2022) 347.

[71] *Copyright: EU Action: Written Question – 4371 of 2020* UK Parliament, UK Parliament (2020); Paul Torremans, 'Transposition of the DSM Copyright Directive 2019/790 in the United Kingdom' [2021] AM 374 374–75; Paul Torremans and Alina Trapova, 'The Copyright Contracts of Tomorrow: A British Point of View' in Simon Geiregat and Hendrik Vanhees (eds), *Copyright Contracts Tomorrow* (LeA 2023) 85–90.

[72] Copyright (Rights and Remuneration of Musicians, Etc.) HC Bill (2021–22) 19; Chris Cooke, 'Kevin Brennan MP's Controversial Music Copyright Proposals Discussed in Parliament' (*CMU*, 3 December 2021) <https://bit.ly/3Lo5YGY>; Stuard Dredge, 'Brennan Bill Second Reading: What Happened… And What Happens Next' (*Music Ally*, 3 December 2021) <https://bit.ly/34Pw4Co>.

[73] Bently and others, *Intellectual Property Law* (n 70) 353–54.

[74] Richard Osborne and Hyojung Sun, 'Economics of Streaming: Contract Adjustment and Rights Reversion' (6 February 2023).

[75] The concept of unfair trade practices also includes unfair behaviour linked to an individual contractual relationship.

[76] See Andrews, *Contract Rules* (n 57) 239–42.

Downloaded from https://www.cambridge.org/core. UNIVERSIDAD AUTONOMA METROPOLITANA, on 16 Nov 2026 at 18:59:40, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/9781009394666.003

harmonisation at the EU level. The relevant provisions of Belgian law as to both B2B unfair contract terms and trade practices are included in Book VI of the Belgian CEL. In Belgium, relevant legislative changes were made by a 2019 act, which added a number of particularly stringent provisions concerning B2B relationships that have a significant impact on the freedom of contract.[77] The French legal framework on law of unfair B2B contract terms and trade practices is somewhat fragmented: both the French Commercial Code[78] (as amended in 2019[79]) and the French Civil Code[80] bear relevance.[81] In Germany, there is no general restriction on unfair B2B contract terms that were negotiated individually. As to unfair trade practices, the uniform regime applicable to both B2B and business-to-consumer (B2C) situations set by the *Gesetz gegen den unlauteren Wettbewerb*[82] is noted. Finally, in the Netherlands, no separate general restrictions exist as to either unfair B2B contract terms or trade practices. Instead, the B2B sphere is regulated through principles of general contract law and extra-contractual liability.[83]

A related doctrine, associated with the law of unfair contract terms and trade practices in some jurisdictions, but with competition law in others, is that of abuse of economic dependence.[84] In the chosen jurisdictions, at the time of writing, this doctrine exists in Belgium, France and Germany.[85]

[77] *Wet van 4 april 2019 houdende Wijziging van het Wetboek van Economisch Recht met Betrekking tot Misbruiken van Economische Afhankelijkheid, Onrechtmatige Bedingen en Oneerlijke Marktpraktijken tussen Ondernemingen, Belgisch Staatsblad* (Belgian Official Gazette, hereinafter: BS) 24 May 2019, 50066 (hereinafter: Belgian B2B Act).

[78] See Arts L 442-1–L 442-8 French Commercial Code.

[79] See *Ordonnance no 2019-359 du 24 avril 2019 portant refonte du titre IV du livre IV du code de commerce relatif à la transparence, aux pratiques restrictives de concurrence et aux autres pratiques prohibées, Journal Officiel de la République Française* (French Official Gazette, hereinafter: JORF) No 0097, 25 April 2019.

[80] See Art 1171 French Civil Code.

[81] See also as to the potential relevance of the *Code de la Consommation* in a B2B context Sofie De Pourcq, *Oneerlijke Handelspraktijken en Bedingen in Contracten Tussen Ondernemingen* (Intersentia 2018) 161–62, 352.

[82] In English: Act on Unfair Competition, commonly abbreviated as UWG.

[83] See eg Baarsma and Rosenboom, 'Oneerlijke Handelspraktijken (n 66) 7–17; Léon Korsten and Jolein Movig, 'Belgische wetswijziging introduceert B2B-bescherming; een voorbeeld voor Nederland?' (2020) 23 M&M 68, 74–76.

[84] The doctrine of abuse of economic dependence is deemed to be part of competition law if the relevant provisions require the behaviour at issue to have an anticompetitive effect, as is the case in Belgium (see Art IV.2/1 Belgian CEL), as to *pratiques anticoncurrentielles* in France (see Art L 420-2(2) French Commercial Code) and in Germany (see Art 20 *Gesetz gegen Wettbewerbsbeschränkungen*, in English: Act against Restraints of Competition, commonly abbreviated as GWB). This is not the case if no anticompetitive effect is required, such as is the case with *pratiques restrictives de concurrence* in France (Arts L 442-1–L 442-8 French Commercial Code).

[85] The Dutch legal system does not foresee a dedicated regime prohibiting abuse of economic dependence. Instead, recourse may be had to the prohibition of abuse of a dominant position under competition law, general contract law mechanisms or instances of self-regulation, see Baarsma and Rosenboom, 'Oneerlijke Handelspraktijken' (n 66) 7–37.

Downloaded from https://www.cambridge.org/core. UNIVERSIDAD AUTONOMA METROPOLITANA, on 16 Nov 2026 at 18:59:40, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/9781009394666.003

3.3.2.3 Substantive Scope

3.3.2.3.1 OBJECT OF THE CONTRACT The substantive scope of the selected substantive legal regimes may first be qualified on the basis of the object of the contract. This refers to the legal consequences of a contract and, thus, the resulting obligations for the parties. Provisions of general contract law are not limited to a certain type of contract and thus apply regardless of the contract's object.

Copyright contract law applies to contracts that have as their object to establish a transfer of or a licence to works protected by copyright and/or fixations of performances protected by the neighbouring right of performing artists ('copyright exploitation contracts').

A first, general category of provisions of copyright contract law applies to all copyright exploitation contracts, both when the contract at issue results in a transfer of exploitation rights and in case a licence is granted. The rules applicable to exclusive and non-exclusive licences are not identical.[86] Further, given the particular status of moral rights, the law applicable to such rights differs from the rules that apply to the grant of exploitation rights.

The relevant provisions of French law only refer to the concept of *cession*.[87] However, it is commonly accepted that this concept (which may be equated to the English 'assignment') includes both transfer (*aliénation*) and licence (*licence*) contracts.[88] The relevant provisions of Belgian copyright contract law expressly refer to both transfers and licences.[89] German law does not allow authors to transfer exclusive rights.[90] For performers, Article 79(2a) German Copyright Act expressly specifies that the protective rules of copyright contract law apply to both transfers and licences. Dutch law, finally, defines the scope of application of the relevant provisions relating to copyright *sensu stricto* by referring to the grant of a right to

[86] See eg Chapter 5, Section 5.2.2.3 concerning indirect duties to exploit.

[87] This book does not treat the specific regimes applicable under French law to so-called *contrats à compte d'auteur* and *contrats de compte à demi*, for want of any *cession* that takes place in such a case (Art L 132-2–3 French IP Code). See Hendrik Vanhees, *Een Juridische Analyse van de Grondslagen, Inhoud en Draagwijdte van Auteursrechtelijke Exploitatiecontracten* (Maklu 1993) 17–19; André Lucas and others, *Traité de la Propriété Littéraire et Artistique* (5th edn, LexisNexis 2017) 682–84; Pierre-Yves Gautier, *Propriété Littéraire et Artistique* (11th edn, Presses Universitaires de France 2019) 618–19; Christophe Caron, *Droit d'Auteur et Droits Voisins* (6th edn, LexisNexis 2020) 482–84.

[88] See eg Sébastien Raimond, *La Qualification du Contrat d'Auteur* (Le Droit des Affaires. Propriété Intellectuelle 34, LexisNexis 2009) 455–56; 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) 81; Lucas and others, *Traité de la Propriété Littéraire et Artistique* (n 87) 608–10, 1129–30.

[89] Arts XI.167, XI.205 Belgian CEL.

[90] See Chapter 4, Section 4.4.1.1.

Downloaded from https://www.cambridge.org/core. UNIVERSIDAD AUTONOMA METROPOLITANA, on 16 Nov 2026 at 18:59:40, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/9781009394666.003

exploit.[91] Thus, in these jurisdictions, the qualification of a copyright exploitation contract as a licence does not allow contracting parties to evade the relevant provisions.

Copyright contract law also provides different sets of rules for certain contract types. These specific regimes differ as to their effect on parties' freedom of contract. The first contract type subject to specific regulation in Belgium, France and Germany is the publishing contract.[92] Such a contract may be defined as a contract through which the author of a work protected by copyright *sensu stricto* (or, in certain cases, their successor(s) in title), grants their corporate partner (the 'publisher') the right to reproduce or have reproduced, make available and distribute this work for the purpose of publication and dissemination.[93] These rules apply to contracts between composers and music publishers, but not to contracts between performers and record companies.[94] The researched provisions particular to publishing contracts were clearly drafted with a literary context in mind. Regardless, the concept of 'publishing contracts' is interpreted broadly as including both literary publishing and music publishing.[95]

A specific set of rules is sometimes foreseen in employment situations and for certain categories of commissioned music – either compositions or performances.[96] In such cases, the contractual playing field is considered to be more level and thus the objective of protecting artists as presumed weaker parties to a contract is deemed to apply to a lesser extent.[97] On the one hand, musicians may be active under an employment contract or deemed to be employees in accordance with the applicable social statute. Although factually and legally distinct from the US concept of works

[91] Art 25b(1) Dutch Copyright Act; Dirk Visser and others, *ACR: Auteurscontractenrecht* (DeLex 2016) 49–82; Dirk Visser, 'Dutch Copyright Contract Law' in Simon Geiregat and Hendrik Vanhees (eds), *Copyright Contracts Tomorrow* (LeA 2023) 25–27.

[92] See (1) in Belgium: Arts XI.195–XI.200 Belgian CEL; (2) in France: Arts L 132-1–L 132-17-8 French IP Code; and (3) in Germany: German Publishing Act.

[93] Cf (1) under Belgian law: Fernand De Visscher and Benoît Michaux, *Précis du Droit d'Auteur et des Droits Voisins* (Bruylant 2000) 343–45; Hendrik Vanhees, 'Art XI.195' in Fabienne Brison and Hendrik Vanhees (eds), *Hommage à Jan Corbet Huldeboek* (3rd edn, Larcier 2018) 309–10; Hendrik Vanhees, 'Auteurscontract' [2019] OBO 1, 37–39; (2) under French law: Art L 132-1 *jo* L 132-2, 132-3 French IP Code; Lucas and others, *Traité de la Propriété Littéraire et Artistique* (n 87) 680–84; and (3) under German law: Art 1 German Publishing Act; Delp, *Der Verlagsvertrag* (n 68) 4–9; Friedrich Karl Fromm and Wilhelm Nordemann, *Urheberrecht. Kommentar zum Urheberrechtsgesetz, zum Verlagsgesetz und zum Urheberrechtswahrnehmungsgesetz* (Rechtswissenschaften und Verwaltung, 10th edn, Kohlhammer 2008) 2030–37.

[94] Fabienne Brison, *Het Naburig Recht van de Uitvoerende Kunstenaar* (Creatie Informatie Communicatie 7, Larcier 2001) 448; Alain Berenboom, *Le Nouveau Droit d'Auteur et les Droits Voisins* (Création Information Communication 1, 3rd edn, Larcier 2005) 228; Dusollier and others, 'Contractual Arrangements Applicable to Creators' (n 66) 123.

[95] See Vanhees, 'Art XI.195' (n 93) 310.

[96] See (1) in Belgium: Arts XI.167(3), XI.205(4) Belgian CEL; (2) in France: Art L132–31 French IP Code; and (3) in the Netherlands: Art 25b(3) Dutch Copyright Act; Art 3 Dutch Neighbouring Rights Act.

[97] Cf Rec 72 DSM Directive.

