5

Performance of the Contract

The big print giveth
and the small print taketh away.

—Tom Waits[1]

5.1 INTRO

The difference in the relative bargaining power of musicians and their corporate partners not only has consequences for the negotiation and formation phase of the contract, but also for its performance, consisting of the exploitation of protected content and the ensuing remuneration. Unfair situations may arise as to both aspects.[2]

This chapter analyses to what extent the legal framework intervenes – and should intervene. First, it reviews exploitation obligations, in terms of both the existence and scope of a duty to exploit and possible limitations to the content of exploitation activities (Section 5.2). Subsequently, the requirement of 'fair' remuneration, the available tools for ex post contract adjustment, and legislative measures seeking to enhance transparency in the music value chain are scrutinised (Section 5.3). The chapter moves on to the performance stage of contracts in secondary relationships (Section 5.4), before making a case for a harmonised residual remuneration right for digital exploitation (Section 5.5), and then concluding (Section 5.6).

[1] Excerpt from the song 'Step Right up' (album Small Change, 1976); cf Luc Gulinck, *Hier Tekenen! (en Let Niet op de Kleine Lettertjes. . .) Wegwijs in het Juridische en Zakelijke Labyrint van de Muziekwereld* (Academia Press 2019) 14.

[2] See eg Steve Albini, 'The Problem with Music' [1993] The Baffler <https://bit.ly/3uUPXAi>; Courtney Love, 'Courtney Love Does the Math' [2000] Salon <https://bit.ly/3AuPo2O>; Mark Hogan, 'The Record Industry Expects a Windfall. Where Will the Money Go?' [2019] Pitchfork <https://bit.ly/3DuMls1>.

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5.2 EXPLOITATION

5.2.1 *Structure*

The concept of 'exploitation' encompasses all activities undertaken by corporate partners in order to build an audience for the music to which they have obtained certain rights of use. Corporate partners to which musicians have transferred or exclusively licensed their rights control the modalities of exploitation of a work/performance in practice, including the remuneration therefor. This may be problematic for a musician who seeks to retain artistic oversight regarding the use of their work/performance.[3] Without a generalised obligation to exploit the music, the musician has no real guarantee that it will be effectively exploited and, if so, how this exploitation will take place. Further, it is difficult for a musician to have a full, transparent insight into what exploitation activities are actually undertaken.[4] This risk of 'under-exploitation' increases with the decreased competition resulting from vertical and horizontal concentration in the music industry.[5] All of this sits uneasily with the exclusive nature of many recording contracts.[6]

The issue of exploitation also has a bearing on the moral rights of musicians. A lack of enforcement of both the right to paternity and the right to integrity may lead to instances of unfairness in practice. A particular example is provided by the plight of composers whose music is uploaded to online platforms. While the name of the featured artist is usually listed in the track's title, more often than not, the songwriter(s) is(are) not identified.[7] Not only may this lead to a lack of remuneration for the exploitation of a piece of music, it also unduly severs the connection between a composer and their work, resulting in a loss of agency.[8]

[3] Cf Phillip W Hall Jr, 'Smells Like Slavery: Unconscionability in Recording Industry Contracts' [2002] Hastings Comm & Ent LJ 189, 214.

[4] 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) 174.

[5] Cf Jim Rogers, *The Death & Life of the Music Industry in the Digital Age* (Bloomsbury 2013) 186–87.

[6] Orly Lobel, *Talent Wants to Be Free. Why We Should Learn to Love Leaks, Raids, and Free Riding* (Yale University Press 2013) 51; Séverine Dusollier, 'EU Contractual Protection of Creators: Blind Spots and Shortcomings' [2018] Colum J L & Arts 436, 446.

[7] Mark Mulligan, *Awakening: The Music Industry In The Digital Age* (Createspace 2015) 210.

[8] Rethink Music Initiative, 'Fair Music: Transparency and Payment Flows in the Music Industry. Recommendations to Increase Transparency, Reduce Friction, and Promote Fairness in the Music Industry' (2015) 4, 25. This problem is linked with the metadata issue, see Chapter 2, Section 2.5.

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This section focuses on the legal release commitments for corporate partners in terms of the exploitation of compositions and (fixated) performances in the streaming age. First, it reviews and evaluates existing positive obligations concerning the extent of exploitation required, as well as the consequences if no or insufficient exploitation takes place. Second, this section analyses and evaluates whether and how musicians may exert control over the content of corporate partners' exploitation activities.

5.2.2 *Duty to Exploit*

5.2.2.1 Overview

Musicians want their music to be exploited in order for it to be heard and, in most cases, result in remuneration.[9] The exploitation activities of the corporate partner play a key role in achieving this goal. Corporate partners have a parallel commercial interest in exploiting music. In the absence of exploitation of the music at issue, neither party will obtain remuneration. However, corporate partners' appetite for exploitation (understandably) lessens significantly if their commercial expectations are not met. The law seeks to balance these overlapping but simultaneously conflicting interests by way of two types of legal provisions.

A first category gives rise to a direct duty on the corporate partners to exploit. Second, so-called use-it-or-lose-it provisions grant musicians the right to reclaim their exclusive exploitation rights if the corporate partner does not perform any acts of exploitation or when such activities are deemed insufficient, without expressly formulating a direct duty to exploit. Thus, an indirect duty to exploit arises: if the corporate partner wishes to maintain the rights granted, they must exploit the music at issue. On the basis of these duties, a requirement of 'fair exploitation' may be conceptualised.

5.2.2.2 Direct Duty to Exploit

Some jurisdictions expressly impose a direct duty to exploit on the corporate partner, either in a general way or specific to a certain contract type.[10] The Belgian legislator has opted for an express general duty to exploit subject to honest trade practices. This duty applies to all copyright exploitation contracts with both composers and performers, except as to music in employment situations and commissioned music.[11]

[9] Cf Rec 80 DSM Directive.

[10] On the substantive scope of this duty to exploit, conceptualised as the requirement of 'fair exploitation', see below, Section 5.2.2.4.

[11] On composers, see Art XI.167(1) para 5 Belgian CEL and on performers, Art XI.205(3) para 4 Belgian CEL; Fernand De Visscher and Benoît Michaux, *Précis du Droit d'Auteur et des Droits Voisins* (Bruylant 2000) 331–33; Hendrik Vanhees, 'Auteurscontract' [2019] OBO 1, 42.

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No such general duty applies under German, Dutch or UK law. As to the French legal framework, it has been argued that the unwaivable principle of proportionate remuneration[12] implies a duty to exploit on the part of the corporate partner.[13]

Independently of the existence of a general duty to exploit, provisions of copyright contract law in Belgium, France and Germany (not in the Netherlands) establish a specific, direct duty to exploit for publishing contracts, such as between composers and music publishers.

Under Belgian law, upon sanction of relative nullity of the publishing contract, it must set a minimum number of 'copies' for the first edition, unless the author is guaranteed an advance.[14] The concept of 'copies' refers to reproductions in fixed material form – that is, physical products.[15] This particular direct duty to exploit therefore has no real consequences in the digital sphere. This concretisation of the general duty to exploit under Belgian law only applies to the first (physical) edition of the publication.[16] The French IP Code obliges music publishers to mine potential avenues for exploitation in a permanent way, including through the promotion of the work(s) at issue.[17] A similar rule regarding a minimum number of copies applies, as is the case under Belgian law, provided that the contract does not set the payment of a minimum royalty.[18] The German Publishing Act also includes an

[12] See below, Section 5.3.2.2.

[13] See Sébastien Raimond, *La Qualification du Contrat d'Auteur* (Le Droit des Affaires. Propriété Intellectuelle 34, LexisNexis 2009) 126–31; Alexis Boisson, *La Licence de Droit d'Auteur* (Bibliothèque de Droit de l'Entreprise 86, LexisNexis 2013) 595–625. See however Jean-Michel Bruguière, 'The Irresistible Rise of the Exploitation Obligation in Literary and Artistic Property Agreements' [2022] RIDA 3, 11–12.

[14] Art XI.195 Belgian CEL.

[15] This position is supported by the text of Art XI.199(1) Belgian CEL and Art L 132-17(1) French IP Code, which grant the author the opportunity to rescind the publishing contract in case the publisher 'destroys' all the copies of the work at issue. This provision is difficult to apply in a digital environment.

[16] Alain Berenboom, *Le Nouveau Droit d'Auteur et les Droits Voisins* (Création Information Communication 1, 3rd edn, Larcier 2005) 232.

[17] Art L 132-12 French IP Code. See also Art L 131-3 para 4 French IP Code. See ia 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) 308–17; Séverine Dusollier and others, 'Contractual Arrangements Applicable to Creators' (Publications Office of the EU 2014) <https://op.europa.eu/s/zIba> 6, 46; André Lucas and others, *Traité de la Propriété Littéraire et Artistique* (5th edn, LexisNexis 2017) 698–706; Pierre-Yves Gautier, *Propriété Littéraire et Artistique* (11th edn, Presses Universitaires de France 2019) 627–41; Christophe Caron, *Droit d'Auteur et Droits Voisins* (6th edn, LexisNexis 2020) 427–28, 458–65; Bruguière, 'The Irresistible Rise' (n 13) 8–15. Regarding literary publishing, cf Arts L 132-17-2(I), L 132-17-5 French IP Code.

[18] Arts L 132-10, L 132-11 French IP Code. See also Jean-Christophe Lardinois, *Les Contrats Commentés de l'Industrie de La Musique 2.0: Cadre Général et Pratique Contractuelle* (Création Information Communication Pratique 1, 2nd edn, Larcier 2009) 121; Raimond, *La Qualification du Contrat d'Auteur* (n 13) 133–36; Dusollier and others, 'Contractual Arrangements Applicable to Creators' (n 17) 46.

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express, albeit waivable, obligation for the publisher to reproduce and distribute the work, as appropriate and customary in the sector.[19]

Taken as a whole, duties to exploit applicable to publishers in particular cater to the literary sector.[20] Their operationalisation appears ill-suited to the music industry in the streaming age. While the manufacture and distribution of (copies of) sheet music used to be an important part of music publishers' commercial activities, this aspect has become much less prevalent. As a result, the activities of music publishers centre to a much lesser extent around 'copies'.

Finally, French law establishes a specific provision concerning the non-use of exploitation rights by record companies. Article L 212-12 French IP Code provides that civil courts may order all appropriate measures in the event of clearly abusive non-exploitation by a record company of the exploitation rights that it has acquired.[21] No equivalent provisions were found.

More general provisions may further affect a corporate partner's duty to exploit. The objective of exploitation that is inherent to copyright exploitation contracts implies the performance of at least some exploitation activities by the corporate partner.[22] This rings especially true in case of transfers and exclusive licences, since the exploitation of the music in such a case depends on the activities of the corporate partner(s).[23] The duty of good-faith contract performance implies a duty to exploit on the part of the corporate partner, at least to a certain extent.[24] A lack of exploitation may exceptionally be qualified as an abuse of right or even lead to the voidability of a contract on the basis of vitiated consent if exploitation is considered

[19] Arts 1, 14, 16 German Publishing Act; Bart Jan Lenselink, *De Verlening van Exploitatiebevoegdheden in het Auteursrecht. Een Rechtsvergelijkend Onderzoek naar Overdracht en Licentieverlening in Auteursrechtelijke Exploitatieverhoudingen naar Nederlands, Duits en Amerikaans Recht* (Sdu Uitgevers 2005) 261; Ludwig Delp, *Der Verlagsvertrag. Handbuch für die Praxis* (8th edn, CH Beck 2008) 10–12; Markellou, *Le Contrat d'Exploitation d'Auteur* (n 17) 304–06.

[20] Lardinois, *Les Contrats Commentés de l'Industrie de La Musique* 2.0 (n 18) 120; Raimond, *La Qualification du Contrat d'Auteur* (n 13) 133–34.