Downloaded from https://www.cambridge.org/core. UNIVERSIDAD AUTONOMA METROPOLITANA, on 16 Nov 2026 at 18:59:40, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/9781009394666.003

'made for hire',[98] this refers to music that the musicians at issue were, in essence, 'hired' to make. For specific rules to apply, the relevant music must arise in the course *and* in the context of the performance of the employment relationship.[99] Notably, under Dutch law, the employer is deemed to be the author of works created by the employee. As a result, the relevant protective provisions of copyright contract law do not apply to employees that create works susceptible to protection under copyright *sensu stricto*.[100] This rule does not apply as such to performers. Instead, under Dutch law, employers of performers are granted the right to exploit the exclusive rights granted to performers to the extent that this is foreseen in the contract, or follows from either the nature of the contract, common practices or reasonableness.[101] Further, not all of the chosen jurisdictions provide specific rules applicable to employment situations: German law expressly provides that the protective rules of copyright contract law also apply to employment relationships, unless the terms or the nature of this relationship dictate otherwise.[102] French law contains no such specification, but does not foresee any specific rules pertaining to the rights of employed musicians either. Finally, Belgian law provides a number of specifications as to the regime applicable to employment contracts, as well as 'commissioned' content.[103]

On the other hand, specific rules are also foreseen for 'commissioned' music, which result from a specific 'commission' for a particular context or purpose. The protective provisions of Dutch copyright contract law do not apply to commissioned content that is primarily intended for 'use by the commissioning party'.[104] Also under Belgian and French law, more permissive regimes apply.[105]

Thus, the law foresees differing rules for music made in an employment context and/or on commission, in terms of both ownership and exploitation. There are

[98] See eg Hannibal Travis, *Copyright Class Struggle: Creative Economies in a Social Media Age* (1st edn, Cambridge University Press 2018) 21–55; Donald Passman, *All You Need to Know about the Music Business* (10th edn, Simon & Schuster 2019) 307–10.

[99] Brison, *Het Naburig Recht van de Uitvoerende Kunstenaar* (n 94) 451–52.

[100] Art 7 Dutch Copyright Act.

[101] Art 3 Neighbouring Rights Act.

[102] Art 43 German Copyright Act.

[103] De Visscher and Michaux, *Précis du Droit d'Auteur* (n 93) 335–41; Marina Markellou, *Le Contrat d'Exploitation d'Auteur. Vers un Droit d'Auteur Contractuel Européen. Analyse Comparative des Systèmes Juridiques Allemand, Belge, Français et Hellénique* (Création Information Communication, Larcier 2012) 127–29. See eg Chapter 4, Section 4.4.3.

[104] This may lead to issues for tunes or jingles, see 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) 401–02; Stef van Gompel and others, 'Evaluatie Wet Auteurscontractenrecht: Eindrapport' (2020) <https://bit.ly/3UBZrh4> 23–25.

[105] See (1) in Belgium: Hendrik Vanhees, *De wettelijke regeling inzake auteurscontracten* (Recht en Praktijk 69, Kluwer 2012) 75–83; Vanhees, 'Auteurscontract' (n 93) 75–85 and (2) in France: Art L 132-31 French IP Code; Conseil Supérieur de la Propriété Littéraire et Artistique (CSPLA), 'Rapport de Mission. Le Contrat de Commande', 2020, available (with annexes) at <https://bit.ly/4b8aQfT>.

Downloaded from https://www.cambridge.org/core. UNIVERSIDAD AUTONOMA METROPOLITANA, on 16 Nov 2026 at 18:59:40, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/9781009394666.003

several arguments in favour of increased simplicity.[106] This rings especially true in the music industry, where recourse to employee status through short-term employment contracts for specific creative output is a recurring strategy to ensure social security protection and mitigate precarious social situations.[107] A linked observation is that the day-to-day practice of employed and freelance musicians is often quite similar – with large ensembles frequently calling upon the services of musicians of both categories and many freelance musicians consistently being asked to work for a select set of corporate partners or even a single corporate partner.[108] The distinct treatment of employees and non-employees may therefore be problematic.[109] A solution could be to presume the existence of an employment relationship in cases where a situation of economic dependence exists for the artist.[110] This concept may be defined by analogy to the regimes concerning abuse of economic dependence in B2B situations, namely as a situation where the market power of an undertaking vis-à-vis their contracting party allows them to force certain contract conditions on this contracting party that would not have been accepted in the absence of such market power.[111] Alternatively, freelancers in a situation comparable to that of employees, in the sense that they cannot determine their own conduct on the music market, may be qualified as 'false self-employed'. This, in turn, supports the argument in favour of an analogue legal status.[112]

Finally, copyright contract law may provide specific rules for performance contracts[113] and audio-visual production contracts.[114] Save the presumption of transfer of exploitation rights in an audio-visual context,[115] these regimes are not discussed in detail in this volume.

[106] Alain Strowel and Bernard Vanbrabant, 'Copyright Licensing: A European View' in Jacques de Werra (ed), *Research Handbook on Intellectual Property Licensing* (Research Handbooks in Intellectual Property, Edward Elgar 2013) 46–47.

[107] 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, 136.

[108] Lionel Bently and others, 'Strengthening the Position of Press Publishers and Authors and Performers in the Copyright Directive' (2017)52.

[109] European Copyright Society, 'Comment' (n 107) 136, 146.

[110] Cf Art L 7121-3 *jo* Art L 7121-4 French Labour Code; Europe Economics and others, 'Remuneration of Authors and Performers for the Use of Their Works and the Fixations of Their Performances. Final Report' (Publications Office of the EU 2015) <https://op.europa.eu/s/zIa9> 58, 140–41, 150–51; Lucas and others, *Traité de la Propriété Littéraire et Artistique* (n 87) 1138; Caron, *Droit d'Auteur et Droits Voisins* (n 87) 638–39.

[111] See eg in Belgium: Art I.6(12*bis*) Belgian CEL.

[112] Cf Case C-413/13 *FNV Kunsten Informatie en Media (KIEM) v Staat der Nederlanden* [2014] ECLI:EU:C:2014:2411, para 31.

[113] See (1) in Belgium: Arts XI.201–202 Belgian CEL and (2) in France: Arts L 132-18–L 132-22 French IP Code.

[114] See (1) in Belgium: Arts XI.179–XI.185 and XI.206 Belgian CEL and (2) in France: Arts L 132-23–L 132-30 and L 212-4–L 212-9 French IP Code.

[115] See Chapter 4, Section 4.3.1.

Downloaded from https://www.cambridge.org/core. UNIVERSIDAD AUTONOMA METROPOLITANA, on 16 Nov 2026 at 18:59:40, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/9781009394666.003

3.3.2.3.2 PARTIES TO THE CONTRACT This subsection treats the personal scope of the selected substantive legal regimes. Principles of general contract law apply regardless of the identity of the parties to the contract. Conversely, both the relevant provisions of copyright contract law and the law of unfair B2B contract terms and trade practices seek to level the contractual playing field in situations where one of the parties has a weaker bargaining position than the other. The personal scope of these regimes is tailored to cases where such a protective attitude is merited.

The personal scope of application of the protective regimes of both copyright contract law and the law of unfair B2B contract terms and trade practices as to corporate partners is quite broad.

First, the identity of the corporate partner does little to affect the scope of application of the relevant provisions of copyright contract law, provided that the object of the contract is for the corporate partner to carry out exploitation activities in accordance with the contract.[116] Illustrative reference may be made to Recital 72 DSM Directive, which provides that its provisions on copyright exploitation contracts do not apply when the corporate partners merely act as end users and do not exploit the music themselves.[117]

Second, the personal scope of the law of unfair contract terms and trade practices differs slightly between the chosen jurisdictions.[118] In any case, one would be hard-pushed to find a corporate partner engaged in the music industry contracts under review that does not fall within the scope of all of them.

The personal scope of copyright contract law vis-à-vis musicians is simultaneously broader and narrower in scope than is the case for the law of unfair B2B contract terms and trade practices. Subject to specific regimes that apply to music made in an employment context or on commission, the protective provisions of copyright contract law apply to persons that qualify as authors and/or performers under the law of copyright.[119] Natural persons who are active as musicians thus fall within the scope of the protective regimes.[120] As confirmed by Recital 72 DSM Directive, the

[116] Cf 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) 295; Raimond, *La Qualification du Contrat d'Auteur* (n 88) 227–28; Nathalie Blanc, *Les Contrats du Droit d'Auteur à l'Epreuve de la Distinction des Contrats Nommés et Innommés* (Nouvelle Bibliothèque de Thèses 93, Dalloz 2010) 47–49. As to the status of investment companies such as Hipgnosis under copyright contract law, see Dirk Visser and Syb Terpstra, 'De stelling van Pythagoras. De lumpsumoverdracht van muziekrechten aan investeringsmaatschappijen en het auteurscontractenrecht' [2023] Auteursrecht 4.

[117] Rec 72 DSM Directive.

[118] See in detail De Pourcq, *Oneerlijke Handelspraktijken* (n 81) 157–71, 398–401.

[119] See, however, Art 48 German Publishing Act, which provides that the provisions of this Act also apply if the person concluding the contract with the publisher is not the author.

[120] Vanhees, 'Auteurscontracten en de Problematiek inzake Werken Gemaakt in Opdracht of in Uitvoering van een Arbeidsovereenkomst of Statuut' (n 116) 292; Dirk Visser, 'Pippi Langkous en het nieuwe auteurscontractenrecht' [2015] NJB 1289, 1291; Hugenholtz, 'Towards Author's

Downloaded from https://www.cambridge.org/core. UNIVERSIDAD AUTONOMA METROPOLITANA, on 16 Nov 2026 at 18:59:40, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/9781009394666.003

same should be true for musicians who conduct their activities through the vessel of a legal entity, such as a one-person company.[121] This is especially true since the mere fact of having recourse to a legal entity to enter into contracts does not appear to affect one's bargaining power. However, if a musician's company may be considered exceedingly powerful in the music marketplace, a convincing argument may be made against the applicability of the protective regimes.[122] In such a case, the musician is no longer a weaker party to the contract and the regime's objective no longer applies.[123] A similar line of argument applies to hereditary rightsholders: while the scope of application of the relevant provisions of copyright contract law is in principle extended to heirs, this extension should not extend to powerful heirs that assume a similar status to corporate partners.[124] Determining when a musician acting through a legal entity or the heir(s)/estate of a musician should lose their status as a perceived weaker party is difficult and requires an analysis of all relevant circumstances. A cautious approach is merited.

The protective rules of copyright contract law also do not apply within secondary relationships between corporate partners and third parties, since neither the objective of protecting a weaker party nor the aim of furthering the position of artists are deemed to apply in such a case.[125] However, as will become clear, artists may in some cases stake a claim vis-à-vis such third parties in order to protect their own interests.[126]

As to provisions on unfair B2B contract terms and trade practices, again the scope in the chosen jurisdictions varies. Depending on the national framework at issue, the relevant question is whether the musician engages in an economic activity or acts for purposes related to their craft. In the past, the European Commission (EC) has held that performing musicians are deemed to engage in economic activities insofar as they commercially exploit their artistic performances.[127] In view of this, it

Paradise' (n 104) 402; Vanhees, 'Auteurscontract' (n 93) 12–15; Raquel Xalabarder, 'The Remuneration of Authors and Performers' [2020] RIDA 129, 133–34.

[121] Cf Vanhees, *De wettelijke regeling inzake auteurscontracten* (n 105) 9; Visser, 'Pippi Langkous en het nieuwe auteurscontractenrecht' (n 120) 1292; European Copyright Society, 'Comment' (n 107) 135; Raquel Xalabarder, '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' [2020] InDret 1, 17.

[122] Rec 72 DSM Directive. Cf Vanhees, 'Auteurscontracten en de Problematiek inzake Werken Gemaakt in Opdracht of in Uitvoering van een Arbeidsovereenkomst of Statuut' (n 116) 293.

[123] ibid; Hugenholtz and Guibault, 'Auteurscontractenrecht' (n 55) 77.

[124] See eg Art 25b(4) Dutch Copyright Act, which limits the application of Dutch copyright contract law to heirs that are natural persons.

[125] Cf Art 25b(3) Dutch Copyright Act, which excludes the applicability of the protective provisions of copyright contract law to the benefit of employers.

[126] See Chapter 4, Section 4.5 and Chapter 5, Section 5.4.