[21] Lucas and others, *Traité de la Propriété Littéraire et Artistique* (n 17) 1152–53.

[22] Cf Hendrik Vanhees, *Een Juridische Analyse van de Grondslagen, Inhoud en Draagwijdte van Auteursrechtelijke Exploitatiecontracten* (Maklu 1993) 210–18; De Visscher and Michaux, *Précis du Droit d'Auteur et des Droits Voisins* (n 11) 332; Dusollier and others, 'Contractual Arrangements Applicable to Creators' (n 17) 22; Julie Groffe, *La Bonne Foi en Droit d'Auteur* (Institut Universitaire Varenne Collection des Thèses 106, LGDJ – lextenso éditions 2015) 292–93.

[23] cf Brigitte Dauwe, 'Overeenkomsten in het Oude en in het Nieuwe Auteursrecht' in Frank Gotzen (ed), *Belgisch Auteursrecht van Oud naar Nieuw Le Renouveau du Droit d'Auteur en Belgique* (CIR 11, Bruylant 1996) 282.

[24] See (1) in Belgium: Art 1134 para 3 Belgian CC; (2) in France: Art 1134 para 3 French CC; (3) in Germany: Art 242 German CC; Ludwig Delp, *Der Verlagsvertrag. Handbuch für die Praxis* (8th edn, CH Beck 2008) 10; and (4) in the Netherlands: Arts 6:2, 6:248 Dutch Civil Code; Vanhees, *Een Juridische Analyse van de Grondslagen* (n 22) 230–34.

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to be an essential element thereof.[25] However, given the restrictive application of limitations to freedom of contract on the basis of general contract law rules, and the fact that these rules are not tailored to the creative sector, it seems unlikely that a substantive general duty to exploit would be inferred from them in practice.

Breach of contract regarding the direct duties to exploit is usually sanctioned by specific performance and/or a right to damages, in accordance with general contract law.[26] In serious cases, the contract may be rescinded, either on the basis of general contract law, specific provisions of copyright contract law, or a specific clause in the contract.[27] French copyright contract law expressly establishes the sanction of contract termination if a publisher falls short in fulfilling their duty to exploit after having been given due notice thereof, as did Belgian law prior to the implementation of the DSM Directive.[28] As the result is a reversal of rights, this adds an *in*direct duty to exploit to the equation.

The provisions that establish a duty to exploit on the part of corporate partners give rise to the question whether there is a parallel duty for musicians. One may think of delivery obligations, instances of mandatory cooperation with promotion and marketing, as well as the negative duty not to engage in activities that risk hindering the exploitation of the music.[29] Such obligations will usually arise from express provisions in the contract.[30] In the absence of such provisions, the requirement of good-faith contract performance implies the existence of a general duty in this sense, as does the requirement for transferors and/or licensors to provide indemnification to their counterparty for their own actions and, to a certain extent, the actions of third parties (for example, in case of copyright infringement

[25] Cf Dauwe, 'Overeenkomsten in het Oude en in het Nieuwe Auteursrecht' (n 23) 283; Dusollier and others, 'Contractual Arrangements Applicable to Creators' (n 17) 55–56.

[26] Lardinois, *Les Contrats Commentés de l'Industrie de La Musique* 2.0 (n 18) 29–30, 121; Agnès Lucas-Schloetter, 'European Copyright Contract Law: A Plea for Harmonisation' (2017) 48 IIC 897, 899; Agnès Lucas-Schloetter, 'The Remuneration of Authors and Performers in Copyright Contract Law' in Paul Torremans (ed), *Research Handbook on Copyright Law* (Research Handbooks in Intellectual Property, 2nd edn, Edward Elgar 2017) 266; Ula Furgał, 'Interpreting EU Reversion Rights: Why "Use-It-or-Lose-It" Should Be the Guiding Principle' (2021) 43 EIPR 283, 287.

[27] For an application in Belgium, expressly noting the mandatory nature of the direct duty to exploit under the Belgian regime concerning publishing contracts, see Court of Appeal Brussels 4 March 2008, docket number 2005/AR/1986, not published; Joris Deene, 'Intellectuele Rechten Kroniek 2008' [2009] NJW 523.

[28] See (1) in Belgium: Art XI.196(1) para 3 Belgian CEL and (2) in France: Art L 132-17 French IP Code. On digital exploitation in literary publishing, see Art L 132-17-5 French IP Code.

[29] On publishing contracts see (1) in France: Arts L 132-8, L 132-9 French IP Code; Markellou, *Le Contrat d'Exploitation d'Auteur* (n 17) 329–63; Groffe, *La Bonne Foi en Droit d'Auteur* (n 22) 283–90; Lucas and others, *Traité de la Propriété Littéraire et Artistique* (n 17) 694–98; Gautier, *Propriété Littéraire et Artistique* (n 17) 620–22; Caron, *Droit d'Auteur et Droits Voisins* (n 17) 450–53 and (2) in Germany: Arts 2(1), 30, 31, 33(2), 39(2) German Publishing Act.

[30] Delp, *Der Verlagsvertrag* (n 24) 13; Lardinois, *Les Contrats Commentés de l'Industrie de La Musique* 2.0 (n 18) 76–77, 96–97.

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allegations).[31] In extreme cases, such as active deception, musicians' behaviour may even be qualified as an unfair trade practice. It deserves to be emphasised, however, that a musician cannot be held responsible if their music lacks commercial success.[32]

Due account for both the artistic and commercial interests involved cautions against a direct duty to exploit on the part of corporate partners in the streaming age.[33] While not expressly and directly requiring exploitation may appear anathema to the essence of copyright exploitation contracts, the potential indirect effects of such a direct duty to exploit are undesirable. A corporate partner forced to actively invest in exploitation activities for a piece of music, at the penalty of breaching their contract and being liable for damages, is likely to hold off on investment in that music. Given that commercial success in the CCIs is never guaranteed, this would negatively affect the investment climate – and thus corporate partners' agency – in a significant way.[34] Ultimately, this would again leave musicians at the losing end of the equation.

5.2.2.3 Indirect Duty to Exploit

The second category of relevant legal provisions consists of so-called use-it-or-lose-it provisions, whereby the lack of (sufficient) exploitation by the corporate partner results in a right of revocation for the musician(s) under certain circumstances.[35] Such revocations not only operate to the benefit of musicians, but also have an associated public interest objective. By allowing artists to reclaim their rights, the

[31] See ia (1) in Belgium: Vanhees, *Een Juridische Analyse van de Grondslagen* (n 22) 98–103, 111, 123–28; Dauwe, 'Overeenkomsten in het Oude en in het Nieuwe Auteursrecht' (n 23) 267–68; De Visscher and Michaux, *Précis du Droit d'Auteur et des Droits Voisins* (n 11) 353; Yves Van Couter and Bernard Vanbrabant, *Handboek Licentieovereenkomsten* (Bibliotheek Handelsrecht Larcier. Mededinging, Handelspraktijken en Intellectuele Rechten 7, Larcier 2008) 10, 60–62, 70; Bernard Vanbrabant, *La Propriété Intellectuelle. Tome 2. Régime Patrimonial* (Création Information Communication, Larcier 2018) 867–74; (2) in France: Raimond, *La Qualification du Contrat d'Auteur* (n 13) 95–96, 424–42; Markellou, *Le Contrat d'Exploitation d'Auteur* (n 17) 340–49; Boisson, *La Licence de Droit d'Auteur* (n 13) 632–72; Gautier, *Propriété Littéraire et Artistique* (n 17) 622–27; Caron, *Droit d'Auteur et Droits Voisins* (n 17) 450–52; and (3) in Germany: Delp, *Der Verlagsvertrag* (n 24) 12; Markellou, *Le Contrat d'Exploitation d'Auteur* (n 17) 337–40.

[32] Cf Van Couter and Vanbrabant, *Handboek Licentieovereenkomsten* (n 31) 68–69.

[33] Vanhees, *Een Juridische Analyse van de Grondslagen* (n 22) 532–34; 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) 305.

[34] Dauwe, 'Overeenkomsten in het Oude en in het Nieuwe Auteursrecht' (n 23) 284.

[35] For an overview of relevant revocation mechanisms in Member States, see <https://bit.ly/3lxpEgN>. See Ula Furgał, 'Reversion Rights in the European Union Member States' (CREATe Working Paper, 19 November 2020). No parallel type of provisions applies to musicians' exploitation activities.

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aim is to avoid 'warehousing' of dormant, unused catalogues by inactive players, instead enabling exclusive rights to be held by those who will exploit them in the most productive way and ultimately enhancing access to protected content for users.[36] Artists who are at liberty to reclaim their rights in case their music remains unexploited may do so, and by seeking other 'exploitation horizons' enhance competition between corporate partners.[37]

The relevant national provisions have been partially harmonised at the EU level. First, the Term Extension Directive sets forth a rights reversion regime specific to performing musicians who have granted exclusive rights to their corporate partner (s). Second, Article 22 DSM Directive applies to copyright exploitation contracts with both composers and performers. The harmonising effect of these provisions is quite limited, in view of their scope and the broad margin for implementation left to Member States.[38] The divergences between the applicable national regimes are not conducive to legal certainty.[39] Further, the differences in scope and application of harmonising regimes at the EU level lead to additional complexity. Both types of measures are discussed in turn below.

5.2.2.3.1 INDIRECT DUTY TO EXPLOIT SPECIFIC TO THE RECORDED MUSIC SECTOR The first revocation mechanism harmonised at the EU level only applies to performers whose performance has been fixed in a phonogram and who have transferred (not licensed) their exclusive rights to a corporate partner. This mechanism grants such performing musicians the unwaivable right to reclaim their exclusive rights if the record company does not 'sufficiently' exploit the phonogram (s) at issue during the extended term of protection of the phonogram – that is, from the fifty-first to the seventieth year of protection.[40] This regime was implemented in

[36] This ties in with the difference between the limited exploitation period of artistic content in practice and the long term of copyright protection. See Tim Brooks, *Survey of Reissues of US Recordings* (Optimizing Collections and Services for Scholarly Use, Council on Library and Information Resources, and Library of Congress 2005); 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) 404; Rebecca Giblin and Kimberlee Weatherall, 'A Collection of Impossible Ideas' in Rebecca Giblin and Kimberlee Weatherall (eds), *What If We Could Reimagine Copyright?* (ANU Press 2017) 326–27; Martin Kretschmer and Rebecca Giblin, 'Getting Creators Paid: One More Chance for Copyright Law' (2021) 43 EIPR 279, 279–80. See also Marcella Favale, 'Bouncing Back from Oblivion: Can Reversionary Copyright Help Unlock Orphan Works?' (2019) 41 EIPR 339.

[37] Hugenholtz, 'Towards Author's Paradise' (n 36) 404.

[38] 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, 784.

[39] ibid 778, 784; Furgał, 'Interpreting EU Reversion Rights' (n 27) 286, 291.

[40] Art 3(2a) Term Directive; Recs 8, 10 Term Extension Directive. If the phonogram has been published, the term is linked with the date of publication. In case no publication has taken place, the term is linked with the lawful communication of the phonogram to the public.

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all chosen jurisdictions.[41] It gives rise to an indirect duty to exploit on the part of the corporate partner. There is no specific corresponding indirect obligation for the first fifty years of the contract. Cynics might therefore argue that this implies that the 'fair' term to start exploiting a phonogram was/is half a century.[42]

Under the harmonised regime, the record company must offer sufficient 'copies'[43] for sale or make the phonogram available to the public by wire or wireless means. If they do not fulfil this obligation, the musician can notify the record company of their intention to terminate the contract. Following such notice, the record company has one year to exploit the phonogram by offering sufficient copies for sale and making it available to the public.[44] This implies an obligation to exploit on both the analogue and digital markets – an obligation that may run counter to current (and especially future) music industry practices.[45] Without such 'sufficient' exploitation, the musician may reclaim their rights and seek DIY exploitation of the phonogram, or call upon the services of another corporate partner. Arguably, the termination automatically arises following the expiry of the grace period.[46]

The final aspect of the analysis is how the use-it-or-lose-it clause is applied in practice in the case of collaborations between multiple performing musicians. The harmonised regime does not impose any rules in this regard. In principle, each musician may assert their rights in accordance with national law, leading to a corresponding loss of rights on the part of the record company.[47] This may allow one musician to block the further exploitation of a phonogram. French law seeks to pre-empt this issue by establishing that the exercise of the right of revocation for a phonogram that contains contributions by multiple performers must take place by common consent, in the absence of which a judge is to rule on the matter.[48]

[41] See (1) in Belgium: Art XI.210(1) Belgian CEL; (3) in France: Arts L 212-3-5, L 212-3-6 French IP Code; (iii) in Germany: Art 79(3) German Copyright Act; (4) in the Netherlands: Art 12(4) Dutch Neighbouring Rights Act; and (5) in the United Kingdom: Art 191HA UK CDPA.

[42] Dusollier and others, 'Contractual Arrangements Applicable to Creators' (n 17) 79.

[43] On the scope of the word 'copies', see ia below, Section 5.2.2.4.

[44] The grace period of one year applies in all chosen jurisdictions. In Belgium, France and Germany, this period is included in the relevant provision. In the Netherlands, the applicability of the one-year grace period follows from an intricate web of interlinked provisions (see Arts 2b, 9a, 12(4) Dutch Neighbouring Rights Act *jo* Art 25e Dutch Copyright Act, see Dirk Visser and others, *ACR: Auteurscontractenrecht* (DeLex 2016) 295–306). On the scope of the requirement of 'sufficient' or 'fair' exploitation, see below, Section 5.2.2.4.

[45] Ana Ramalho and Aurelio Lopez-Tarruella, 'Implementation of the Directive 2011/77/EU: Copyright Term of Protection' (2018) 33–34, 49.

[46] Cf Fabienne Brison, 'Art XI.210' in Fabienne Brison and Hendrik Vanhees (eds), *Hommage à Jan Corbet Huldeboek* (3rd edn, Larcier 2018) 386.

[47] Cf Rec 8 Term Extension Directive. In Belgium, the record label only loses its own relevant exclusive exploitation rights as a producer if each musician terminates the contract regarding a certain phonogram, see Art XI.210(1) para 4 Belgian CEL. It has been argued that this implementation is contrary to the Term Extension Directive, see Brison, 'Art XI.210' (n 46) 387.

[48] Art L 212-3-6 French IP Code; Ramalho and Lopez-Tarruella, 'Implementation of the Directive 2011/77/EU' (n 45) 23–24.

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In Germany, the revocation mechanism is to be set in motion by an elected representative or by the leader of a group of musicians.[49] In effect, this implies the requirement of a majority decision on the matter of rights revocation.[50] This may provide a more efficient solution.

5.2.2.3.2 INDIRECT DUTY TO EXPLOIT IN THE MUSIC PUBLISHING AND RECORDED MUSIC SECTORS The DSM Directive offers a second chance for a high-performing harmonised use-it-or-lose-it clause. Article 22 DSM Directive sets certain minimum requirements for regimes that apply to copyright exploitation contracts with authors and/or performers where there is no exploitation. The harmonised regime does not apply to non-exclusive licences. Moreover, as is the case for the other relevant provisions of the DSM Directive, the substantive scope of Article 22 DSM Directive is limited to exploitation rights that have been harmonised under EU law – that is, the rights of reproduction *sensu stricto*, communication to the public and distribution, to the exclusion of the right of adaptation.[51] Regardless, in order to maintain the internal coherence of the national legal frameworks, Member States may also be expected to implement the harmonised regime for non-harmonised rights.[52]

Subsequent to Article 22 DSM Directive, musicians (either composers or performers) who have transferred their rights or granted an exclusive licence thereto must be able to reclaim these rights, either in whole or in part, if the corporate partner does not perform any exploitation activities.[53] The regime harmonised by Article 22 DSM Directive does not apply to non-exclusive licences. However, given the minimum harmonising nature of this provision, Member States may establish a use-it-or-lose-it provision for non-exclusive licences as well.

Article 22 DSM Directive leaves significant leeway for Member States as to its implementation into national law, allowing several differences between the applicable national legal regimes.[54] First, Member States are free to further specify the revocation mechanism under national law, taking account of the specific nature of certain CCIs and types of artistic content.[55] In addition, the EU legislator allows for

[49] Cf Art 74(2) German Copyright Act; Ramalho and Lopez-Tarruella, 'Implementation of the Directive 2011/77/EU' (n 45) 24.

[50] ibid 7, 23–24, 33–34, 49.

[51] Cf Rec 72 DSM Directive.

[52] Raquel Xalabarder, 'The Remuneration of Authors and Performers' [2020] RIDA 129, 135–36.

[53] Art 22(1) DSM Directive. Cf Lucas-Schloetter, 'European Copyright Contract Law' (n 26) 899.

[54] Fair Internet Coalition, 'Joint Guidelines for the Implementation of the 2019 Copyright Directive' (2019) 25; Séverine Dusollier, 'The 2019 Directive on Copyright in the Digital Single Market: Some Progress, a Few Bad Choices, and an Overall Failed Ambition' [2020] CML Rev 979,1025; 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, 145; Furgał, 'Interpreting EU Reversion Rights'(n 27) 284.

[55] Art 22(2)(a) DSM Directive. See also Rec 80 DSM Directive.

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specifications of national law for co-creations or co-performances based on the relative importance of artists' contributions and the legitimate interests of the artists involved.[56] The broad language of Article 22 DSM Directive further indicates that Member States' discretion extends beyond the possibility of sector-specific rules and provisions particular to collaborative content.[57]

The use-it-or-lose-it provision included in the German Copyright Act applies to both composing and performing musicians and is limited to exclusive rights (exclusive licences of rights of composers and either transfers or exclusive licences of rights of performers).[58] In addition, for publishing contracts, the German Publishing Act grants the author a waivable right to revocation in case the publisher does not exercise their right to publish a new edition of a work.[59]

The Dutch regime applies to both authors and performers and, contrary to what is the case under German law, does not limit its applicability to exclusive contracts.[60] It applies to transfer contracts and both exclusive and non-exclusive licences.

Third, pre-DSM, both Belgian and French law only contained a reversion regime specific to publishing contracts – that is, applicable to music publishing, but not to recorded music – as a sanction in case of breach of the direct duty to exploit

[56] Art 22(2)(b) DSM Directive.

[57] Shapiro, 'Remuneration Provisions in the DSM Copyright Directive and the Audiovisual Industry in the EU' (n 38) 784.

[58] Art 41(1) *jo* 79(2a) German Copyright Act. See in detail P Bernt Hugenholtz and Lucie Guibault, 'Auteurscontractenrecht: Naar Een Wettelijke Regeling?' (2004) <https://bit.ly/3UvnwGx> 25, 68–70; Lenselink, *De Verlening van Exploitatiebevoegdheden in het Auteursrecht* (n 19) 266–68; Gerhard Schricker, *Urheberrecht. Kommentar* (3rd edn, CH Beck 2006) 850–59; Friedrich Karl Fromm and Wilhelm Nordemann, *Urheberrecht. Kommentar zum Urheberrechtsgesetz, zum Verlagsgesetz und zum Urheberrechtswahrnehmungsgesetz* (Rechtswissenschaften und Verwaltung, 10th edn, Kohlhammer 2008) 874–93; Ulrich Loewenheim, 'Rückruf des Nutzungsrechts nach § 41 UrhG und Fortbestehen der Enkelrechte' in Kirsten-Inger Wöhrn and others (eds), *Festschrift für Artur-Axel Wandtke zum 70 Geburtstag am 26 März 2013* (Walter De Gruyter 2013) 199–207; Gunda Dreyer and others, *Urheberrecht* (Heidelberger Kommentar, 4th edn, CF Müller 2018) 837–44; Philipp Möhring and Käte Nicolini, *Urheberrecht* (4th edn, CH Beck 2018) 609–17; Gernot Schulze, 'Das Urhebervertragsrecht nach Erlass der EU-Richtlinie über das Urheberrecht im digitalen Binnenmarkt' [2019] GRUR 682, 685.

[59] Art 17 German Publishing Act. This right is not expressly limited to copyright exploitation contracts that grant an exclusive right. Art 8 German Publishing Act provides that publishing contracts that fall within the scope of this act are, in principle, exclusive, unless the contract specifies otherwise.

[60] Art 25e Dutch Copyright Act for authors *jo* Art 2b Dutch Neighbouring Rights Act for performers; Visser and others, *ACR: Auteurscontractenrecht* (n 44) 163–87; JH Spoor and others, *Auteursrecht. Auteursrecht, portretrecht, naburige rechten en databankenrecht* (Recht en Praktijk, 4th edn, Wolters Kluwer 2019) 569–79. For a rare (albeit indirect) application of this provision in the music industry the case between the Dutch rock band Golden Earring and their music publisher, see District Court Amsterdam 9 May 2012, docket number C/13/496699 HA ZA 11-2296, ECLI:NL:RBAMS:2013:5971; Court of Appeal Amsterdam 31 March 2015, docket number 200.148.383, ECLI:NL:GHAMS:2015:1201; Dutch Supreme Court 7 July 2017, docket number 15/03787, ECLI:NL:HR:2017:1270.

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discussed above.[61] In addition to the rule specific to publishing contracts, the French legal framework now provides a revocation mechanism to the benefit of both authors and performers, albeit limited to transfers and exclusive licences.[62] Conversely, the Belgian legislator has amended the pre-existing mechanism specific to publishing contracts, to the benefit of a new mechanism that applies to both authors and performers.[63] The scope of the Belgian revocation mechanism excludes both non-exclusive licences and music made either in an employment context or on commission.[64] The same is true for insignificant contributions, to the extent that the exercise of the revocation right by one artist would unduly prejudice the interests of the other artists involved.[65]

The conditions for application of the relevant national regimes differ. The first main substantive difference is whether the reversion regimes require 'sufficient' use on the part of the corporate partner[66] or whether any use suffices to exclude its application. Further, some regimes include an express proportionality test that limits the substantive scope of application of the reversion regime, while others do not.

The scope of the revocation mechanism included in Article 22 DSM Directive is limited to situations of non-exploitation.[67] It could therefore be argued that one stream of a phonogram on a single DSP constitutes an exploitation activity that is sufficient to render the harmonised revocation mechanism wholly inoperative.[68] At present, such an interpretation is not expressly excluded, given the lack of legal qualification of music streaming beyond the fact that it is covered by both the reproduction right and the making-available right.

However, some jurisdictions are more artist-friendly and require more than any form of exploitation to evade application of the revocation mechanism. General revocation mechanisms relating to insufficient exploitation are, as yet, not harmonised at the EU level.[69]

[61] See respectively Art XI.196(1) Belgian CEL and former Art L 132-17(2) French IP Code; Hugenholtz and Guibault, 'Auteurscontractenrecht' (n 58) 70–71.

[62] See respectively Arts L 131-5-2, L 212-3-3 French IP Code.

[63] Arts XI.167/4, XI.205/4 Belgian CEL.

[64] 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) 103; Explanatory Memorandum Belgian Draft DSM Implementation Act (2020) 60–62, 107.

[65] Raad voor de Intellectuele Eigendom (n 64) 103; Explanatory Memorandum Belgian Draft DSM Implementation Act (n 64).