[127] *RAI/UNITEL* (Case IV/29.559) Commission Decision 78/516/EEC [1978] OJ L 157/39; Phillip W Hall Jr, 'Smells Like Slavery: Unconscionability in Recording Industry Contracts' [2002] Hastings Comm & Ent LJ 189, 200; Valérie-Laure Bénabou, 'European Competition Law and

Downloaded from https://www.cambridge.org/core. UNIVERSIDAD AUTONOMA METROPOLITANA, on 16 Nov 2026 at 18:59:40, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/9781009394666.003

may be argued that provisions on unfair B2B contract terms and trade practices do not apply to amateur musicians, with the exception of those who are (sufficiently) commercially active in the music industry. Drawing a line in the sand in this regard, however, is rather difficult. Moreover, once amateur musicians enter into a copyright *exploitation* contract with a corporate partner in the music industry, it may be argued that the commercial *exploitation* of their music is on the horizon and thus that those musicians lose their amateur status. Excluding such musicians from the scope of application of the protective framework would leave them exceedingly vulnerable from a legal perspective. The bargaining power of an amateur musician entering into a copyright exploitation contract without any 'professional' aspirations at the moment of contract formation may even be lower than that of a musician who purposefully seeks to 'enter' the music industry. As the risk of unfairness may be considered as inversely proportionate to the bargaining power of the weaker party, the amateur status of a musician should not have any impact on the scope of the relevant provisions on unfair B2B contract terms and trade practices with regard to the music industry contracts under review. Further, the applicability of these provisions is not affected by the fact that a musician conducts their activities through a legal entity, or that the contract is entered into by the musician's successors in title – hereditary or otherwise. Finally, no separate rules apply to the use of either exploitation rights or moral rights, and the legal framework applies indiscriminately to composers and performers.

While the provisions on copyright exploitation contracts in the DSM Directive do not distinguish between contracts with authors and performers, it will be shown that the applicable legal framework in the chosen jurisdictions nevertheless differs markedly.[128] Independently of the legal (re)qualification thereof, the contribution of musical performers risks being accorded less artistic and/or commercial value than that made by a composer.[129] In other words, performers' share of music's social,

Copyright: Where Do We Stand? Where Do We Go?' in Estelle Derclaye (ed), *Research Handbook on the Future of EU Copyright* (Research Handbooks in Intellectual Property, Edward Elgar 2009) 546; Jules Stuyck and Bert Keirsbilck, *Handels- en Economisch Recht. Deel 2. Mededingingsrecht. A. Handelspraktijken en Contracten met Consumenten* (Beginselen van Belgisch Privaatrecht XIII, 5th edn, Wolters Kluwer 2019) 89.

[128] See also Jan Corbet, *Auteursrecht* (Algemene Praktische Rechtsverzameling, Story-Scientia 1997) 96; Brison, *Het Naburig Recht van de Uitvoerende Kunstenaar* (n 94) 443, 448; Brison, 'Art XI.205' (n 93) 363.

[129] Richard Arnold, 'Are Performers Authors?' [1999] EIPR 464, 468–69; Luke McDonagh, 'Rearranging the Roles of the Performer and the Composer in the Music Industry: The Potential Significance of Fisher v Brooker' [2012] IPQ 64, 64; Stefan Skopelja, 'The Boundaries of "Authorship" and "Performance" in Musical Copyright' [2015] UNSWLJ Student Series No 15-04, 9; Mathilde Pavis, 'The Author–Performer Divide in Intellectual Property Law: A Comparative Analysis of the American, Australian, British and French Legal Frameworks' (University of Exeter 2016) vol I, 27, 75–76, 117 and vol II, 4, 84, 102–07; Ananay Aguilar, 'Distributed Ownership in Music: Between Authorship and Performance' (2018) 27 Social & Legal Studies 776 777, 793; Fraser, 'Sharing the Spoils of a Shared Practice' (n 39) 52–53; Bently and others, *Intellectual Property Law* (n 70) 370.

Downloaded from https://www.cambridge.org/core. UNIVERSIDAD AUTONOMA METROPOLITANA, on 16 Nov 2026 at 18:59:40, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/9781009394666.003

cultural and economic capital is more limited than that of composers.[130] While the creative genius of a composer is often quite readily accepted, many performing musicians – especially session musicians – are considered to be mere craftsmen, as providers of a certain service.[131] On a contractual level, this perceived status is usually accompanied by standard contracts, with a full assignment of rights in return for a flat fee.[132]

This apparent underprivileged nature of performance may be unmerited.[133] 'Music' in itself does not exist in a palpable way, only the score does. A composition consisting of melody, harmony and rhythm requires a performance to bring it to life.[134] Illustrative reference may be made to variations in timbre, rhythmic articulation and other sound elements that often cannot be exhaustively recorded through musical notation.[135] The artistic value of the creative, interpretative work done by performing musicians should receive due recognition, thus increasing performer agency.[136] Because of the overarching importance attached to notation in music, to the musical score, such aspects risk remaining underexposed.[137] In a way, the emphasis put on a musical score in a certain genre is inversely proportionate to the valuation of musical performance in practice.[138] In the

[130] Cf above regarding Pierre Bourdieu's *Forms of Capital*. See also Brison, *Het Naburig Recht van de Uitvoerende Kunstenaar* (n 94) 15; Fraser, 'Sharing the Spoils of a Shared Practice' (n 39) 53–55.

[131] Daniel Leech-Wilkinson, 'Classical Music as Enforced Utopia' (2016) 15 Arts and Humanities in Higher Education 325, 326; Pavis, 'The Author–Performer Divide' (n 129) vol I, 76; Aguilar, 'Distributed Ownership in Music' (n 129) 785; Ananay Aguilar, 'The Collective Management of Performers' Rights in the UK: A Story of Competing Interests' (2019) 16 SCRIPTed 4, 31; Fraser, 'Sharing the Spoils of a Shared Practice' (n 39) 52.

[132] See Chapter 2, Section 2.4.5.

[133] See Pavis, 'The Author–Performer Divide' (n 129). See also Kanchana Kariyawasam and Rangika Palliyaarachchi, 'The Song Would Be Nothing Without Someone to Sing It: Copyright and Performers' Rights in Music' [2020] Int Rev Law Comput Technol 1; Mathilde Pavis, 'Sixty Years of International Performers' Rights: Time for a Performers' Copyright?' in Hayleigh Bosher and Eleonora Rosati (eds), *Developments and Directions in Intellectual Property Law* (Oxford University Press 2023).

[134] Leech-Wilkinson, 'Classical Music as Enforced Utopia' (n 131) 330.

[135] The influence of such variations is readily noticeable in pieces of (classical) music that have been around for centuries, with significant evolutions in performance styles over the years. As noted by Leech-Wilkinson: 'the same notes can make (and have made) substantially different music'. See Skopelja, 'The Boundaries of "Authorship" and "Performance"' (n 129); Leech-Wilkinson, 'Classical Music as Enforced Utopia' (n 131) 327–28, 332.

[136] Cf Rec 4 Term Directive. See also Leech-Wilkinson, 'Classical Music as Enforced Utopia' (n 131) 326, 334–35; Richard Osborne, 'Is Equitable Remuneration Equitable? Performers' Rights in the UK' (2017) 40 Popular Music and Society 573, 578–79, 587–88; Aguilar, 'Distributed Ownership in Music' (n 129) 777.

[137] Robert Brauneis, 'Musical Work Copyright for the Era of Digital Sound Technology: Looking beyond Composition and Performance' [2014] GW Law Faculty Publications & Other Works 8–10, 15–17. See, however, on the waning role of the score in popular music and the consequences thereof, albeit from the perspective of US law, ibid 18 et seq.

[138] Cf Skopelja, 'The Boundaries of "Authorship" and "Performance"' (n 129).

Downloaded from https://www.cambridge.org/core. UNIVERSIDAD AUTONOMA METROPOLITANA, on 16 Nov 2026 at 18:59:40, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/9781009394666.003

field of classical music in particular, the score determines and separates the roles of musicians: the composer writes and owns the score, while performers merely interpret it and work in its service.[139] In such a context, possibly (mis)guided by a lack of knowledge regarding the legal status of their activities, performers see themselves as 'mere' performers. In other musical genres, where emphasis on the score is more limited (for example, pop music, R&B or EDM), performing musicians may value the nature of their contribution more highly.[140] Attention to the appropriate artistic and commercial valuation of performances is therefore necessary.

Legally speaking, this translates into the desirability of a legal framework that does not force performers to always 'play second fiddle'. Composers and performers are entitled to an analogue level of protection, unless the specifics of their situation dictate otherwise in particular situations.[141] Significantly, the minimum thresholds for copyright exploitation contracts set by the DSM Directive apply equally to the broad category of 'authors and performers', which includes all types of musician. In terms of application of the existing rules, this implies a desirability of uniform interpretation of analogue provisions.

3.3.2.4 Interplay between Relevant Legal Regimes

Analysis of the scope of the selected substantive legal regimes reveals a significant overlap. The interplay between the different applicable sets of rules is therefore relevant. This relationship may be qualified on the basis of the legal distinction between general and specific rules (*leges generales* and *leges speciales*). General contract law serves as a *lex generalis* and applies in a complementary way to copyright exploitation contracts, to the extent that no specific rules to the contrary exist.[142] In practice, the broad scope of application of general contract law and the lack of tailoring to the specificities of contractual dynamics of the CCIs (including

[139] This clear distinction is moreover seemingly perpetuated through formal education channels such as music conservatoires. See Leech-Wilkinson, 'Classical Music as Enforced Utopia' (n 131) 325–36; Aguilar, 'Distributed Ownership in Music' (n 129) 783–85, 787–88, 794; Daniel Leech-Wilkinson, *Challenging Performance: Classical Music Performance Norms and How to Escape Them* (ebook, 2020). Full text at <https://challengingperformance.com/the-book>. See in particular chapter 18.1. Even so, it is noted that scores of early music leave much leeway for the performer, see Richard Caves, *Creative Industries. Contracts Between Art and Commerce* (Harvard University Press 2002) 273.

[140] Aguilar, 'Distributed Ownership in Music' (n 129) 794.

[141] Cf Hugenholtz and Guibault, 'Auteurscontractenrecht' (n 55) 78; European Copyright Society, 'Comment' (n 107) 132, 134.

[142] Guibault and Hugenholtz, 'Study' (n 60) 11; Blanc, *Les Contrats du Droit d'Auteur* (n 116) 443; Strowel and Vanbrabant, 'Copyright Licensing: A European View' (n 106) 29; Gautier, *Propriété Littéraire et Artistique* (n 87) 493; Caron, *Droit d'Auteur et Droits Voisins* (n 87) 412–13; van Gompel and others, 'Evaluatie Wet Auteurscontractenrecht: Eindrapport' (n 104) 14.

Downloaded from https://www.cambridge.org/core. UNIVERSIDAD AUTONOMA METROPOLITANA, on 16 Nov 2026 at 18:59:40, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/9781009394666.003

the music industry) limit its application in practice, to the benefit of the relevant specific legal regimes.[143]

Copyright contract law and contract-related provisions on unfair B2B contract terms and trade practices may be qualified as a *lex specialis* vis-à-vis general contract law, with an overlapping but distinct substantive scope. While the scope of copyright contract law is more limited than that of provisions on unfair B2B contracts in terms of object, it may apply to a broader category of parties (that is, also to musicians that do not qualify as undertakings). This renders the absolute categorisation of either regime as 'general' or 'specific' tricky. A simultaneous application of both legal regimes may be sought. While copyright contract law is more tailored to the contracts under review, the rules on unfair B2B contract terms fulfil a complementary, fallback role.

Finally, the regimes applicable to certain specific copyright exploitation contracts may be qualified as a *lex specialis* vis-à-vis the more general provisions of copyright contract law. Again, the more general rules apply in a subsidiary way to the extent that no deviating specific provision is applicable.[144] For this book, this distinction is chiefly relevant for publishing contracts and music made in an employment context or on commission.

3.3.2.5 Geographical Scope

Contract law has traditionally been largely embedded in national traditions. Further, as dictated by the principle of territoriality, the geographical scope of the relevant rules of copyright (contract) law is limited to the national territory. Over recent decades, the importance of the EU level to the regulation of copyright law has increased. Until recently, there was no substantive regulatory EU intervention in the field of copyright contract law, with the EU legislator traditionally favouring the principle of freedom of contract over the protection of parties with weaker bargaining power in B2B situations. While several EU directives refer to the need to secure appropriate remuneration for artists[145], substantive rules were, until recently, limited to the contract measures included in the Term Extension Directive and the criteria for appropriate remuneration of rightsholders set forth in Article 16(2) CRM Directive – which were implemented into UK law prior to Brexit and subsequently retained.[146]

[143] Séverine Dusollier, 'EU Contractual Protection of Creators: Blind Spots and Shortcomings' [2018] Colum J L & Arts, 436, 443.

[144] Vanhees, 'Auteurscontract' (n 93) 36–37; Raad voor de Intellectuele Eigendom, 'Advies betreffende de omzetting in Belgisch recht van richtlijn 2019/790/EU van 17 april 2019 inzake auteursrechten en naburige rechten in de digitale eengemaakte markt en tot wijziging van Richtlijnen 96/9/EG en 2001/29/EG' (19 June 2020) 67.