[66] On the scope of the requirement of 'sufficient' or 'fair' exploitation, see below, Section 5.2.2.4.

[67] Furgał, 'Interpreting EU Reversion Rights'(n 27) 285–86.

[68] Ananay Aguilar, 'The New Copyright Directive: Fair Remuneration in Exploitation Contracts of Authors and Performers – Part II, Articles 20–23' (*Kluwer Copyright Blog*, 1 August 2019) <https://bit.ly/3Qh8WBl>.

[69] As to the specific revocation mechanism foreseen in the Term Extension Directive, see above, Section 5.2.2.3.1.

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The Dutch regime requires 'sufficient' exploitation for the corporate partner to be able to avoid termination of the contract by the artist.[70] The same is true under German law.[71] The corporate partner must be granted two years to start exploiting the content at issue.[72] While the Belgian provisions do not expressly require 'sufficient' exploitation by the corporate partner, this may be deduced from the general duty to exploit in accordance with sector practices.[73]

Under French law, both the post-DSM generalised revocation mechanism and the pre-existing regime for publishing contracts only come into play if no exploitation activities take place.[74]

Article 22 DSM Directive does not expressly require a proportionality test. However, the harmonised reversion right does *not* apply if the lack of exploitation is predominantly due to circumstances that the musician 'can reasonably be expected to remedy' – in other words, where the non-exploitation is attributable to the artist.[75] This proviso expressly applies under Belgian, German and Dutch law. At the time of writing, no equivalent requirement exists under French law. The national regimes under review also include other considerations of proportionality. For example, the Belgian regime expressly establishes its disapplication if the corporate partner had a legitimate reason not to exploit the content at issue, interpreted as a reason that is foreign to them, such as a fire in the warehouses leading to a destruction of stock.[76] Another example is that German law expressly requires artists to indemnify the corporate partner if this is deemed fair and equitable.[77] A strict interpretation of the proportionality requirement is desirable. The same is true for the abovementioned provisions of national law that implement proportionality considerations. Otherwise, there is a risk of undue circumvention of the protection that the revocation mechanism offers to musicians.[78] This rings especially true for music streaming, where it may be argued that legitimate reasons

[70] Art 25e Dutch Copyright Act *jo* Art 2b Dutch Neighbouring Rights Act.
[71] Amended Arts 41(1) *jo* 79(2a) German Copyright Act.
[72] Arts 41(2) *jo* 79(2a) German Copyright Act.
[73] See, however, arguing in favour of the inclusion of an express requirement of 'sufficient' exploitation, Raad voor de Intellectuele Eigendom, 'Advies' (n 64) 100.
[74] Arts L 131-5-2(I), L 212-3-3(I), L 132-17(2) French IP Code; Jean Lapousterle, 'La Révocation Des Contrats d'auteurs et d'artistes-Interprètes' [2021] PI 36.
[75] Art 22(4) DSM Directive. See (1) in Belgium: Arts XI.167/4(4)(1°), XI.205/4(4)(1°) Belgian CEL; (2) in Germany: Art 41(1) *jo* 79(2a) German Copyright Act; and (3) in the Netherlands: Art 25e Dutch Copyright Act *jo* Art 2b Dutch Neighbouring Rights Act.
[76] Art XI.167/4(3), XI.205/4(3) Belgian CEL
[77] Arts 41(6) *jo* 79(2a) German Copyright Act. See, questioning the compatibility of this requirement with Art 22 DSM Directive, Patrick Zurth, 'Implementation of the DSM Directive's Contract Provisions into German Law' in Simon Geiregat and Hendrik Vanhees (eds), *Copyright Contracts Tomorrow* (LeA 2023) 61.
[78] As argued in European Copyright Society, 'Comment' (n 54) 132, 134.

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not to exploit content would routinely arise, thus easily allowing the harmonised revocation mechanism to be bypassed.[79]

Further, the application of the harmonised use-it-or-lose-it clause in time merits closer attention. The appropriate temporal application of a certain protective measure depends on a balance between procedural considerations of legal certainty and substantive considerations of enhanced protection.[80] In view of the limited scope of the harmonising mechanism (which only applies in case of non-use) and the procedural safeguards included to the benefit of corporate partners (such as the requirement of a notice of default), its consequences in practice – and thus its impact on the freedom of contract – are limited. The immediate application of this mechanism to acts of exploitation stemming from ongoing contracts from 7 June 2021 is therefore merited.[81]

Legal mechanisms securing an indirect duty to exploit should simultaneously be of a mandatory nature and a measure of last resort.[82]

As to the former, the harmonised revocation mechanism is not expressly qualified as mandatory law in Article 23 DSM Directive and may therefore in principle be subject to contractual derogations.[83] Legislative approaches differ. While the Dutch regime has been labelled as unwaivable,[84] the French legislator has not done this – although this may yet occur following a collective negotiation process.[85] In Germany and Belgium, an alternative route was chosen: derogations to the detriment of artists are only possible if they stem from collective negotiations.[86] This route is expressly mentioned in Article 22 DSM Directive.[87] In practice, such provisions lead to a qualification of the revocation mechanism as mandatory law, albeit only indirectly.[88]

The latter aspect is linked with the objective of maintaining the position of corporate partners. Musicians should not be able to reclaim their rights on a whim. Substantive conditions, such as a requirement of proportionality, as well as procedural steps, such as a notice of default and an additional grace period, play an

[79] Aguilar, 'The New Copyright Directive: Part II, Articles 20–23' (n 68).
[80] See Chapter 3, Section 3.3.2.6.
[81] Cf European Copyright Society, 'Comment' (n 54) 139–40; Eleonora Rosati, *Copyright in the Digital Single Market. Article-by-Article Commentary to the Provisions of Directive 2019/790* (Oxford University Press 2021) 406–07.
[82] European Copyright Society, 'Comment' (n 54) 145.
[83] See Art 23(1) DSM Directive, which does not include Art 22 DSM Directive.
[84] Art 25h(1) Dutch Copyright Act *jo* Art 2b Dutch Neighbouring Rights Act.
[85] See respectively Arts L 131-5-2, L 212-3-3 French IP Code.
[86] Art 41(4) *jo* 79(2a) German Copyright Act; Arts XI.167/5 *jo* XI.167/6, XI.205/5 *jo* XI.205/6 Belgian CEL.
[87] Art 22(5) DSM Directive. See also Aguilar, 'The New Copyright Directive: Part II, Articles 20–23' (n 68).
[88] Cf Shapiro, 'Remuneration Provisions in the DSM Copyright Directive and the Audiovisual Industry in the EU' (n 38) 784.

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important role.[89] The application of the revocation mechanism is indeed subject to procedural conditions. Care must be taken to ensure that these steps are not too arduous for artists, in order to avoid an enforcement gap in practice.[90]

First, a logical substantive prerequisite is that corporate partners must have a reasonable amount of time to start exploiting the music following the grant of rights, such as the period of two years that applies under German law.[91] Under the generalised French revocation mechanism, this period is to be set through collective bargaining.[92]

The musician(s) must notify the corporate partner and set a reasonable deadline for the desired exploitation activities.[93] Only after the expiry of that deadline do the applicable sanctions apply.[94] For publishing contracts in particular, French law provides for automatic expiry of the contract if two requests for delivery of copies remain unanswered within three months.[95] Under German law, no grace period must be granted to the corporate partner if it is impossible for them to conduct exploitation activities, if they refuse to take action, or if such a grace period would unduly prejudice the artist's interests.[96]

In order for musicians to be able to assess whether fair exploitation is actually taking place, an argument may be made in favour of transparency obligations comparable to those in place for fair remuneration.[97]

As to the scope of the rights reclaim, it is an interesting option to seek to merely revoke exclusivity instead of opting for a full rights revocation,[98] or to seek revocation

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

[90] See Chapter 7. See also Rita Matulionyte, 'Empowering Authors via Fairer Copyright Contract Law' (2019) 42 UNSWLJ 681, 708.

[91] Art 22(3) DSM Directive. See also Rec 80 DSM Directive.

[92] Arts L 131-5-2(II), L 212-3-3(II) French IP Code.

[93] See (1) in Belgium: Arts XI.167/4, XI.205/4 Belgian CEL; (2) in France: no express provision, awaiting determination by collective agreement (see, however, Art L 132-17-2(II)–(III) French IP Code, which sets a deadline of six months following a notice of default for literary publishing); (3) in Germany: Art 41(3) *jo* 79(2a) German Copyright Act; and (4) in the Netherlands: Art 25e(3) Dutch Copyright Act *jo* Art 2b Dutch Neighbouring Rights Act.

[94] Art 22(3) *jo* (2) DSM Directive. As to the effect of this sanction, see ongoing legislative developments in the Netherlands, where the references to the retroactive termination of the contract in the relevant Art 25e Dutch Copyright Act will be modified to references to non-retroactive termination, see <https://bit.ly/3Uze3Ov>. See also Iris Houben and Dirk Visser, 'De Beëindiging van Muziekexploitatieovereenkomsten' [2022] Auteursrecht 3, 135–49.

[95] Art L 132-17(2) French IP Code.

[96] Art 41(3) *jo* 79(2a) German Copyright Act; Art 17 German Publishing Act.

[97] Cf below, Section 5.3.3. See also under Dutch law the former Art 25e(4) Dutch Copyright Act *jo* Art 2b Dutch Neighbouring Rights Act.

[98] Pre-DSM, German law did not foresee the possibility for artists to revoke the exclusivity of the licence, providing only the option of revocation. Artists may now choose between full revocation or mere revocation of exclusivity, see amended Art 41(5) *jo* 79(2a) German Copyright Act. Dutch law does not expressly provide the possibility for the artist to revoke the exclusivity of a licence. However, it does foresee a right to compensation if the corporate partner does not act

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only for certain specific methods of exploitation. As to the latter, inspiration may be drawn from the French model for literary publishing, which allows authors to invoke the applicable use-it-or-lose-it mechanism separately for analogue and digital exploitation.[99]

A final aspect of the analysis is how the revocation mechanism is applied where multiple musicians are involved. A blanket exclusion of the music sector from the harmonised revocation mechanism, as appears to be allowed under Article 22 DSM Directive, would be excessive.[100] This option was not chosen by any of the selected jurisdictions. Neither German nor Belgian law provide any express rule for collaborative music. Conversely, the French regime mandates a joint exercise of the right of revocation in such a case; in the absence of consensus, the matter is to be brought before a judge.[101] Similarly, under Dutch law, rights pertaining to collaborative content that cannot be separated can only be revoked if all artists involved provide their consent.[102] If the undue refusal of one of the artists disproportionately prejudices the interests of the others (that is, constitutes an actionable form of abuse of law), the contract may only be rescinded through court proceedings.[103] Coupling the principled requirement for joint consent with a prohibition of the abusive refusal thereof indeed appears to be the most balanced solution. However, given the difficulties associated with legal proceedings in music industry,[104] the mandated intervention of a judge risks being slightly unproductive.

5.2.2.4 Requirement of Fair Exploitation

A duty of fair exploitation may have an indirect (but tangible) consequence for the scope of the grant at the contract's formation stage. A duty to exploit for each pertinent method of exploitation is likely to induce corporate partners to limit the grant to what is relevant.[105] This would be a positive evolution. The duty should be indirect: if a corporate partner does not fulfil the minimum requirements in terms of exploitation, musicians should be able to exercise their agency as an independent

quickly enough following the exercise of the right to revocation, see Art 25e(7) Dutch Copyright Act *jo* Art 2b Dutch Neighbouring Rights Act.

[99] Art L 132-17-2 French IP Code.

[100] Cf Aguilar, 'The New Copyright Directive: Part II, Articles 20–23' (n 68).

[101] Art L 131-5-2(IV) French IP Code.

[102] Art 25e(2) Dutch Copyright Act *jo* Art 2b Dutch Neighbouring Rights Act; Visser and others, *ACR: Auteurscontractenrecht* (n 44) 164–65; Stef van Gompel and others, 'Evaluatie Wet Auteurscontractenrecht: Eindrapport' (2020) <https://bit.ly/3UBZrh4> 49–50.

[103] Art 25e(2) Dutch Copyright Act *jo* Art 2b Dutch Neighbouring Rights Act; Visser and others, *ACR: Auteurscontractenrecht* (n 44) 164–65.

[104] See Chapter 7, Section 7.4.

[105] Cf Dusollier and others, 'Contractual Arrangements Applicable to Creators' (n 17) 72, 102–03; Elena Cooper, 'Reverting to Reversion Rights? Reflections on the Copyright Act 191' (2021) 43 EIPR 292, 292.

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actor by having recourse to a high-performing rights reversal mechanism.[106] This offers a fairly unintrusive way to achieve stakeholder agency and a fair balance between the interests at play. The amount of exploitation activities required to avoid revocation may be shaped through soft law along the lines of the concept of 'fair exploitation' conceptualised here.

The criteria set forth below are based on an interpretation of the current legal framework and do not require any substantive amendments – an approach that is deemed preferable to far-reaching amendments and/or additions to the existing rules.

The international and EU regulatory levels offer some initial, tentative tools for concretisation. First, the definition of 'published works' and 'publication' under the Berne and Rome Conventions respectively may bear relevance. The Berne Convention defines 'published works' as 'works published with the consent of their authors, whatever may be the means of manufacture of the copies, provided that the availability of such copies has been such as to satisfy the reasonable requirements of the public, having regard to the nature of the work'.[107] The Rome Convention defines 'publication' as the 'offering of copies of a phonogram to the public in reasonable quantity'.[108] While these provisions are not expressly linked with any type of duty to exploit, the expressly mentioned lack of relevance of the 'means of manufacture' gives support to the argument that both analogue and digital exploitation activities may fulfil a corporate partner's duty to sufficiently exploit.

At the EU level, the requirement of 'sufficient' exploitation under the use-it-or-lose-it mechanism set by the Term Extension Directive refers to the need to both offer 'copies' of the phonogram(s) at issue and make them available on demand, thus requiring exploitation of not only the reproduction right, but also the making-available right.

While the international and EU frameworks remain very high-level on the issue of 'sufficient' exploitation, it may be concluded that fair exploitation requires attention to both analogue and digital methods of exploitation. This translates into a requirement of exploitation activities as to both the reproduction and making available right. Of further note is the consistent requirement for corporate partners to offer certain 'copies' on the market.

However, the streaming age is fuelled by a new method of consuming music that does not require physical copies, or (in many cases) full digital copies. The

[106] Cf Dusollier and others, 'Contractual Arrangements Applicable to Creators' (n 17) 14; Joshua Yuvaraj, 'Back to the Start: Re-Envisioning the Role of Copyright Reversion in Australia and Other Common Law Countries' (Monash University 2021).

[107] Art 3(3) Berne Convention; cf Brison, 'Art XI.210' (n 46) 386.

[108] Art 3(d) Rome Convention. Interestingly, Rec 8 Term Extension Directive expressly refers to the Rome Convention with regard to the scope of 'sufficient' exploitation under the Term Extension Directive, without further specifying which provision of the Rome Convention bears relevance in this regard. The referenced Art 3(d) Rome Convention appears to be the only possibly relevant provision.

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usefulness of the term 'copies' is therefore rapidly decreasing. An alternative basis for the concrete implementation of the requirement of fair exploitation is merited. Below, a set of guiding criteria is developed. In turn, the concept of fair exploitation is shaped on a substantive, personal, geographical and temporal level. The substantive analysis takes account the use of both the musician's contribution in the music at issue and the music as such, also considering the overarching impact of digitisation. Due account is taken of relevant sector practices and the potential contribution of collective arrangements.

On a substantive level, the concept of exploitation in music may be analysed from two separate angles – the use of a certain contribution in music and the subsequent use of that music in the offline and/or online environment.

The former aspect relates to the intrinsic value and significance of a musician's contribution and the intensity and frequency of its use in a given piece of music (such as the inclusion of a short excerpt on repeat throughout the piece[109]).

A musician who has significantly contributed to a piece of music has a stronger claim as to fair exploitation than a musician whose contribution is limited. As indicated above,[110] the EU legislator allows for specifications of the harmonised revocation mechanism under national law for co-creations or co-performances, based on the relative importance of artists' contributions and the legitimate interests of the artists involved.[111] Member States may even exclude content from the scope of application of the revocation mechanism where such content usually contains contributions of a plurality of artists.[112] Given the steep increase of collaborations in the creation and performance of music[113] and the practical issues that may arise

[109] Cf Commission, SWD(2016) 301 final (n 4) 174; 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) 92.

[110] See above, Section 5.2.2.3.

[111] Art 22(2)(b) DSM Directive.

[112] Art 22(2) DSM Directive.

[113] For example, in popular music a trend may be discerned where a rising number of songwriters on the composition side is complemented by, on the performing artists' side, a successful megastar featuring a range of artists attempting to 'ride their coattails' to (inter)national stardom. This increased dispersion of creativity may ultimately result in nobody being able to raise a fair claim to authorship; 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) 66. See also Richard Arnold, 'Reflections on the Triumph of Music: Copyrights and Performers' Rights in Music' (Oxford Intellectual Property Invited Speaker Seminar, Oxford, UK, 20 October 2009) 13; Jostein Gripsrud, 'Creativity and the Sense of Collective Ownership in Theatre and Popular Music' in Mireille van Eechoud (ed), *The Work of Authorship* (Amsterdam University Press 2014) 227; Isabelle De Voldere and others, 'Mapping the Creative Value Chains. A Study on the Economy of Culture in the Digital Age. Final Report' (Publications Office of the EU 2017) <https://op.europa.eu/s/zIa8> 64; Nancy K Baym, *Playing to the Crowd. Musicians, Audiences, and the Intimate Work of Connection* (New York University Press 2018) 73; Alan B Krueger, *Rockonomics* (John Murray 2019) 32–33, 64–66; Kai Riemer and others (eds), *Collaboration in the Digital Age. How Technology Enables*

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from the application of the revocation mechanism in multi-musician situations in practice, such specifications may prove to be useful.

Musicians' individual contributions are often not discernible after the fact. This may be ascribed to the nature of the collaborative musical process, which is unpredictable and often takes place in an integrative way. A collaboration starts with a number of (unprotected) abstract ideas that are concretised and transformed throughout the group process. When several authors make a concrete, original contribution to the creation of a work protected by copyright, joint authorship may arise.[114] However, unless every intervention is recorded in detail, untangling this creative process and determining who contributed what is arduous. Subsequent to the principle of distributive creativity, it may even be argued that the distinction of individual contributions to a musical work is impossible.[115] Even if the individual contributions are separable, the question arises when exactly the weight of a musician's contribution should be assessed – at the moment of the contribution or at a later stage. It may be argued that a musician's contribution can only be properly assessed with hindsight. A short, insignificant sequence of notes contributed by a session musician may ultimately prove to be the main reference point for its target audience, leaving a significant imprint on the piece of music over time.

A contribution's intrinsic worth refers to its artistic value,[116] which is inherently subjective and subject to a qualitative, not quantitative assessment. The significance of a certain contribution in the context of a larger whole is somewhat easier to quantify, but still difficult to gauge in advance. Both the intrinsic value and the significance of a musician's contribution are particularly hard to grasp in an objective way. This may be illustrated by relevant case law from the United Kingdom in several high-stakes disputes concerning authorship in the music industry.

A first notable case, *Hadley v Kemp*, concerns the dispute between the members of new-wave band Spandau Ballet that was brought before the UK High Court of Justice in the late 1990s. Following the commercial success of Spandau Ballet's first five albums, vocalist Tony Hadley, drummer John Keeple and multi-instrumentalist Steve Norman claimed joint ownership in a number of songs – including and

Individuals, Teams and Businesses (Progress in IS, Springer International 2019); Daniela Simone, *Copyright and Collective Authorship: Locating the Authors of Collaborative Work* (Cambridge Intellectual Property and Information Law 50, Cambridge University Press 2019) 1. For an illustration, see also eg Andrew Unterberger, 'Only 13 No. 1 Hot 100 Hits This Century Were Penned without Co-Writers' (*Billboard*, 25 January 2022) <https://bit.ly/3rC6fhz> and the searchable music rights database Songdex at <https://bit.ly/39BEZWN>.

[114] See (1) in Belgium: Arts XI.168–169 Belgian CEL; (2) in France: Arts L 113-2–L 113-5 French IP Code; (3) in Germany: Art 8 German Copyright Act; (4) in the Netherlands: Arts 5(1), 26 Dutch Copyright Act; and (5) in the United Kingdom: Arts 10–10A UK CDPA.

[115] See Laura Bishop, 'Collaborative Musical Creativity: How Ensembles Coordinate Spontaneity' (2018) 9 Front Psychol 1.

[116] Fabienne Brison, *Het Naburig Recht van de Uitvoerende Kunstenaar* (Creatie Informatie Communicatie 7, Larcier 2001) 440–41.

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importantly the hit 'True', which contained Norman's signature saxophone solo – and sued Gary Kemp, guitarist and acknowledged composer of the band. The creative process of the band usually consisted of Kemp first providing the general structure, melody and chords of a certain piece of music and the band then completing the finalised, recorded product together. The High Court rejected the band members' claims entirely.[117] This judgment was met with significant criticism.[118] Influencing considerations included a focus on melody and chord progression as a core of the music and the fact that Kemp maintained artistic control throughout the creative process. In two further cases, the English courts showed greater deference to the artistic contribution of performers. In the case leading to the UK Court of Appeal decision in *Beckingham v Hodgens*, violinist Robert James Beckingham claimed joint authorship in the adaptation of The Bluebells' version of the song 'Young at Heart'. Beckingham had contributed a violin solo that features several times throughout the song, in return for a modest flat session fee. The Court of Appeal deemed the session musician's contribution significant and original enough to warrant joint authorship in the song.[119] A similar outcome was reached in *Fisher v Brooker*, a case regarding authorship of Procol Harum's 1967 hit song 'A Whiter Shade of Pale' that went all the way up to the UK Supreme Court (then still the House of Lords). This case revolved around an introductory organ solo created by Matthew Fisher, clearly inspired by a Bach chorale prelude, combined with an organ accompaniment to the song's vocal parts. In return for his services, Fisher received a modest fee. However, the brief solo turned out to be an important part of the song, eventually allowing Fisher to successfully claim joint authorship. The High Court decision[120] awarded Fisher joint authorship of the musical work itself, while the Court of Appeal,[121] confirmed in this position by the House of Lords,[122] only granted Fisher joint authorship of the arrangement as recorded, in view the existence of an earlier demo to which he had not contributed.

Musicology experts play an important role in such court cases.[123] These expert witnesses draft extensive reports containing detailed analyses of the music at issue as well as historical and conceptual arguments. Thus, they seek to objectify the creative process. The assessment appears to be both quantitative and qualitative. As to the

[117] *Hadley v Kemp* [1999] EMLR 589.
[118] See eg Richard Arnold, 'Are Performers Authors?' [1999] EIPR 464, 468–69.
[119] *Hodgens v Beckingham* [2003] EWCA Civ 143, [2003] EMLR 18 (first instance decision: *Beckingham v Hodgens* [2002] EWCA Civ 1901); Dominic Free, 'Beckingham v. Hodgens: The Session Musician's Claim to Music Copyright' (2003) 13 Entertainment Law Review 93.
[120] *Fisher v Brooker* [2006] EWHC 3239 (Ch), [2007] EMLR 256, [2007] FSR 12.
[121] *Brooker v Fisher* [2008] EWCA Civ 287.
[122] *Fisher v Brooker* [2009] UKHL 41.
[123] Arnold, 'Reflections on the Triumph of Music: Copyrights and Performers' Rights in Music' (n 113) 8–9; Lionel Bently, 'Authorship of Popular Music in UK Copyright Law' (2009) 12 ICS 179; Stefan Skopelja, 'The Boundaries of "Authorship" and "Performance" in Musical Copyright' [2015] UNSWLJ Student Series No 15-04.