[145] See eg Recs 10–11, 35 InfoSoc Directive, Rec 3 Resale Right Directive, Rec 5 Rental and Lending Directive.

[146] See Chapter 5, Sections 5.2.2.3.1 and 5.3.2.2.1.

Downloaded from https://www.cambridge.org/core. UNIVERSIDAD AUTONOMA METROPOLITANA, on 16 Nov 2026 at 18:59:40, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/9781009394666.003

The first step to fill this gap was taken with the DSM Directive, which was meant to lead to EU-wide express provisions on the negotiation of artists' contracts.[147] As will become clear throughout the analysis of the substantive provisions in the following chapters, the harmonising effect of the DSM Directive is only partial. The relevant provisions are of a minimum harmonising nature and the Member States retain a significant margin of implementation.

Finally, the international regulatory level deals with copyright exploitation contracts only in an indirect way.[148] In particular, reference may be made to the recognition that artists have a right to see their interests protected, as is acknowledged in Article 27(2) UDHR and Article 15(1)(c) ICESCR.

3.3.2.6 Temporal Scope

3.3.2.6.1 PRINCIPLES OF INTERTEMPORAL LAW The third aspect that determines the relationship between the different relevant legal regimes is their application in time. This issue is governed by the principles of transition law, also referred to as 'intertemporal' law. Two distinct but interlinked questions arise.[149] First, it must be determined when exactly a new legal regime enters into force, when an act becomes binding. Second, there must be a delineation of the concrete situations to which the new legal regime at issue applies. Three main types of hypothetical circumstances may be discerned. First, both the legal fact and its consequences – here, the music industry contract and its performance through exploitation and remuneration – may take place before the entry into force of the new act. In such a case, unless the new regime is expressly imbued with retroactive effect, the old regime remains applicable. In the second category of situations, both legal fact and consequences arise after the entry into force of the new act. Again, settling the issue of temporal application is quite simple: the new regime applies to such cases. The third set of circumstances provides more food for discussion. Indeed, when the legal fact occurs before the new act's entry into force, but its legal consequences (partially) take place only after this moment, resolving the issue of temporal application is contentious. By way of example, such a situation arises in case a music industry contract is concluded before the entry into force of the new regime and is still ongoing when the new legal regime enters into force.

In determining the applicable legal regime, a balance must be sought between considerations of substantive and procedural fairness.[150] On the one hand, a new legal regime may be considered to bring progress in terms of equality and justice.

[147] On the implementation of the DSM Directive in the Member States, see <https://bit.ly/2X26syc>; <https://bit.ly/31uWybNo>.
[148] Xalabarder, 'The Principle of Appropriate and Proportionate Remuneration' (n 121) 5.
[149] Thijs Vancoppernolle, *Intertemporeel Recht* (Intersentia 2019) 20–26.
[150] Case C-168/09 *Flos v Semeraro* [2011] ECLI:EU:C:2011:29, paras 56–57.

Downloaded from https://www.cambridge.org/core. UNIVERSIDAD AUTONOMA METROPOLITANA, on 16 Nov 2026 at 18:59:40, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/9781009394666.003

A broad application in time of a new legal regime may be considered to further fairness in substantive terms. This translates into an immediate application of the new legal regime to the legal consequences of ongoing contracts that postdate its entry into force.

On the other hand, grounds of 'fair play' rather argue in favour of applying the old regime to existing contractual relationships. Contracting parties may legitimately expect their relationship to be governed by the law applicable at the moment of contract formation. This leads to a parallel application of two differing legal regimes: contracts concluded following the new regime's entry into force are subject to this new regime, while ongoing contracts are still governed by the old regime. As such contracts fade out over time, so does the old legal regime. This engenders both transparency and legal certainty for contracting parties, who are likely to have negotiated their contractual relationships solely in view of the legal framework applicable at that time.[151] It may be argued that the contractual balance thus reached between the parties should not be disturbed ex post.

However, a principled choice for immediate application of new legal regimes could be the most beneficial. Such a solution would both provide clarity and avoid the unequal treatment (and thus risk of discrimination) that a choice for continued application of the old regime to ongoing contracts would entail.[152] Other arguments in favour of such a choice include furthering of progress through the enhanced justice that the new legal regime is assumed to bring.

A new legal regime may include an express provision regarding its entry into force and/or its applicability in time, such as by including a transition period.[153] If it does not, a set of default rules applies. In the chosen EU jurisdictions, the default rules regarding entry into force of an act range from (in principle) a day (France[154]), ten days (Belgium[155]) or fourteen days (Germany[156]) to one or two months (Netherlands[157]) following its publication.[158]

[151] Vancoppernolle, *Intertemporeel Recht* (n 149) 59–61.

[152] Cf ibid 53–54.

[153] ibid 28–30. On UK law, see <www.legislation.gov.uk/understanding-legislation>.

[154] See Art 1 French Civil Code.

[155] See Art 4(2) *Wet 31 mei 1961 betreffende het gebruik der talen in wetgevingszaken, het opmaken, bekendmaken en inwerkingtreden van wetten en verordeningen*, BS 21 June 1961, 5171.

[156] See Art 82(2) German Basic Law.

[157] See Art 10(1) *Wet van 4 februari 1988, houdende regeling van de uitgifte van het Staatsblad en de Staatscourant en van de bekendmaking en de inwerkingtreding van wetten, algemene maatregelen van bestuur en vanwege het Rijk anders dan bij wet of algemene maatregel van bestuur vastgestelde algemeen verbindende voorschriften* <https://bit.ly/3viaQpm>.

[158] See in more detail Vancoppernolle, *Intertemporeel Recht* (n 149) 21. In the United Kingdom, the application of new laws is specified in the 'Commencement' section of an Act. If this is not the case, the application in time is set by the Secretary of State for the relevant government department. In the absence a statute pertaining to the regulation of copyright exploitation contracts under UK law, considerations as to the application of UK legislation in time are not included here.

Downloaded from https://www.cambridge.org/core. UNIVERSIDAD AUTONOMA METROPOLITANA, on 16 Nov 2026 at 18:59:40, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/9781009394666.003

The default rules regarding an act's application in time usually adhere to four main principles. The first is the fundamental principle of non-retroactivity, which dictates that new acts generally do not apply to past situations, and is motivated by the wish to protect legal certainty and the legitimate expectations of legal subjects.[159] Second, new acts generally apply immediately and exclusively to current and future situations.[160] Third, the legal consequences of ongoing contracts are usually governed by the old regime.[161] The fourth rule provides for exceptions to the third, leading to immediate application of certain acts, even to ongoing contracts.[162] The precise details of this fourth rule differ. In Belgium, both mandatory acts and acts that relate to public order apply immediately, save if the act at issue provides otherwise.[163] A more restrictive view is taken in France and Germany, where the immediate application to ongoing contracts is limited to those new acts where particularly imperative public policy considerations apply – a rather vague concept in itself.[164] An – interesting, yet somewhat unpredictable – alternative approach that has to some extent been accepted in Germany and the Netherlands seeks to solve intertemporal conflicts on a case-by-case basis, referring to a set of criteria that includes the new law's objective, the perceived injustice caused by the old law and the legitimate expectations of the relevant parties.[165]

A convincing argument may be made to remodel intertemporal law based on conflict-of-law rules, focusing on the legitimate expectations of parties whose situation is adversely affected by the new legal regime.[166] If this party (or these parties) may legitimately expect the old regime to apply, this would be the outcome of the case, unless the result would not be in conformity with applicable higher norms, such as the constitution.[167]

[159] Concerning the lack of retroactivity of acts under the laws of the chosen EU jurisdictions, the consequences of this principle and the exceptions thereto, see Vancoppernolle, *Intertemporeel Recht* (n 149) 34–48. See also the extensive source materials cited there. In essence, because of this principle, rights that have arisen (such as a right to damages), cannot be removed through the application of the new law, and rights that have been removed (such as through the statute of limitations) cannot arise again.

[160] This is indicated in Dutch as *onmiddellijke werking*, in French as *effet immédiat* and in German as *Sofortwirkung* or *sofortige Anwendung*. See Vancoppernolle, *Intertemporeel Recht* (n 149) 49–58, 87. For a clear nuance regarding the German legal system, see ibid 52. For various corrective mechanisms, see ibid 52–58.

[161] This is indicated in Dutch as *eerbiedigende werking*, in French as *effet différé*, *survie de la loi ancienne* or *effet post-actif* and in German as *Nachwirkung des alten Gesetzes*. See Vancoppernolle, *Intertemporeel Recht* (n 149) 58–62, 87.

[162] ibid 62–75.

[163] Art 1.2 new Belgian CC; Vancoppernolle, *Intertemporeel Recht* (n 149) 62–66.

[164] ibid 66–67.

[165] ibid 75–79.

[166] ibid 151–202, 609–11, 855–58.

[167] ibid 205–602, 611–16, 876–81.

Downloaded from https://www.cambridge.org/core. UNIVERSIDAD AUTONOMA METROPOLITANA, on 16 Nov 2026 at 18:59:40, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/9781009394666.003

3.3.2.6.2 APPLICATION TO LEGAL FRAMEWORK A full discussion of the temporal application of general contract law falls outside the scope of this research.[168] However, particular attention is devoted to the relevant provisions of copyright contract law in the continental EU jurisdictions under review, which have evolved significantly over recent decades.

In Belgium, the existing provisions of the 1994 Belgian Copyright Act were included in Book XI, Title 5 Belgian CEL by way of the Belgian Act of 19 April 2014.[169] These codified provisions apply to all works and performances that are protected when this act entered into force on 1 January 2015.[170]

The French legal framework saw an important substantive amendment with a 2014 decree that changed provisions concerning publishing contracts in particular.[171] The French legislator expressly applied these new, restrictive rules to pre-existing contracts in the literary sector.[172] Further, a 2016 act brought significant changes to the rules that apply to contracts between performing musicians and their record companies, in addition to setting up an alternative dispute resolution (ADR) mechanism specific to the music sector.[173] While most of the relevant provisions concerning copyright exploitation contracts do not apply to contracts ongoing at the entry into force of these provisions, an exception was made for a particular transparency obligation specific to record companies.[174]

Over recent decades, the German legislator amended and supplemented the provisions of copyright contract law under review in this book by way of acts dating

[168] See (1) in Belgium: Claeys and Tanghe, *Algemeen Contractenrecht* (n 57) 25–38; (2) in France: Buffelan-Lanore and Larribau-Terneyre, *Droit Civil. Les obligations* (n 57) 5–42; Terré and others, *Droit Civil. Les Obligations* (n 57) 31–86; (3) in Germany: Markesinis and others, *The German Law of Contract* (n 57) 6–16; Fikentscher and Heinemann, *Schuldrecht* (n 57) 1022–28; and (4) in the Netherlands: Asser, *Verbintenissenrecht* (n 57) x–xi, 5–8.

[169] *Wet van 19 april 2014 houdende Invoeging van Boek XI, 'Intellectuele Eigendom' in het Wetboek van Economisch Recht, en houdende Invoeging van Bepalingen eigen aan Boek XI in de Boeken I, XV en XVII van Hetzelfde Wetboek*, BS 12 June 2014, 44352 (hereinafter: Belgian Act 19 April 2014).

[170] Art 40(1) para 1 Belgian Act 19 April 2014. The provisions of that act concerning the resale right relating to artworks (see Chapter 5, Section 5.4.3.1) entered into force on 1 July 2015.

[171] *Ordonnance no 2014-1348 du 12 novembre 2014 modifiant les dispositions du code de la propriété intellectuelle relatives au contrat d'édition*, JORF No 0262, 13 November 2014 (hereinafter: French Decree of 12 November 2014).

[172] See Arts 9–12 French Decree of 12 November 2014; Caron, *Droit d'Auteur et Droits Voisins* (n 87) 444–45.

[173] *Loi no 2016-925 du 7 juillet 2016 relative à la liberté de la création, à l'architecture et au patrimoine*, JORF No 0158, 8 July 2016 (hereinafter: French Act of 7 July 2016). On ADR under French law, see Chapter 7, Section 7.5.

[174] Art 110 French Act of 7 July 2016. The provision subject to immediate application is Art 212-15 French IP Code. on transparency obligations under French law, see Chapter 5, Sections 5.3.3 and 5.4.3.2.