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latter, a high degree of importance is seemingly placed on melody and chord progressions, leaving less room for focus on rhythm. Regardless, any court decision assessing a given contribution's 'significance' is inherently fact-specific and bears a significant subjective aspect.[124] Ultimately, it all comes down to the question of how the court (more often than not composed of musical laymen) assesses the value of a certain contribution.

In view of the difficulty in assessing artists' relative contributions to a certain piece of music, shaping national law in this regard as allowed under Article 22 may prove to be problematic.[125] Care must therefore be taken not to overemphasise the importance of this criterion in the conceptualisation of fair exploitation. Internal distribution mechanisms used by CMOs that quantify performers' contributions by using a proportionate division drawing from a points-based system may fulfil a clarifying role in this regard. By way of example, in the context of the division of remuneration rights, the Belgian performer CMO PlayRight accords fifteen points to both featured artists and conductors of groups that exceed twelve musicians, while session musicians are granted five points per instrument group[126] to which their performance relates, with a maximum of three instrument groups.[127] After the points have been added, a proportionate division takes place, with a minimum guarantee of 30 per cent to the benefit of featured artists and conductors.[128] German performer CMO GVL accords four points to featured artists, conductors and full band members and one point to session musicians.[129] Similarly, Dutch performer CMO SENA accords five points to featured artists and full band members, three points to conductors and one point to session musicians per instrument played (including vocals) with a maximum of three points per musician and a total maximum of 50 per cent of revenues for all session musicians combined.[130] In France, the division has been rather contentious over the years, leading to an evolving CMO landscape with the establishment of the Société des Artistes Interprètes (SAI) by performer CMOs ADAMI (for featured artists) and Spedidam (for non-featured artists).[131] SAI is an example of a CMO that does not use a points-based system. Instead, it opts for an

[124] Arnold, 'Reflections on The Triumph of Music: Copyrights and Performers' Rights in Music' (n 113) 2; Lionel Bently and Laura Biron, 'Discontinuities between Legal Conceptions of Authorship and Social Practices: What, If Anything, Is to Be Done?' in Mireille van Eechoud (ed), *The Work of Authorship* (Amsterdam University Press 2014) 262; Skopelja, 'The Boundaries of "Authorship" and "Performance" in Musical Copyright' (n 123).

[125] Cf Fair Internet Coalition, 'Joint Guidelines' (n 54) 25.

[126] The seven instrument groups referred to are keyboard, string and wind instruments, percussion, melodic percussion, mechanical instruments and vocals.

[127] Art 26 *Algemeen Reglement PlayRight* (2020) <https://bit.ly/3lM9iQ2>.

[128] ibid.

[129] *Anlage 1 zum Verteilungsplan Nr 2 ab 2017 ab dem Verteilungsjahr 2019 Punktwerte (Gewichtung) der Mitwirkendenkategorien* (2020) <https://bit.ly/3tZNTqw>.

[130] Arts 7–8 *Repartitiereglement SENA* (2024) <https://shorturl.at/mqrD8>.

[131] <https://la-sai.fr/>.

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equal distribution among all identified eligible performing artists.[132] The distribution rules of UK CMO Phonographic Performance Limited (PPL), finally, provide a detailed procedure to aptly allocate featured and non-featured performers' revenue shares.[133]

The other side of the exploitation 'coin' is the (partial or full) use of a composition and/or fixation of a performance by a third party in a way that falls within the scope of the exclusive rights of the rightsholder(s) and thus, in principle, requires their permission. Applied to the music industry, corporate partners should exert a certain degree of effort to build and maintain an audience for (and thus ultimately maximise the revenue garnered by) music to which they have been granted certain rights, through marketing and promotion activities.[134]

As for physical music sales, fair exploitation also implies responsibility in terms of the manufacturing and distribution of copies – the steps required to bring the physical music product to the end user. In the context of a direct duty to exploit, this requirement has been quantified in terms of a minimum number of 'copies'.[135] In the online environment, corporate partners' appropriate exploitation activities are much more difficult to objectify.[136]

One of the questions is whether the mere fact that users have downloaded or streamed the music at issue in itself provides proof of exploitation on the part of the relevant corporate partners, even if they have not undertaken any active exploitation activities themselves in terms of marketing, promotion or other means to improve the 'findability' of a given piece of music – that is, its prominence on relevant online platforms.[137] If streams and digital downloads qualify as 'copies' in the sense of the duty to exploit under copyright contract law, the answer is clear: a copy is an act of exploitation. However, digital downloads and streams are not equivalent to physical copies – on a technological or economic level. Theoretically speaking, both digital downloads and streams may occur without the active intervention of a corporate partner, as opposed to physical copies. Moreover, the economics of streaming are vastly different from those associated with either digital downloads or physical copies.[138]

[132] See <https://shorturl.at/zAHI6>.

[133] Schedule 5, Performer Allocation Rules (2015) <https://bit.ly/46d4noh>.

[134] Regarding the perceived obligation (under French law) for a music publisher to contact a record company for securing the use of a certain composition, see eg Dusollier and others, 'Contractual Arrangements Applicable to Creators' (n 17) 123. See also Groffe, *La Bonne Foi en Droit d'Auteur* (n 22) 295–96; Spoor and others, *Auteursrecht* (n 60) 573–74. As to the exploitation by third parties, see below, Section 5.4.2.

[135] See above, Section 5.2.2.2.

[136] European Copyright Society, 'Comment' (n 54) 133.

[137] Kretschmer and Giblin, 'Getting Creators Paid' (n 36) 280; Dirk Visser, 'Dutch Copyright Contract Law' in Simon Geiregat and Hendrik Vanhees (eds), *Copyright Contracts Tomorrow* (LeA 2023) 34–35.

[138] This has required a modification to the way in which music chart metrics function and, more in general, how the popularity of music is assessed. This has led to recourse to the 'album-equivalent unit', a measurement unit that refers to the consumption of music that is deemed equal to the purchase of one album copy. The precise number of digital downloads and/or

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The legal framework offers little concrete guidance. For example, since many of the relevant legal provisions predate the internet revolution, it is not beyond dispute whether the term 'copies' used in such provisions only covers physical copies, or whether this also extends to digital downloads of phonograms. As indicated above, the link with 'copies' is even more tenuous for streaming, and may even become non-existent for the next potentially disruptive technology. Instead of holding on to the pre-digital concept of 'copies', alignment should be sought with the legal concepts of the right of reproduction *sensu stricto* and the right of communication to the public (including the right of making available).[139] Logic dictates that fair exploitation should relate to both prongs of exclusive rights. This implies the need for both (physical as well as digital) reproduction and (digital) making available of the music at issue. This corresponds with the approach of the EU legislator in the context of the Term Extension Directive for phonograms subject to transfer contracts, where loss of rights can ultimately only be avoided if the corporate partner's exploitation activities relate to both the reproduction right and the making-available right. By analogy, the requirement for literary publishers under French law to commit to exploitation activities concerning the literary work(s) at issue both on paper and as an e-book may be referenced.[140]

However, the specification of fair exploitation as the need for both physical and digital exploitation activities is still very vague. More concrete support for the operationalisation of 'fair exploitation' may be found in the concept of 'methods of exploitation' of protected content, which groups certain types of use in separate categories. Above, it was argued that there are several separate methods of exploitation in the music industry, in particular requiring a distinction between digital downloads and streaming. This begs the question whether the concept of fair exploitation requires the corporate partner to mine all existing and emerging methods of exploitation for the purpose of building an audience for the music to which they have been granted rights, or whether their activities may be limited to more traditional methods of exploitation, such as digital downloads, the existing models for music streaming, sync and merchandising.

A link may be made with the legal restrictions on the scope of rights granted, both as to requirements pertaining to the specification thereof (mainly in Belgium and France) and possible limitations as to the grant of rights regarding future methods of

streams deemed relevant in this regard differs per jurisdiction. By way of example, the Recording Industry Association of America (RIAA) equates 10 permanent downloads and 1,500 streams to 1 album sale, see eg <https://bit.ly/3lo8qlN>. On the partially confidential chart metric methodology wielded by IFPI, see <https://bit.ly/3mBRw20>. See also Luis Aguiar and Joel Waldfogel, 'Streaming Reaches Flood Stage: Does Spotify Stimulate or Depress Music Sales?' (JRC Technical Reports, 2015).

[139] See Chapter 2, Section 2.2.2.2. Cf Dusollier, 'EU Contractual Protection of Creators' (n 6) 456.

[140] Arts L 132-17-1–8 French IP Code as amended on the basis of the French Decree of 12 November 2014, which was ratified by Art 107 French Act of 7 July 2016.

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exploitation (in all four chosen EU jurisdictions).[141] These restrictions aim to counter excessive rights transfers and ensure informed consent on the part of the musician(s) at the moment of contract formation. Attaching a duty to exploit to each existing and emerging method of exploitation in the performance stage of the contract would strengthen the effect of these restrictions. This would mean that corporate partners would have to weigh the benefits of obtaining rights regarding a certain method of exploitation up against the burden of having to conduct exploitation activities – the latter at the pain of having to give up the rights at issue in case the musician(s) reclaim(s) them. Not accepting the right of the musician to (partially) reclaim their rights in such a case would amount to consolidating musician lock-in, at least where the contract at issue results in a transfer or an exclusive licence.

A less burdensome alternative for the corporate partner, with a more limited direct impact on the freedom of contract, would be to only attach a duty to exploit to methods of exploitation deemed 'significant' – again a vague concept relating to which further concretisation would be welcome.[142]

These theoretical considerations offer us little to no practical guidance in determining what exactly constitutes 'sufficient' exploitation in the digital sphere.[143] A first avenue to make 'sufficient' exploitation more concrete could be to set a minimum revenue benchmark, either in total or as to ensuing remuneration granted to the musician.[144] However, it seems disproportionate to attach the continued grant of rights to the corporate partner to the content's commercial success, given its inherent unpredictability. A more fruitful alternative form of objectification may be provided by the concept of 'findability' of a given piece of music.[145] Fair exploitation implies active steps towards improving such 'findability', bringing it to the attention of users through marketing and promotion activities. In other words, fair exploitation means that the corporate partner must seek to increase the 'actual or potential number of persons who enjoy or wish to enjoy'[146] the music they represent. The mere online availability of a piece of music on a digital download and/or streaming platform is insufficient, regardless of the size (and thus the potential audience) of the platform.[147] Otherwise, given the ubiquitous availability of content online, this

[141] See Chapter 4, Section 4.4.1.2.

[142] Cf Dusollier and others, 'Contractual Arrangements Applicable to Creators' (n 17) 102–03; Lucas-Schloetter, 'The Remuneration of Authors and Performers in Copyright Contract Law' (n 26) 267; Dusollier, 'EU Contractual Protection of Creators' (n 6) 455.

[143] Cf Furgał, 'Interpreting EU Reversion Rights' (n 27) 289.

[144] The latter solution is foreseen by the standard contract for original Dutch literary works in the Netherlands, see Art 15(1)(c) at <https://shorturl.at/lozQ4>.

[145] Furgał, 'Interpreting EU Reversion Rights'(n 27) 290, 291; Kretschmer and Giblin, 'Getting Creators Paid' (n 36) 280.

[146] Cf Joined Cases C-403/08 and C-429/08 *Football Association Premier League (FAPL) and Others* [2011] ECLI:EU:C:2011:631, para 109.

[147] Cf Fair Internet Coalition, 'Joint Guidelines' (n 54) 26; van Gompel and others, 'Evaluatie Wet Auteurscontractenrecht: Eindrapport' (n 102) 48; Furgał, 'Interpreting EU Reversion Rights' (n

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requirement of exploitation risks remaining an empty shell. At the close of this subsection, an attempt is made to concretise these considerations into practical criteria.

The identity of the parties may also have an impact on the level of exploitation activities required. On the commercial side, account should be taken of the level of professionalism, and the size and financial capacity of the corporate partner, implying a lighter obligation for SMEs.[148] On the artistic side, a sliding scale of fame may serve as a way to frame musicians' legitimate expectations concerning the level of exploitation activities required from their corporate partner(s).[149]

In the online world, the potential geographical market for a certain piece of music extends across the globe. Even in a purely physical setting, it may be argued that fair exploitation requires activities across national borders, especially if the music at issue has already proven to be commercially successful in the home country.[150] However, requiring global exploitation activities by the corporate partner would be excessive. Fair exploitation requires commercial opportunities to be mined in all territories where sufficient market potential may be discerned.[151] Parties' legitimate expectations as expressed throughout the contract negotiation process should provide more specific indications in this regard.

Temporal considerations also play a role. The requisite exploitation activities must take place within a reasonable period following the formation of the contract.[152] This may be linked with the reasonable time granted to corporate partners in the context of the indirect duty to exploit, such as two years under German law.[153]

An important question is whether fair exploitation only implies an obligation for the corporate partner at the outset of contract performance, or whether it should lead to an obligation of sustained, continuous exploitation over time. An example of the former is provided by the Belgian regime, which appears to be limited to situations where there is a lack of initial exploitation.[154] An example of the latter may be found under Dutch law, which expressly renders the right to revocation applicable both if no sufficient exploitation takes place at the outset of the contract and if, following sufficient exploitation at first, this ceases to be the case after a

27) 290. See, however, Ramalho and Lopez-Tarruella, 'Implementation of the Directive 2011/77/EU' (n 45) 49.

[148] Cf Brison, *Het Naburig Recht van de Uitvoerende Kunstenaar* (n 116) 445.

[149] Cf ibid.

[150] For French case law on music publishing contracts, see Lardinois, *Les Contrats Commentés de l'Industrie de La Musique* 2.0 (n 18) 122.

[151] Van Gompel and others, 'Evaluatie Wet Auteurscontractenrecht: Eindrapport' (n 102) 51.

[152] Brison, *Het Naburig Recht van de Uitvoerende Kunstenaar* (n 116) 444.

[153] Art 22(3) DSM Directive; Arts 41(2) *jo* 79(2a) German Copyright Act. See also Rec 80 DSM Directive. See above, Section 5.2.2.3.2.

[154] Arts XI.167/4, XI.205/4 Belgian CEL; Raad voor de Intellectuele Eigendom, 'Advies' (n 64) 99, 125–26; Furgał, 'Interpreting EU Reversion Rights' (n 27) 288.

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certain period.[155] If commercial success is not forthcoming despite corporate partners' best efforts, their obligations in this context should not be unduly maintained. However, given the varying potential shelf life of different musical genres (with pop music, for example, having a faster 'expiry date' than classical music), care must be taken not to adopt an excessively restrictive stance. Moreover, if an indirect rather than a direct duty to exploit applies, the result of its application in practice is merely a rights reversal, mostly without an associated right to damages for the artist. In view of this, as well as the fact that rights reversal furthers the public interest objective of combating undue 'warehousing' of artistic content, sustained exploitation over time to avoid rights reversal appears to be wholly defensible.[156]

Further, in order to maintain a fair balance, a temporal restriction on musicians' behaviour is merited: once it is established that the corporate partner at issue will not comply with the requirement of fair exploitation, the musician should not remain unduly inactive. Failure to oppose a lack of (sufficient) exploitation by the corporate partner(s) indicates that the exploitation of their music is not the primary focus and points away from the existence of a substantive duty to exploit on the part of the corporate partner.

The exact timing of appropriate behaviour is rather fluid and fact-specific.[157] In a bid to remedy this, under pre-DSM Belgian law, all publishing contracts must set a specific time limit for the required exploitation activities, in the absence of which reference is made to sector practices.[158] This approach was maintained in the new generalised use-it-or-lose-it clause.[159] An express contract provision regarding timing could indeed be beneficial in terms of clarity, but would again be subject to the relative bargaining power of the parties. Thus, while a set term for requisite action would benefit procedural fairness, it risks hindering substantive fairness. In order to maintain flexibility, recourse to sector practices is preferable.

This reference to sector practices as a tool for operationalisation is common to all of the criteria discussed above, either implicitly or explicitly.[160] Rules that are specific to the music sector and that take account of the particularities of the exploitation of music are desirable. Sector-specific arrangements remain possible after the partial harmonisation of the revocation mechanism under EU law. Indeed,

[155] Art 25e(1) Dutch Copyright Act; Furgał, 'Reversion Rights in the European Union Member States' (n 35) 288.

[156] Hugenholtz, 'Towards Author's Paradise' (n 36) 404; van Gompel and others, 'Evaluatie Wet Auteurscontractenrecht: Eindrapport' (n 102) 46; Furgał, 'Interpreting EU Reversion Rights' (n 27) 283.

[157] Cf Vanhees, 'Auteurscontracten en de Problematiek inzake Werken Gemaakt in Opdracht of in Uitvoering van een Arbeidsovereenkomst of Statuut' (n 33) 306.

[158] Art XI.196(1) paras 1–2 Belgian CEL; Dusollier and others, 'Contractual Arrangements Applicable to Creators' (n 17) 46; Hendrik Vanhees, 'Art XI.195' in Fabienne Brison and Hendrik Vanhees (eds), *Hommage à Jan Corbet Huldeboek* (3rd edn, Larcier 2018) 314.

[159] Arts XI.167/4, XI.205/4 Belgian CEL.

[160] For express references to sector practices, see eg Arts L 132-11, L 132-12, L 132-13 French IP Code; Art 14 German Publishing Act.

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Member States are free to specify this mechanism under national law, taking account of the specific nature of certain CCIs and types of artistic content.[161]

Specific reference may be made to the possibility for Member States to restrict the application of the revocation mechanism to a certain time frame.[162] Such a limitation makes sense for music that has a relatively long shelf life, where the exploitation of such music is intended to take place over a longer period of time. In such cases, the corporate partner recoups their investment over a longer time and a limitation of the right to revocation appears to be justified.[163]

Another example is the evolution of the activities of music publishers over time. Contrary to what is the case for classical music, the production and distribution of sheet music appears to be much less important for contemporary music, where the music publisher's task instead focuses on offering the composition(s) for reproduction using new production techniques.[164]

It may be asked whether the reference to trade practices may result in the duty to exploit becoming moot. If corporate partners in a certain CCI make a habit of not exploiting creative content or ceasing exploitation if commercial success is not immediately forthcoming, this risks elevating non-exploitation to the status of a commercial practice.[165] However, given the objective of exploitation that is – or at least should be – central to copyright exploitation contracts at the moment of their formation, this risk is unlikely to materialise in practice.

Finally, the principle of fair exploitation may be shaped further by having recourse to collective bargaining.[166] In the context of the DSM implementation process, both Belgium[167] and France[168] have embraced this possibility. In France, the modalities of the new revocation mechanism are largely left up to sector-specific collective bargaining, the outcome of which may be declared legally binding for all stakeholders.[169] If the collective negotiation process is not successful, the French Conseil d'État is to set the specifics of the revocation mechanism.[170] Also in Belgium, express reference is made to the benefits of collective bargaining in further fleshing out the general revocation mechanism.[171]

Recourse to collectivity is not a new tool for the French music industry. This is shown by the French code of practice signed by six representative organisations of

[161] Art 22(2)(a) DSM Directive. See also Rec 80 DSM Directive. See above, Section 5.2.2.3.2.
[162] Art 22(2) DSM Directive. See also Rec 80 DSM Directive.
[163] Aguilar, 'The New Copyright Directive: Part II, Articles 20–23' (n 68).
[164] Jan Corbet, *Auteursrecht* (Algemene Praktische Rechtsverzameling, Story-Scientia 1997) 85.
[165] Cf Vanhees, *Een Juridische Analyse van de Grondslagen* (n 22) 536–38.
[166] Cf European Copyright Society, 'Comment' (n 54) 133, 138, 145–46.
[167] Arts XI.167/5, 205/5 Belgian CEL. For a prior example in the Belgian literary sector, see Association des éditeurs belges (ADEB), *Code des usages des éditeurs de langue française de belgique* (2012).
[168] Art L 132-25-1 French IP Code.
[169] Arts L 131-5-2(II)–(III), 212-3-3(II)–(III) French IP Code.
[170] Arts L 131-5-1(III), L 212-3-1(III) French IP Code.
[171] Arts XI.167/5, XI.205/5 Belgian CEL.

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composers and music publishers in 2017.[172] This code applies mandatorily to all contracts entered into after 1 July 2018 by any member of the signatory organisations. As to exploitation, throughout the contract reference may be made to the signatories' stated commitment to sustained exploitation activities that seek to ensure the best possible exploitation for a given piece of music,[173] as well as the need to make explicit the applicable duties to exploit in the contract.[174] In order to be able to fulfil these duties, the publisher must, throughout the contract, retain a copy of the music, in the form of its full score, and, if applicable, a phonographic recording.[175] This code of practice also contains a detailed list of relevant exploitation activities that distinguishes between classical and contemporary music and sets a minimum benchmark for 'sufficient' exploitation by music publishers.[176]

Despite a sustained effort at concretisation, the above analysis remained at times rather theoretical. A further translation into practical criteria is therefore merited.

A first *conditio sine qua non* for fair exploitation in the music industry is that a graphic version or phonographic recording of the composition is made available offline and online. In the physical world, this should lead to commercialisation of mechanical copies, such as on vinyl and CD, and possibly also on DVD – as long as that format is still in use. If orders are being placed, fair exploitation implies securing delivery of such orders without undue delay. In the digital sphere, availability of the phonograms at issue on digital download and music-streaming platforms should be a prerequisite of fair exploitation. In addition, sheet music should be available in printed version and online if this is common practice as to the genre of the music. Beyond the mere availability of compositions and/or (fixated) performances, corporate partners should take steps to push further reproduction and making available of the music at issue – in essence, to increase its audience in both the home territory and abroad. For compositions, this may imply the addition to analogue and digital catalogues and other relevant databases, as well as other efforts towards enhancing opportunities for compositions to be adapted or arranged. For both compositions and phonograms, possible opportunities leading to the diffusion of the music via radio and/or TV, synchronisation with video material (such as for the purpose of advertising), the inclusion as a sample and/or as part of a compilation album should be mined. As regards streaming platforms in particular, certain steps should be taken to promote inclusion on streaming playlists. Proof of fair exploitation may also be supported by the conclusion of sub-publishing contracts and/or investments in merchandising or video footage pertaining to the musician(s) and their music, such as music videos, live concert videos and/or documentaries. Finally, fair exploitation

[172] Code des Usages et des Bonnes Pratiques de l'Edition des Œuvres Musicales (4 October 2017).
[173] ibid ss 3, 3.4.
[174] ibid s 3.3. The publisher has a year to start exploiting the composition. This period is extended to two years for classical music.
[175] ibid s 3.4.
[176] ibid.

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may also result from efforts seeking to secure the public performance of a certain composition or by a (group of) performing musician(s), such as by securing and maintaining contacts with, for example, booking agents and festival organisers.