Downloaded from https://www.cambridge.org/core. UNIVERSIDAD AUTONOMA METROPOLITANA, on 16 Nov 2026 at 18:59:40, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/9781009394666.003

from 2002,[175] 2007[176] and 2016.[177] The German legislator has combined the traditional route of having the legal consequences of ongoing contracts be governed by the old regime with the immediate application of some protective provisions to ongoing contracts.[178] First, while most of the provisions of the German Act of 28 March 2002 only apply to contracts that were concluded, and/or facts that occurred, from 1 July 2002 (the day the 2002 act entered into force), limited immediate application was accorded to the right of fair remuneration as to contracts concluded between 1 June 2001 and 30 June 2002 if the content at issue was/is exploited after 30 June 2002.[179] In addition, the contract adjustment mechanism applies to all facts that have occurred since 28 March 2002 – also those stemming from contracts predating the German Act of 28 March 2002.[180] The main change effected by the German Act of 28 October 2007 was the introduction of the possibility for authors to grant rights relating to future methods of exploitation under certain conditions.[181] The relevant transitional provision foresees that contracts dating between 1 January 1966 and 2008 that exclusively grant all essential exploitation rights to the corporate partner, without limitation in either place or time, also include methods of exploitation that were not yet known at the time of contract

[175] *Gesetz zur Stärkung der vertraglichen Stellung von Urhebern und ausübenden Künstlern Vom 28. März 2002*, *Bundesgesetzblatt* (German Official Gazette, hereinafter: BGBl) 2002 Part I No 21, 1155 (hereinafter: German Act of 28 March 2002). See also Adolf Dietz, 'Amendment of German Copyright Law in Order to Strengthen the Contractual Position of Authors and Performers' [2002] IIC 828; Adolf Dietz, 'News from Germany. Significant Legislative and Case Law Developments in Copyright Contract Law in Germany' [2003] RIDA 146; Adolf Dietz, 'Copyright Contract Law According to the New German Legislation and Practice' [2005] AMI 20; Eva Inés Obergfell (ed), *Zehn Jahre reformiertes Urhebervertragsrecht: 1. Josef Kohler-Symposion* (Josef Kohler-Symposion, Berlin/Boston, Walter De Gruyter 2013).

[176] *Zweites Gesetz zur Regelung des Urheberrechts in der Informationsgesellschaft Vom 28. Oktober 2007*, BGBl 2007 Part I No 54, 2513 (hereinafter: German Act of 28 October 2007). See also Agnès Lucas-Schloetter, 'Qu'y a-t-Il Dans La "Deuxième Corbeille"? La Loi Allemande Du 26 Octobre 2007 Relative Au Droit d'Auteur Dans La Société de l'Information' [2008] PI 368; Silke von Lewinski, 'News from Germany. Developments in Germany from Mid-2005 until the End of 2010. Part I' [2011] RIDA 164, 167, 181–91.

[177] *Gesetz zur verbesserten Durchsetzung des Anspruchs der Urheber und ausübenden Künstler auf angemessene Vergütung und zur Regelung von Fragen der Verlegerbeteiligung Vom 20. Dezember 2016*, BGBl 2016 Part I No 63, 3037 (hereinafter: German Act of 20 December 2016). See also Agnès Lucas-Schloetter, 'Das neue Urhebervertragsrecht' [2017] GRUR 235.

[178] Art 132 German Copyright Act; Gerhard Schricker, *Urheberrecht. Kommentar* (3rd edn, CH Beck 2006) 2196–204; Fromm and Nordemann, *Urheberrecht* (n 93) 1963–71; Gunda Dreyer and others, *Urheberrecht* (Heidelberger Kommentar, 4th edn, CF Müller 2018) 1699–704; Philipp Möhring and Käte Nicolini, *Urheberrecht* (4th edn, CH Beck 2018) 1453–61.

[179] Art 132(3)–(4) German Copyright Act. On the right of fair remuneration under German law see below, Section 3.3.2.2.

[180] Art 132(3)–(4) German Copyright Act. On the contract adjustment mechanism under German law see below, Section 3.3.2.3.1.

[181] More specifically, this led to the repeal of Art 31(4) German Copyright Act and the introduction of Art 31a German Copyright Act: see Chapter 4, Section 4.4.1.2.

Downloaded from https://www.cambridge.org/core. UNIVERSIDAD AUTONOMA METROPOLITANA, on 16 Nov 2026 at 18:59:40, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/9781009394666.003

formation, unless the author objects in a timely manner.[182] As for the 2016 amendment of the German Copyright Act, the new provisions concerning copyright exploitation contracts only apply to contracts concluded from 1 March 2018 onwards, with the exception of the right of revocation, which applies to all facts that occur after 1 March 2018, independent of their contractual origins.[183]

The 2015 Dutch act on copyright exploitation contracts contains a wide range of protective rules. Before the entry into force of this act, copyright exploitation contracts were largely governed by the general provisions of the Dutch Civil Code.[184] In principle, the provisions of the 2015 act only apply to contracts that postdate its entry into force, with some exceptions.[185] The most relevant exceptions to this principle are the limitation as to future works, the general requirement of reasonableness and the right of revocation.[186] Those protective rules also apply to pre-existing contracts. Several amendments of the legal framework are on the table in the Netherlands at the time of writing.[187]

In addition, in the past decade, the implementation of two relevant EU directives into national law led to several amendments of copyright contract law in the chosen jurisdictions that bear relevance to the legal framework applicable to the music industry contracts under review, namely the Term Extension Directive and the DSM Directive.

The extended term of protection for phonograms applies to all content that qualified for neighbouring rights protection on 1 November 2013, as well as all posterior content.[188] The rights in phonograms granted to corporate partners on

[182] Art 137l(1) German Copyright Act.

[183] Art 132(3a)–(4) German Copyright Act. On the right of revocation under German law see below, Section 3.2.2.

[184] Hugenholtz, 'Towards Author's Paradise' (n 104) 399.

[185] *Wet van 30 juni 2015 tot wijziging van de Auteurswet en de Wet op de naburige rechten in verband met de versterking van de positie van de auteur en de uitvoerende kunstenaar bij overeenkomsten betreffende het auteursrecht en het naburig recht*, *Staatsblad* (Dutch Official Gazette, hereinafter: Stb) 2015, 257 (hereinafter: Dutch Act of 30 June 2015). See Visser and others, *ACR: Auteurscontractenrecht* (n 91) 307–13; JH Spoor and others, *Auteursrecht. Auteursrecht, portretrecht, naburige rechten en databankenrecht* (Recht en Praktijk, 4th edn, Wolters Kluwer 2019) 558–59; Stef van Gompel, 'Omzetting van de DSM Auteursrecht Richtlijn 2019/790 in Nederland' [2021] AM 338, 335.

[186] Art III Dutch Act of 30 June 2015.

[187] See <https://bit.ly/3Uze3Ov>. See also Commissie Auteursrecht, 'Advies over concept wetsvoorstel auteurscontractenrecht II' (5 September 2022) <https://bit.ly/3S767nQ>.

[188] See (1) in Belgium: Art 40(4) para 1 Belgian Act 19 April 2014; (2) in France: Art 8(I) *Loi no 2015-195 du 20 février 2015 portant diverses dispositions d'adaptation au droit de l'Union européenne dans les domaines de la propriété littéraire et artistique et du patrimoine culturel*, JORF No 0045, 22 February 2015 (hereinafter: French Act of 20 February 2015); (3) in Germany: Art 137m(1) German Copyright Act; (4) in the Netherlands: Art III(2) *Wet van 9 oktober 2013 tot wijziging van de Wet op de naburige rechten in verband met de omzetting van Richtlijn 2011/77/EU van het Europees Parlement en de Europese Raad van 27 september 2011 tot wijziging van de Richtlijn 2006/116/EG betreffende de beschermingstermijn van het auteursrecht en bepaalde naburige rechten*, Stb 2013, 383 (hereinafter: Dutch Act of 9 October 2013); and (5) in the United Kingdom: Arts 1, 21 Copyright and Duration of Rights in Performances Regulations 2013, SI 2013/1782.

Downloaded from https://www.cambridge.org/core. UNIVERSIDAD AUTONOMA METROPOLITANA, on 16 Nov 2026 at 18:59:40, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/9781009394666.003

1 November 2013 continue to produce effects for the extended period of protection of twenty years, unless the contract itself clearly indicates otherwise.[189] It is difficult to envisage a such a deviating contractual provision, given the inherent difficulties associated with predicting future legislative developments. It may therefore be said with relative certainty that prior grants remain applicable for the full period of seventy years. This arrangement is ostensibly prompted by concerns of legal certainty,[190] but appears to be a policy decision in favour of corporate partners. This term extension was coupled with several measures that sought to ensure that musicians reaped part of the additional revenues associated with the term extension.[191] These measures apply to contracts that predate the entry into force of the Term Extension Directive, effective from the fifty-first year of protection. While this immediate effect favours musicians, this is countervailed by the continuing effect of prior grants during the extended period of protection.

The other legislative instrument of note at the EU level is the DSM Directive, which dates from 2019.[192] The implementation of this Directive into Member State law was due by 7 June 2021. The provisions of the DSM Directive apply in respect of 'all works and other subject matter that are protected by national law in the field of copyright' on or after this date.[193] This implies that the DSM Directive may apply to pre-existing music.[194] However, the application in time of the DSM Directive is expressly limited by the proviso that it does not affect 'any acts concluded and rights acquired before 7 June 2021'.[195] Alternative interpretations are possible, especially as to its application to pre-existing licence agreements. The provision apparently perceives the contractual relationships at issue as a static environment, whereby a singular relevant point in time may be pinpointed. While this may be true for contracts resulting in a transfer of rights, such a single moment in time is much more difficult to determine in a licensing context.[196]

On the one hand, it could be argued that the concepts of 'acts concluded' and 'rights acquired' refer to all copyright exploitation agreements entered into before 7 June 2021, be it through a transfer or a licence. This would mean that the minimum benchmarks set by the DSM Directive only apply to contracts postdating the DSM implementation deadline. This interpretation clearly favours the interests of corporate partners. It risks undermining the objective of the DSM Directive to secure enhanced protection for artists.[197]

[189] Art 10a(1) Term Directive; Recital 15 Term Extension Directive.
[190] Rec 15 Term Extension Directive.
[191] See Chapter 5, Sections 5.2.2.3.2 and 5.3.2.2.
[192] See <https://bit.ly/2YSDGRz>.
[193] Art 26(1) DSM Directive.
[194] Cf Ted Shapiro, 'Remuneration Provisions in the DSM Copyright Directive and the Audiovisual Industry in the EU: The Elusive Quest for Fairness' (2020) 42 EIPR 778, 787.
[195] Art 26(2) DSM Directive.
[196] Shapiro, 'Remuneration Provisions in the DSM Copyright Directive' (n 194) 787.
[197] European Copyright Society, 'Comment' (n 107) 132, 139.

Downloaded from https://www.cambridge.org/core. UNIVERSIDAD AUTONOMA METROPOLITANA, on 16 Nov 2026 at 18:59:40, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/9781009394666.003

The alternative interpretation is that the concept of 'acts concluded' refers to acts of exploitation, not agreements.[198] This position is supported by the Dutch DSM Implementation Act, which provides that it does not apply to exploitation activities (in Dutch: *exploitatiehandelingen*) and rights granted (in Dutch: *verworven rechten*) predating its entry into force.[199] This interpretation would bring acts of exploitation conducted on the basis of earlier contracts into the temporal scope of application of the DSM Directive. This interpretation would be favourable to the interests of musicians.[200]

In interpreting this provision, recourse may be had to ECJ case law interpreting the transitional provision of the InfoSoc Directive, which provides that its provisions apply 'without prejudice to any acts concluded and rights acquired before 22 December 2002'.[201] In the context of the *VG Wort* case concerning private copying, the phrase 'acts concluded' was interpreted as referring to 'acts of exploitation' by the ECJ.[202] However, this argument is specific to the context of private copying and has no place in a contractual situation.[203] The indiscriminate copying of the concept 'acts concluded' from the InfoSoc Directive is regrettable. A clearer formulation, as was included, for example, in the Unfair Contract Terms Directive,[204] the Consumer Rights Directive,[205] the Sale of Goods Directive[206] and the Digital Content Directive,[207] would have been preferable.

Independently of the above, the question arises how certain triggers that occur after the formation of the contract may affect the legal framework to which the

[198] This has apparently been the position of the EC, see Shapiro, 'Remuneration Provisions in the DSM Copyright Directive' (n 194) 787. See also Case C-168/09 *Flos v Semeraro* [2011] ECLI:EU:C:2011:29, para 51; Yannos Paramythiotis, 'Fairness in Copyright Contract Law: Remuneration for Authors and Performers Under the Copyright in the Digital Single Market Directive' in Tatiana-Eleni Synodinou and others (eds), *EU Internet Law in the Digital Single Market* (Springer International 2021) 94.

[199] Art VI Dutch DSM Implementation Act. Cf the reference to the concept of *exploitatiehandelingen* in Art 40(4) para 2 Belgian Act 19 April 2014, which implemented the Term Extension Directive into national law.

[200] See European Copyright Society, 'Comment' (n 107) 139.

[201] Art 10(2) InfoSoc Directive. On the legislative history of this provision, see the Opinion of AG Sharpston in Joined Cases C-457/11 to C-460/11 *Verwertungsgesellschaft Wort (VG Wort) and Others* [2013] ECLI:EU:C:2013:34, paras 132–33.

[202] Joined Cases C-457/11–C-460/11 *Verwertungsgesellschaft Wort (VG Wort) and Others* [2013] ECLI:EU:C:2013:34, para 28. See also AG Sharpston, referring to 'acts of reproduction': Joined Cases C-457/11–C-460/11 *Verwertungsgesellschaft Wort (VG Wort) and Others* [2013] ECLI:EU:C:2013:34, para 135.

[203] Shapiro, 'Remuneration Provisions in the DSM Copyright Directive' (n 194) 787–88.

[204] See Art 10(1) para 2 Unfair Contract Terms Directive, which declares its provisions applicable to all contracts concluded after 31 December 1994.

[205] Art 28(2) Consumer Rights Directive, which declares its provisions applicable to contracts concluded after 13 June 2014.

[206] Art 24(2) Sale of Goods Directive, which declares its provisions inapplicable to contracts concluded before 1 January 2022.

[207] Art 24(2) Digital Content Directive, which declares its provisions applicable to the supply of digital content or digital services which occurs from 1 January 2022, except for Arts 19, 20, which only apply to contracts concluded from that date.

Downloaded from https://www.cambridge.org/core. UNIVERSIDAD AUTONOMA METROPOLITANA, on 16 Nov 2026 at 18:59:40, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/9781009394666.003

contract must adhere. Reference may be made to clauses that foresee a renegotiation or termination of the contract in case certain circumstances arise.[208] Does the concept of 'acts concluded' include such 'new' agreements based on a contractual relationship that predates the DSM Directive? The text of the DSM Directive suggests that the minimum benchmarks do not apply to exploitation activities that took place before 7 June 2021.[209] The 'lack of clarity supports application of the general rule against retroactivity'.[210]

Finally, the requirement of transparency[211] applies from 7 June 2022 onwards.[212] This grace period seeks to enable corporate partners to adapt their existing reporting practices to the minimum benchmarks set by the DSM Directive.[213] However, the DSM Directive has failed to specify expressly whether, following the expiry of this grace period, the requirement of transparency will apply to contracts concluded before 7 June 2022 (or even 7 June 2021).[214]

The absence of clear legislative guidance on the temporal application of the DSM Directive is regrettable, since it leaves the door open for legal uncertainty and regulatory divergences at the national level. A preliminary reference filed with the ECJ by the Belgian Council of State will hopefully provide such guidance. This case is pending under the docket number C-575/23 at the time of writing and concerns the neighbouring rights of the performing musicians of the National Orchestra of Belgium.

The Netherlands was the first of the chosen jurisdictions to implement the DSM Directive into national law, on 16 December 2020.[215] Subject to the specifications on 'acts concluded' reviewed above, the provisions on artist contracts of the Dutch DSM Implementation Act entered into force on 7 June 2021.[216] The reporting

[208] Shapiro, 'Remuneration Provisions in the DSM Copyright Directive (n 194) 787.
[209] ibid.
[210] ibid.
[211] See Art 19 DSM Directive and Chapter 5, Sections 5.3.3 and 5.4.3.2.
[212] Art 27 DSM Directive.
[213] Rec 77 DSM Directive.
[214] See, however, Christophe Geiger and Franciska Schönherr, 'The Information Society Directive' in Irini Stamatoudi and Paul Torremans (eds), *EU Copyright Law. A Commentary* (Elgar Commentaries, Edward Elgar 2021) 760.
[215] *Wet van 16 december 2020 tot wijziging van de Auteurswet, de Wet op de naburige rechten, de Databankenwet en de Wet toezicht en geschillenbeslechting collectieve beheersorganisaties auteurs- en naburige rechten in verband met de implementatie van Richtlijn (EU) 2019/790 van het Europees parlement en de Raad van 17 april 2019 inzake auteursrechten en naburige rechten in de digitale eengemaakte markt en tot wijziging van de Richtlijnen 96/9/EG en 2001/29/EG (Implementatiewet richtlijn auteursrecht in de digitale eengemaakte markt)*, Stb 2020, 558 <https://bit.ly/30F3rPC> (hereinafter: Dutch DSM Implementation Act).
[216] *Besluit van 18 december 2020 tot vaststelling van het tijdstip van inwerkingtreding van de Implementatiewet richtlijn auteursrecht in de digitale eengemaakte markt*, Stb 2020, 559 <https://bit.ly/3uQgoJo> (hereinafter: Dutch Decree of 18 December 2020). See also clarifications added in the course of the ongoing review process of the Dutch regulatory framework at <https://bit.ly/3Uze3Ov>.

Downloaded from https://www.cambridge.org/core. UNIVERSIDAD AUTONOMA METROPOLITANA, on 16 Nov 2026 at 18:59:40, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/9781009394666.003

obligations entered into force on 7 June 2022.[217] The Dutch DSM Implementation Act does not expressly treat the issue of application of the reporting obligations to ongoing contracts.[218]

Second, on 12 May 2021 the French government issued a decree[219] partially implementing the DSM Directive, including the provisions on artist contracts.[220] The French decree only specifies its temporal application as to the provisions that implement Article 17 (7 June 2021) and Article 19 DSM Directive (7 June 2022).[221] The French DSM Implementation Decree expressly specifies that the reporting obligations will apply to ongoing contracts.[222] No specification was added as to the provisions implementing Articles 18 and 20 through 23 DSM Directive.

The third of the chosen jurisdictions to implement the DSM Directive was Germany, on 19 May 2021.[223] The amendments of the German Copyright Act pertaining to copyright exploitation contracts entered into force on 7 June 2021, while the separate act implementing Article 17 DSM Directive entered into force on 1 August 2021.[224] Detailed provisions have been foreseen on the temporal application of the amendments to ongoing contracts. Contracts with either composers or performers that were concluded and/or facts that occurred from 1 July 2002 until 28 February 2017 in principle remain subject to the legal framework as applicable on 28 February 2017.[225] In principle, the law as applicable on 1 March 2017 remains applicable to contracts with either composers or performers that were concluded and/or facts that occurred from 1 March 2017 until 6 June 2021.[226] Since 7 June 2021, the legislative amendments pertaining to the use-it-or-lose-it clause[227] and the contract adjustment mechanism[228] also apply to ongoing contracts.[229] From

[217] See under Dutch law the Dutch Decree of 18 December 2020 and under French law Art 13(II) *jo* Arts 5, 12 French DSM Implementation Decree.

[218] See Visser, 'Dutch Copyright Contract Law' (n 91) 37.

[219] In French: *Ordonnance*.

[220] *Ordonnance no 2021-580 du 12 mai 2021 portant transposition du 6 de l'article 2 et des articles 17 à 23 de la directive 2019/790 du Parlement européen et du Conseil du 17 avril 2019 sur le droit d'auteur et les droits voisins dans le marché unique numérique et modifiant les directives 96/9/CE et 2001/29/CE*, JORF No 0111, 13 May 2021 (hereinafter: French DSM Implementation Decree).

[221] Art 13 French DSM Implementation Decree.

[222] Article 13(II) French DSM Implementation Decree.

[223] *Gesetz zur Anpassung des Urheberrechts an die Erfordernisse des digitalen Binnenmarktes*, *Drucksache* 19/29894 <https://bit.ly/3FthVYG> (hereinafter: German DSM Implementation Act). Art 17 DSM Directive was implemented by way of a separate act, namely the *Gesetz über die urheberrechtliche Verantwortlichkeit von Diensteanbietern für das Teilen von Online-Inhalten* ('*Urheberrechts-Diensteanbieter-Gesetz*' or 'UrhDaG', hereinafter: German OCSSP Act).

[224] Art 5 German DSM Implementation Act.

[225] Arts 132(3a), 132(4) German Copyright Act.

[226] Arts 133(1), 133(4) German Copyright Act.

[227] Art 41 German Copyright Act. See Chapter 5, Section 5.2.2.3.2.

[228] Art 32a German Copyright Act. See Chapter 5, Section 5.3.2.3.1.

[229] Arts 133(2), 133(4) German Copyright Act.

Downloaded from https://www.cambridge.org/core. UNIVERSIDAD AUTONOMA METROPOLITANA, on 16 Nov 2026 at 18:59:40, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/9781009394666.003

7 June 2022, the amended provisions setting forth active reporting obligations[230] also apply to ongoing contracts.[231]

Finally, in Belgium, a remarkable evolution has taken place. The 2021 Belgian implementing act specified that its entry into force did not prejudice rights granted by law or through prior acts of exploitation.[232] This formulation indicated an intended restrictive application in time and a lack of application of the new rules to ongoing contracts.[233] However, consequent to a legislative amendment dating from the spring of 2024, the mandatory provisions of this act now expressly apply to ongoing contracts.[234]

Both the law of unfair B2B contract terms and trade practices[235] and general contract law have undergone changes over recent decades. The 2019 Belgian rules concerning unfair contract terms apply to contracts that have been concluded, renewed and/or modified after 1 December 2020,[236] while the amended regime concerning unfair trade practices applies to undertakings' behaviour on or after 1 September 2019.[237] Recent relevant amendments to the French regime on unfair B2B contract terms and trade practices, intended to significantly simplify the applicable regime and render it more intelligible, entered into force on 26 April 2019, without an express qualification as to the temporal effects of the amended provisions under review in this book.[238] Further, the provision specific to contracts of adhesion under French law initially stems from contract law reform dating from 2016, whereby pre-existing contracts were excluded from the scope of application, and was subsequently amended in 2018, as to contracts entered into from 1 October 2018 onwards.[239]

Before substantively analysing the applicable legal framework, it is difficult to comprehensively assess the choices of national and EU legislators concerning the

[230] Arts 32d, 32e German Copyright Act. See Chapter 5, Sections 5.3.3 and 5.4.3.2.

[231] Arts 133(3)–(4) German Copyright Act.

[232] Art 99 Belgian DSM Implementation Act.

[233] Cf Emmanuel Cornu and Romain Meys, 'La transposition en droit belge de la directive sur le droit d'auteur et les droits voisins dans le marché unique numérique: Une modification significative du cadre contractuel d'exploitation des droits' [2022] JT 773, 787–88.

[234] Art 196 *Wet van 9 februari 2024 houdende diverse bepalingen inzake economie*, Belgian Official Gazette 21 March 2024, 34577.

[235] See in detail De Pourcq, *Oneerlijke Handelspraktijken* (n 81).

[236] Art 39 para 4 Belgian B2B Act.

[237] Art 39 para 1 Belgian B2B Act.

[238] *Ordonnance no 2019-359 du 24 avril 2019 portant refonte du titre IV du livre IV du code de commerce relatif à la transparence, aux pratiques restrictives de concurrence et aux autres pratiques prohibées*, JORF No 0097, 25 April 2019. A specification as to temporal application was included only for the legislative amendments pertaining to payment terms, see Art 5.

[239] See Art 1171 French Civil Code *jo* Art 9 *Ordonnance no 2016-131 du 10 février 2016 portant réforme du droit des contrats, du régime général et de la preuve des obligations*, JORF No 0035, 11 February 2016 and Art 16(I) *Loi n° 2018-287 du 20 avril 2018 ratifiant l'ordonnance no 2016-131 du 10 février 2016 portant réforme du droit des contrats, du régime général et de la preuve des obligations*, JORF No 0093, 21 April 2018.

Downloaded from https://www.cambridge.org/core. UNIVERSIDAD AUTONOMA METROPOLITANA, on 16 Nov 2026 at 18:59:40, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/9781009394666.003

temporal scope of the relevant legal framework. Only after the relevant rules have been reviewed and evaluated, the application of the legal framework in time may be put to the 'fairness test'.

3.4 ESTABLISHING THE APPROPRIATE LEVEL(S) AND METHOD(S) OF REGULATION

Before delving into the substance of the law, the appropriate level(s) and method(s) of regulation merit closer attention. At present, the relevant legal framework spans protective regimes across several fields of law and provides several rules that vary depending on the type of contract – with different rules applying to music publishing contracts and contracts with record companies, as well as to employment situations or commissioned music.[240] The different substantive scope of the relevant protective regimes allows for an approach that is tailored to the wide spectrum of musicians: both composing and performing musicians, either with or without an employment status, active in big or small groups or as a soloist, and so on. Doing justice to the diversity that exists in practice is a legitimate objective.

However, given the continuous emergence of new business models and methods of exploiting protected content, an equally legitimate question is whether attaining this objective is at all feasible. In addition, more simplicity and uniformity in terms of the applicable rules may be beneficial. Therefore, an argument may be made in favour of a more streamlined, harmonised legal framework. Such a framework may be less tailored to specific situations, but would provide a coherent, transparent set of rules that engenders legal certainty. While stopping short of a full uniformisation of the applicable rules, this consideration is to be borne in mind throughout this book. It is valid at both the national and EU levels, the latter from an internal market perspective. Notably, the DSM Directive does not distinguish between different types of contracts. It not only applies to the broad spectrum of creations (both works and performances), but also to a multiplicity of economic and cultural sectors – not only the music industry.[241]

The field of law considered to be the most suitable for the purposes of this book is copyright contract law, given its proximity to the CCIs and the music industry in particular. Provisions of general contract law and those curtailing unfair B2B contract terms and trade practices may act as a fallback rebalancing measure in certain exceptionally unfair situations. However, the general nature of these rules makes it hard to effectively invoke them in the context of the contracts under review.[242] Conversely, given their focus on relationships characterised by a

[240] See above, Section 3.3.2.

[241] Cf Séverine Dusollier, 'An Effective and Comprehensive Contractual Protection of Creators and Performers' (Copyright in the Digital Single Market, Brussels, 30 January 2020).

[242] Dusollier and others, 'Contractual Arrangements Applicable to Creators' (n 66) 60–61.

Downloaded from https://www.cambridge.org/core. UNIVERSIDAD AUTONOMA METROPOLITANA, on 16 Nov 2026 at 18:59:40, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/9781009394666.003

difference in (bargaining) power, the provisions pertaining to unfair B2B contract terms and trade practices may serve as a source of inspiration. The benefits of the threefold structure of (1) a list of per se prohibitions, (2) a grey list subject to an impact test and (3) a general norm based on fairness considerations are hard to deny. As argued by Ohly, this approach 'combines certainty in clear cases with flexibility to deal with unforeseen situations'.[243] However, this would require compiling a list of appropriate per se prohibitions that is both clear and complete – and does justice to the diversity of CCIs as well as within the music industry itself.[244] Potential express prohibitions spring to mind of tying practices between music publishers and record companies, of undue limitations of royalty calculation bases, of excessive discounts and deductions, of the grant of rights to future methods of exploitation without separate remuneration, of unbridled option clauses and indefinite terms, and so forth.[245] This list may very well be partly subjective, and it is almost certain that some stakeholders would not agree with its formulation. Moreover, research of the same kind in other CCIs would undoubtedly lead to a similar but different list of terms and practices to be considered per se unfair. Therefore, formulating a comprehensive regime of unfair B2B contract terms and trade practices in the CCIs would be rather challenging. A generalised harmonisation of the law of unfair B2B contract terms and trade practices at the EU level – also extending beyond the CCIs – is therefore unlikely.[246] In any case, from the perspective of good lawmaking, hard law regulatory intervention as to the music industry alone appears to be inefficient and overly sectorial. In view of this, the area of unfair B2B contract terms and trade practices does not appear to provide fruitful ground for further harmonisation for the purposes of this book.

Finally, the potential contribution of competition law to a fair(er) balance in the music industry is noted, as well as the need to approach copyright (and IP in general) contracts and competition from a holistic perspective.[247]

[243] Ansgar Ohly, 'A Fairness-Based Approach to Economic Rights' in P Bernt Hugenholtz (ed), *Copyright Reconstructed. Rethinking Copyright's Economic Rights in a Time of Highly Dynamic Technological and Economic Change* (Information Law Series 41, Wolters Kluwer 2018) 91.

[244] Cf more in general ibid.

[245] Cf Dusollier and others, 'Contractual Arrangements Applicable to Creators' (n 66) 103; Dusollier, 'EU Contractual Protection of Creators' (n 143) 456.

[246] Cf De Pourcq, *Oneerlijke Handelspraktijken* (n 81) 693–700. The EU legislator has undertaken specific initiatives in this regard, such as (1) Directive (EU) 2019/633 of the European Parliament and of the Council of 17 April 2019 on unfair trading practices in business-to-business relationships in the agricultural and food supply chain [2019] OJ L111/59 and (2) Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services [2019] OJ L186/57.

[247] Cf Friso Bostoen and Jozefien Vanherpe, 'Competition Law in the Digitized Music Industry: The Winners Take It All – But Should They?' (2021) 2 CPI Antitrust Chronicle 30, 30–38. See also extensively CMA, 'Music and Streaming: Final Report' (29 November 2022).

Downloaded from https://www.cambridge.org/core. UNIVERSIDAD AUTONOMA METROPOLITANA, on 16 Nov 2026 at 18:59:40, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/9781009394666.003

The next step is to determine the regulatory level that appears the most appropriate for enhancing fairness in the music industry. The global reach of online music and, consequently, the cross-border nature of the contracts under review beg the question whether further harmonisation of the copyright contract law should take place at the international regulatory level. However, regardless of possible substantive arguments in favour of global harmonisation, the realisation of hard-law rules on copyright contracts at the global level appears, at the time of writing, to be wholly unrealistic. Consequent to the principle of territoriality, the applicable national copyright laws differ by country, with a significant divide still persisting between civil law and common law countries. Therefore, for the foreseeable future, an international consensus on the appropriate copyright contract law framework seems illusory. Regardless, the consequences of the further globalisation and increasing homogeneity of the music market may yet surprise us all.[248]

Awaiting such potential surprises, the main question as to the appropriate regulatory level is whether and to what extent further European harmonisation of copyright contract law is merited – even though the United Kingdom would not be covered by such regulatory evolution. Subsequent to the principle of conferral, the EU has only the competences conferred on it by the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU), in order to achieve the objectives contained in these treaties.[249] EU competences are either exclusive[250] (including the establishment of competition rules necessary for the functioning of the internal market), shared[251] (including internal market) or supporting[252] (including culture). The exercise of the EU's competences is further subject to the principles of subsidiarity and proportionality. The former implies that the EU may only act under its shared and/or supporting competences if the objectives of the proposed action can be better achieved at the EU regulatory level.[253] If this is not the case, national regulation is considered a better fit. Second, subsequent to the principle of proportionality, the EU may not act in a way that exceeds what is necessary to achieve the objectives of the TEU and/or the TFEU.[254]

[248] Alan B Krueger, *Rockonomics* (John Murray 2019) 232.
[249] Art 5(2) TEU; Ana Ramalho, *The Competence of the European Union in Copyright Lawmaking. A Normative Perspective of EU Powers for Copyright Harmonization* (Springer International 2016) 106–09.
[250] Art 3 TFEU.
[251] Art 4 TFEU.
[252] Art 6 TFEU.
[253] Art 5(3) TEU.
[254] Art 5(4) TEU.

Downloaded from https://www.cambridge.org/core. UNIVERSIDAD AUTONOMA METROPOLITANA, on 16 Nov 2026 at 18:59:40, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/9781009394666.003

The EU legislator does not have a generalised competence for copyright contract law.[255] However, Article 114 TFEU grants the EU legislator power to adopt measures for the establishment and functioning of the internal market. Further, Article 118 TFEU specifies that the EU is competent to establish measures for the creation of EU-wide IP rights.[256] So far, harmonising EU measures relating to copyright have primarily been based on the objective of furthering the internal market.[257] Not only is EU harmonisation deemed to contribute to the proper functioning of this internal market, it is also said to simultaneously stimulate innovation, creativity, investment and production of new content.[258] For EU action to be legitimately based on the internal market competence, the measures at issue must genuinely have as their aim and content to improve the conditions for the establishment and functioning of the internal market.[259] In this context, the ECJ deems a 'mere finding of disparities between national rules and of the abstract risk of obstacles to the exercise of fundamental freedoms or of distortions of competition liable to result therefrom' to be insufficient.[260] As contract law is traditionally a national field of law, there was a certain hesitation regarding harmonisation of the law applicable to copyright exploitation contracts.[261] This reticence was further fuelled by the wish to acknowledge territorial differences between CCIs.[262] A final hurdle for harmonisation

[255] Silke von Lewinski, 'Copyright Contracts' in Tatiana-Eleni Synodinou (ed), *Codification of European Copyright Law Challenges and Perspectives* (Information Law Series 29, Kluwer Law International 2012) 242; Reto M Hilty and Valentina Moscon, 'Part D – Copyright Contract Law (Article 10 and Articles 14–16 COM(2016) 593 Final)' in Reto M Hilty and Valentina Moscon (eds), *Modernisation of the EU Copyright Rules Position Statement of the Max Planck Institute for Innovation and Competition* (Max Planck Institute for Innovation and Competition Research Paper Series 17–12, Max Planck Institute for Innovation and Competition 2017) 73. See in detail on the EU's competence concerning copyright law Ramalho, *The Competence of the European Union in Copyright Lawmaking* (n 249). See on EU external action in particular Yole Tanghe, 'EU Trade Policy and Copyright Law: On Competence Boundaries and Balancing Copyright Protection with Other Fundamental Rights' (KU Leuven 2019).

[256] See eg Synodinou, 'The Desirability of Unification of European Copyright Law' (n 4) 6.

[257] See eg Recs 1–7 InfoSoc Directive; Recs 9–15 Resale Right Directive; Recs 1–10 IPRED; Recs 1, 5 CRM Directive; Rec 1 Satellite and Cable Directive II; Recs 1–2 DSM Directive. See in detail Ramalho, *The Competence of the European Union in Copyright Lawmaking* (n 249) 10–13, 28–36, 92–95; Synodinou, 'The Desirability of Unification of European Copyright Law' (n 4) 4–6, 15.

[258] Rec 2 DSM Directive.

[259] Case C-376/98, *Germany v Parliament and Council* [2000] ECLI:EU:C:2000:544, paras 83–84.

[260] Hilty and Moscon, 'Part D – Copyright Contract Law (Article 10 and Articles 14–16 COM(2016) 593 Final)' (n 255) 73.

[261] Andreas Rahmatian, 'Dealing with Rights in Copyright-Protected Works: Assignments and Licences' in Estelle Derclaye (ed), *Research Handbook on the Future of EU Copyright* (Research Handbooks in Intellectual Property, Edward Elgar 2009) 313–14.

[262] Cf Commission, 'Report on the Responses to the Public Consultation on the Review of the EU Copyright Rules' (July 2014) <https://bit.ly/3yjVQN8> 80.

Downloaded from https://www.cambridge.org/core. UNIVERSIDAD AUTONOMA METROPOLITANA, on 16 Nov 2026 at 18:59:40, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/9781009394666.003

efforts in the field of copyright contract law was the limited harmonisation of initial ownership[263] and moral rights.[264]

A shift towards harmonisation in the field of copyright exploitation contracts was first indicated by the rules on contractual relationships with CMOs in the CRM Directive.[265] The need for further harmonisation was subsequently identified in the runup to the DSM Directive.[266] The undeniability of the cross-border dimension is confirmed by the harmonising measures that are already in place at the EU level.[267] The measures included in the DSM Directive in particular seek to allow rightsholders to better exercise their rights in the online environment, thus improving the functioning of the Digital Single Market.[268] The legislative approach in the jurisdictions under review varies rather widely. This sits uneasily with the online and thus potentially global nature of the music contracts under review. Fragmentation, a lack of transparency and ensuing shortcomings in terms of legal certainty arise, as well as a risk of forum shopping.[269] The effect is a validation and continuation of existing power relationships. The potential for further harmonising efforts is clear.[270]

The next step is to determine the appropriate method of regulation. A first important distinction in this regard is that between hard and soft law. The former refers to binding legal instruments and has the benefits of transparency and legal certainty. However, a further increase in such top-down regulation risks entailing a disproportionate encroachment on the freedom of contract and may moreover lead

[263] Michel M Walter and Silke von Lewinski, 'Status of Harmonization and Outlook' in Silke von Lewinski and Michel M Walter (eds), *European Copyright Law A Commentary* (Oxford University Press 2010) 1465–71; Antoon Quaedvlieg, 'Authorship and Ownership: Authors, Entrepreneurs and Rights' in Tatiana-Eleni Synodinou (ed), *Codification of European Copyright Law Challenges and Perspectives* (Information Law Series 29, Kluwer Law International 2012) 197–232. See eg on the initial ownership of rights in audio-visual works, Art 2(2) Rental and Lending Directive.

[264] Guibault and Hugenholtz, 'Study' (n 60) 153; Hugenholtz and Guibault, 'Auteurscontractenrecht' (n 55) 2; Lucie Guibault, 'Relationship between Copyright and Contract Law' in Estelle Derclaye (ed), *Research Handbook on the Future of EU Copyright* (Research Handbooks in Intellectual Property, Edward Elgar 2009) 525.

[265] Arts 11–32 CRM Directive.

[266] Report on the Public Consultation (n 262) 78–79, 82; Commission, 'A Digital Single Market Strategy for Europe' (Communication) COM(2015) 192 Final' (5 June 2015) 7; SWD (2016) 301 final (n 55) 175–91.

[267] SWD(2016) 301 final (n 55) 194.

[268] ibid 132.

[269] Dusollier and others, 'Contractual Arrangements Applicable to Creators' (n 66) 49, 101–02; Hilty and Moscon, 'Part D – Copyright Contract Law (Article 10 and Articles 14–16 COM(2016) 593 Final)' (n 255) 72.

[270] See eg regulatory efforts in the European Parliament concerning the EU framework for the social and professional situation of artists and workers in the CCIs (2023/2051(INL)) <https://bit.ly/3FkTUEm> and 'Cultural Diversity and the Conditions for Authors in the European Music Streaming Market' (2023/2054(INI)). See also OMC Working Group of Member States' Experts, 'The Status and Working Conditions of Artists and Cultural and Creative Professionals' (European Union Publications Office June 2023).

Downloaded from https://www.cambridge.org/core. UNIVERSIDAD AUTONOMA METROPOLITANA, on 16 Nov 2026 at 18:59:40, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/9781009394666.003

to inefficiencies due to an increase in administration and transaction costs.[271] More malleable, flexible soft law may be said to contribute to a dynamic framework that is more likely to be able to keep up with market changes than somewhat static and all too often unwieldy top-down regulation.[272] In addition, the often sector-specific nature of soft law may aid in acknowledging the specificity of the various CCIs, allowing for a list of per se prohibitions without having to compile one list that 'works' for all CCIs. Finally, soft law that stands the test of time may, over time, be cemented into hard law.[273] This also applies to collectively bargained solutions that may be made generally binding.

The CCIs are extremely diverse, especially across different national territories. Even within the music industry itself, there are relevant genre-specific practices, such as the distinction between employed and freelance orchestral musicians.[274] Drawing the line between an overly specific sectorial framework and a one-size-fits-all regulatory approach that does not take due account of this diversity may be problematic.[275] A potential solution to this conundrum may be to reserve the applicable hard law framework for general rules and essential principles, which are then fleshed out in complementary sector-specific soft law and best practices fuelled by recurring, inclusive stakeholder dialogues. The French implementation process of the DSM Directive may serve as an example, as it leaves much of the specifics of the protective legal framework to collective bargaining.[276] Cross-border – and preferably sector-specific – initiatives in this regard would be most welcome. There may even be room for soft law regarding copyright exploitation contracts at the international level.[277] A particular role in this regard may be envisaged for the World Intellectual Property Organization (WIPO), and in particular the open public–private partnership 'WIPO for Creators'[278] that was launched by WIPO and the Music Rights Awareness Foundation in 2020.[279] While this initiative was primarily set up for awareness-raising purposes, a potential enhancement of its role

[271] Martin Kretschmer and others, 'The Relationship between Copyright and Contract Law' (2010) <https://ssrn.com/abstract=2624945> 5.

[272] Cf Guibault and Hugenholtz, 'Study' (n 60) 157; eg P Bernt Hugenholtz and others, 'The Recasting of Copyright & Related Rights for the Knowledge Economy' (2006) 83–137 214–15; De Pourcq, *Oneerlijke Handelspraktijken* (n 81) 624–25, 701–04.

[273] Hugenholtz and others, 'The Recasting of Copyright & Related Rights for the Knowledge Economy' (n 272) 214–15.

[274] See Chapter 2, Section 2.2.2.1.

[275] Bently and others, 'Strengthening the Position' (n 108) 54.

[276] See Chapter 5, Sections 5.2–3. See also the stakeholder dialogues that took place in 2019 and 2020 concerning the application of Art 17 DSM Directive, which led to Commission, 'Guidance on Article 17 of Directive 2019/790 on Copyright in the Digital Single Market' (Communication) COM(2021) 288 final.

[277] Strowel and Vanbrabant, 'Copyright Licensing: A European View' (n 106) 48.

[278] <www.wipo.int/wipoforcreators/en>.

[279] In this context, Universal Music's decision to become the first corporate sponsor of WIPO for Creators in October 2021 constitutes a step in the right direction, see <https://bit.ly/360UTeJ>.

Downloaded from https://www.cambridge.org/core. UNIVERSIDAD AUTONOMA METROPOLITANA, on 16 Nov 2026 at 18:59:40, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/9781009394666.003

in terms of standard-setting could be contemplated.[280] However, the potential of sector dialogue should not serve as an excuse for the legislator to avoid making hard (law) decisions.

Empirical research associated with evidence-based lawmaking is difficult and its results are often unpredictable. Nevertheless, additional qualitative and quantitative evidence obtained through independent research that uses a solid methodology should be welcomed.[281] Further evidence may be obtained on the impact of the law on the overall income of musicians, on the investment climate for corporate partners and on the position of users, as well as on the functioning of reporting, contract adjustment and ADR mechanisms in practice. Further interdisciplinary research that brings together the law, economics and sociology is to be supported.[282] A promising initiative in this regard is the 'Copyright Evidence' project, which was developed by the CREATe Centre at the University of Glasgow in partnership with the AHRC[283] Creative Industries Policy & Evidence Centre (PEC).[284] This project houses an open platform that collects empirical studies relating to copyright. It has already catalogued over 900 studies at the time of writing. At the EU level, reference may be made to the Music Moves Europe (MME) strategic initiative, which may lead to the creation of a European Music Observatory.[285] The impact assessments drafted in support of regulatory action at the EU level may also play a contributing role.[286] Finally, the inclusion of the objective of achieving a 'competitive, fair and sustainable European music ecosystem' in the context of the EU

[280] For WIPO standards that apply in the context of industrial property rights, see <https://bit.ly/3mCgjDF>.

[281] Reference may be made to the market study of the UK CMA, 'Music and Streaming: Final Report' (n 247). This report is available online at <https://bit.ly/3YHoQoc>. See also Work Package 3 of the 'ReCreating Europe' project, funded under the Horizon 2020 programme, which includes a survey of authors and performers regarding digitisation, copyright and the digital single market: eg Joost Poort and others, 'Mapping Document on Income Development of Authors and Performers and Copyright Reversal in EU' (2021); Joost Poort and Abeer Pervaiz, 'Survey Data Perspectives Authors and Performers' (2022). See also <www.recreating.eu>.

[282] Stef van Gompel, 'Modern Copyright Reform and the Challenges of Evidence-Based Policymaking' in Jørgen Blomqvist (ed), *Copyright, to Be or not to Be* (Ex Tuto 2019) 129, 132. See also Emily Hudson, *Drafting Copyright Exceptions: From the Law in Books to the Law in Action* (Cambridge Intellectual Property and Information Law, Cambridge University Press 2020); Giulia Priora, 'Distributive Justice in EU Copyright Law: A Function-Based Assessment for a Sustainable Harmonization' (Sant'Anna School of Advanced Studies 2020).

[283] Abbreviation of 'Arts and Humanities Research Council', a British research council that supports research and postgraduate study in the arts and humanities.

[284] <www.copyrightevidence.org>.

[285] <https://bit.ly/3lojIq2>. On the potential for a European Music Observatory, see Panteia and KEA, *Feasibility Study for the Establishment of a European Music Observatory: Final Report* (Publications Office of the European Union 2020).

[286] See eg Commission, 'Impact Assessment on the Legal and Economic Situation of Performers and Record Producers in the European Union' (Staff Working Document) SEC(2008) 2287' (27 July 2008); Commission, 'Impact Assessment Reforming Cross-Border Collective Management of Copyright and Related Rights for Legitimate Online Music Services' (Staff Working Document) SEC(2005) 1254 (11 October 2005); SWD(2016) 301 final (n 55).

Downloaded from https://www.cambridge.org/core. UNIVERSIDAD AUTONOMA METROPOLITANA, on 16 Nov 2026 at 18:59:40, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/9781009394666.003

research and innovation framework programme Horizon Europe is noted with assent.[287]

3.5 OUTRO

This chapter has analysed the normative criterion of achieving a 'fair(er) balance' between the legitimate interests of the relevant music industry players on both a procedural and substantive level, with a focus on exclusive, individually managed rights in the recorded music and music publishing sector. It then went on to analyse the scope of the relevant substantive legal regimes in substance, place and time. Following an overview of the relevant legislative sources at the national, EU and international levels, the substantive scope of the different protective regimes was assessed. In addition to a categorisation based on the object of the contract, it was found that the identity of the parties to the contract may also affect the applicable legal rules. Given the overlap between the different legislative regimes, their interplay was subsequently reviewed, revealing a multitude of *leges generales et speciales*. Geographically speaking, the continued importance of the national regulatory level in the field of contract law was highlighted, both as to general contract law, copyright contract law and provisions on unfair B2B contract terms and trade practices. This chapter then delved into the crucial issue of intertemporal law, highlighting the essential principles and the conservative application in terms of time of the progressively more protective legal regimes in the chosen jurisdictions. Finally, the appropriate level(s) and method(s) of regulation were treated, arguing in favour of evidence-based lawmaking that combines a hard law approach to general rules and essential principles, to be specified through soft law and sector-specific best practices.

This brings us to the substance of the relevant regulatory framework. Three types of measures may be distinguished. First, there may be certain formal requirements, such as the need for a written document for purposes of proof or validity. Second, the legal framework may result in the prohibition of certain clauses deemed unfair or excessive, either under the framework of (copyright) contract law or the law of unfair B2B contract terms and trade practices. By way of example, the scope of rights transferred may be limited to a certain extent, such as by the principle of strict interpretation, the need for a proper specification of the scope and terms of the transferred/licenced right(s) and restrictions to the transfer of/licence to certain rights – for example, to future works and/or unknown modes of exploitation. Other rules may limit contract transfers, sub-licensing and/or excessive contract duration, or prohibit other contract terms and/or trade practices deemed unfair. Third, the legal framework may impose certain substantive obligations on one (or

[287] See HORIZON-CL2-2022-HERITAGE-01-05 in Commission, 'Horizon Europe Work Programme 2021–2022. 5. Culture, Creativity and Inclusive Society' (2021) 60–61.

Downloaded from https://www.cambridge.org/core. UNIVERSIDAD AUTONOMA METROPOLITANA, on 16 Nov 2026 at 18:59:40, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/9781009394666.003

more) of the contracting parties in favour of the weaker contract party (or parties). Such measures seek to level the contractual playing field and include certain exploitation obligations and requirements regarding appropriate remuneration for the transferee/licensee. While formal contract requirements are largely confined to the formation stage of the contract and apply in an ex ante way, the latter two categories transcend the abovementioned triad based on the stages of the contract and combine legislative intervention relating to the conditions at the outset of the contract with ex post mechanisms that seek to rectify situations labelled as unfair.

Many of the legislative provisions under review in this book also apply outside the music industry context, to other CCIs. However, given this book's focus on the music industry, the analysis of the relevant legal regimes focuses on their application to the music industry contracts under review. Where deemed relevant, prior analogous research relating to other CCIs is referenced in the footnotes.

The analysis of each category of regulatory measures in the following chapters is two-pronged. First, the substantive scope of application of the measure is analysed, confirming whether it applies to both transfers and licences, and to both composers and performers. Specifications as to scope are not only made on an individual level, but also based on the collective dimension of copyright exploitation. In particular, the influence of the idea of collectiveness (concretised through both collective bargaining and the intervention of CMOs) on the scope of application of the measure at issue is highlighted. Subsequently, the content of the measure is reviewed, focusing on the applicable conditions of application, the appropriate interpretation of the resulting obligations for the contract partners and the question whether the measures at issue may be subject to contractual deviation.

Downloaded from https://www.cambridge.org/core. UNIVERSIDAD AUTONOMA METROPOLITANA, on 16 Nov 2026 at 18:59:40, subject to the Cambridge Core terms of use, available at https://www.cambridge.org/core/terms. https://doi.org/10.1017/9781009394666.003