In essence, exploitation may only be deemed fair if it relates to all significant methods of exploitation, both analogue and digital. Given that the concept of 'copies' is largely inoperative in the digital sphere, focus should lie with minimum requirements to improve the 'findability' of a piece of music, implying a minimum benchmark for promotion and marketing activities. On a temporal level, initial exploitation at the outset of the contract arguably does not suffice. In order to tackle the issue of content 'warehousing', there is a need for sustained exploitation over time.[177]

5.2.3 *Control of Exploitation Activities*

Following the analysis of the requisite extent of exploitation activities to be undertaken by the corporate partner, our attention shifts to the possibilities for the musician(s) to assert control. In addition, several courses of action are possible on the basis of moral rights protection. Moral rights play an important role in ensuring due acknowledgement for artists as well as in enhancing agency. The former task mainly rests on the shoulders of the right to paternity (for authors, and for performers to a lesser extent), while the latter falls upon the right of disclosure[178] (for authors, not performers) and the right to integrity[179] (for both authors and performers).[180] By way of example, musicians may invoke the latter right to prevent the synchronisation of their music with a certain video,[181] or the inclusion of their music on a compilation album.[182] Moral rights are, as such, unwaivable, but their application in practice may be subject to specification in the contract. The possibility for musicians to invoke their moral rights in a specific situation may therefore be limited.[183]

In addition to the right to integrity, another moral right may prove to be relevant in certain, albeit exceptional cases. French law provides for a express, unwaivable

[177] Furgał, 'Interpreting EU Reversion Rights' (n 27) 288.

[178] For an example, see Lardinois, *Les Contrats Commentés de l'Industrie de La Musique* 2.0 (n 18) 124–25.

[179] See eg Jeff Keustermans and Peter Blomme, *Auteursrecht. Capita Selecta* (2nd edn, Intersentia 2021) 196–205.

[180] Cf Art 39 German Copyright Act. See also Schricker, *Urheberrecht. Kommentar* (n 58) 829–42; Fromm and Nordemann, *Urheberrecht* (n 58) 851–63; Dreyer and others, *Urheberrecht* (n 58) 823–29; Möhring and Nicolini, *Urheberrecht* (n 58) 586–93.

[181] See eg Court of Appeal Paris 27 September 1996 (*Farmer v Sony Music Entertainment*), see Lardinois, *Les Contrats Commentés de l'Industrie de La Musique* 2.0 (n 18) 123.

[182] See eg French Supreme Court 12 July 2001 (*Dutronc*), French Supreme Court 10 July 2002 (*Jean Ferrat v Universal Music*), *Tribunal de Grande Instance* ('TGI') Paris 10 January 1990 (*Rostropovich*); TGI Paris 10 May 1996, all discussed in ibid 75–76, 123.

[183] As to all copyright exploitation contracts, see Vanhees, *Een Juridische Analyse van de Grondslagen* (n 22) 360–412, 578–91.

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'right to repent' for authors (not performers), as a result of which a composer may withdraw or retract their work subsequent to its initial disclosure.[184] The exercise of this *droit de retrait et de repentir* requires a change of conviction on the part of the author, as well as the indemnification of the initial corporate partner.[185] Purely economic reasons, such as the wish to call upon the services of another publisher that, for example, spends more on marketing or offers a better royalty rate, do not suffice.[186] In any case, if the artist wishes to resume exploitation at a later stage, they must offer a right of use to their initial corporate partner under the same conditions as initially agreed.[187]

Similarly, in Germany, the artist has a right of revocation in case of a change of conviction concerning the work that makes the exploitation in the way originally agreed impossible to accept.[188] This right may not be waived in advance.[189] The (artistic and other) reasons for this change of conviction must be substantiated. Moreover, as is the case under French law, the corporate partner has a right to reasonable compensation for costs incurred,[190] as well as a right of first refusal in case of further exploitation – albeit not necessarily under the same conditions as initially agreed, but under 'reasonable' conditions.[191] The conditions attached to the exercise of this right, combined with the possibly limited financial resources of the

[184] Art L 121-4 French IP Code. See ia Edouard Fortunet, 'The Author's Moral Right to Withdraw a Work (Droit de Repentir): A French Perspective' (2011) 6 JIPLP 535, 535–41; Dusollier and others, 'Contractual Arrangements Applicable to Creators' (n 17) 78; Lucas and others, *Traité de la Propriété Littéraire et Artistique* (n 17) 503–08, 1078–79.

[185] Hugenholtz and Guibault, 'Auteurscontractenrecht' (n 58) 71; 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) 309–10; Daniel Chozick, 'Help! Fixing the Problem of Copyright Termination Inconsistencies through Public and Private International Law' (2018) 49 Georget J Int Law 1461, 1466–68; Caron, *Droit d'Auteur et Droits Voisins* (n 17) 250–51.

[186] See French Supreme Court 14 May 1991, docket number 89-21.701 <https://bit.ly/3uOCBYg>.

[187] Art L 121-4 French IP Code.

[188] Art 42(1) German Copyright Act (*Rückrufsrecht wegen gewandelter Überzeugung*). See also Art 35(1) German Publishing Act. See in detail Hugenholtz and Guibault, 'Auteurscontractenrecht' (n 58) 72; Lenselink, *De Verlening van Exploitatiebevoegdheden in het Auteursrecht* (n 19) 266–69; Schricker, *Urheberrecht. Kommentar* (n 58) 859–72; Delp, *Der Verlagsvertrag* (n 24) 16–18; Fromm and Nordemann, *Urheberrecht* (n 58) 893–903; Rahmatian, 'Dealing with Rights in Copyright-Protected Works' (n 185) 309; Dusollier and others, 'Contractual Arrangements Applicable to Creators' (n 17) 77–78; 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> 43–44; Lucas-Schloetter, 'The Remuneration of Authors and Performers in Copyright Contract Law' (n 26) 267; Dreyer and others, *Urheberrecht* (n 58) 844–49; Möhring and Nicolini, *Urheberrecht* (n 58) 617–23.

[189] Art 42(2) *jo* 79(2a) German Copyright Act.

[190] Art 42(3) *jo* 79(2a) German Copyright Act; Art 35(2) German Publishing Act.

[191] Art 42(4) German Copyright Act.

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author(s) at issue, clearly limit the application of this right of withdrawal in practice.[192]

In Belgium, the Netherlands and the United Kingdom, no such express right exists, bar the Dutch provision that allows authors to modify the work in a reasonable way and the general prohibition on the abuse of rights.[193] Finally, it is possible to establish a provision in the contract that expressly allows a right of withdrawal. However, such a clause is unlikely to materialise, given the difference in bargaining power to the benefit of the corporate partner and the significant effect on the binding force of the contract that such a provision would entail.

The limited right of withdrawal described above constitutes a severe restriction on the principled binding force of a contract.[194] Its application should be limited to extreme cases and subject to the requirement of good faith on the part of the musician, which may manifest itself by requiring timely protest on their behalf.[195] Moreover, recourse to a right of withdrawal should only be allowed in circumstances where the continued performance of the initial contract would constitute an abuse of rights on the part of the corporate partner.[196]

Other, more general provisions of the selected substantive legal regimes may further affect musicians' right to exert control in the context of a corporate partner's exploitation activities, such as good-faith performance of a contract and abuse of rights on the part of the counterparty.[197] Save requirements that stem from the protection of public order and good morals, possible lines of action on the basis of general contract law are, in principle, waivable by the musician(s). Given the restrictive application of the relevant provisions in practice, their incidence in the music contracts under review is limited.

Independently of the possible ground(s) for action, the operationalisation of musician agency regarding the extent as well as the content of exploitation activities of their corporate partners depends on the transparency in terms of exploitation that exists in the context of the contractual relationship and the actual application of the legal framework.[198]

Moreover, even if appropriate control and agency may be achieved for all parties through obligations relating to exploitation, the crux of the matter of contractual

[192] Rahmatian, 'Dealing with Rights in Copyright-Protected Works' (n 185) 309.
[193] Art 25(4) Dutch Copyright Act.
[194] Cf Vanhees, *Een Juridische Analyse van de Grondslagen* (n 22) 461.
[195] Lardinois, *Les Contrats Commentés de l'Industrie de La Musique* 2.0 (n 18) 125.
[196] Cf Nicolas Debruyne, *Commerciële Exploitatie van de Menselijke Afbeelding, Naam en Stem* (Recht en Onderneming 54, die Keure 2021) 309.
[197] See (1) in Belgium: Art 1134 para 3 Belgian CC; (2) in France: Art 1134 para 3 French CC; (3) in Germany: Art 242 German CC; and (4) in the Netherlands: Arts 6:2, 6:248 Dutch Civil Code. See also eg Brison, *Het Naburig Recht van de Uitvoerende Kunstenaar* (n 116) 376; Spoor and others, *Auteursrecht* (n 60) 449–51. See also Chapter 3, Section 3.3.1 and sources referenced there.
[198] See in more detail below, Section 5.3.3 and Chapter 6.

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balance is whether such exploitation leads to fair remuneration for all parties. This is the topic of the next section.

5.3 REMUNERATION

5.3.1 *Structure*

The exploitation of music does not in itself guarantee any remuneration, given that the consumption of artistic content depends on market demand, and since music may in certain cases be consumed for free.[199] In view of the importance of remuneration as an incentive, achieving fairness in terms of remuneration will go a long way to attaining a fairer balance in the music contracts under review. This section examines how the law affects the division of revenues in the streaming age. First, while acknowledging the justified interest of corporate partners in acquiring part of the economic value garnered through the exploitation of protected music, it discusses and evaluates the scope of the legal requirement to fairly remunerate artists. Second, given the importance of transparency to the operationalisation of fairness and the significant margin for improvement that exists in this regard in the music industry,[200] a separate subsection specifically focuses on the operationalisation of transparency in the music industry.

5.3.2 *Fair Remuneration*

5.3.2.1 Overview

This subsection approaches the concept of fair remuneration in the context of primary contractual relationships in both an ex ante and ex post fashion.[201] First, the principle of fair remuneration is made more concrete by way of a number of guiding criteria that take account of the dynamic market environment of the music industry. Subsequently, mechanisms that may allow the ex post modification of remuneration arrangements are discussed.

5.3.2.2 Requirement of Fair Remuneration

5.3.2.2.1 LEGAL REQUIREMENTS OF FAIR REMUNERATION Article 18 DSM Directive requires all Member States to ensure that artists who enter into copyright exploitation contracts 'are entitled to receive appropriate and proportionate

[199] See eg Lionel Bently and others, 'Strengthening the Position of Press Publishers and Authors and Performers in the Copyright Directive' (2017) 53.
[200] See Chapter 2, Section 2.5.
[201] As to secondary relationships, see below, Section 5.4.3.

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remuneration'.[202] This minimum ex ante benchmark, which is referred to in this book as the principle of 'fair' remuneration, seeks to contribute to a sustainable marketplace for content creation, exploitation and consumption.[203] The principle of fair remuneration was not included in the initial Commission Proposal.[204] It was added by the European Parliament[205] under the influence of the 'Fair Internet for Performers' campaign.[206] The recognition of this principle of fair remuneration in EU legislation was primarily welcomed by stakeholders on the artistic side of the copyright aisle.[207] A countervailing force is provided by the second paragraph of Article 18, which requires Member States to take due account of the freedom of contract in its implementation into national law, and thus achieve a fair balance between the rights and interests of all involved.[208]

Article 18 DSM Directive complements two prior, narrower harmonising measures taken in the context of the Term Extension Directive, namely the right to supplementary compensation and the 'clean slate' provision. These fairly detailed measures are meant to ensure that the term extension for neighbouring rights associated with phonograms actually benefits performing musicians that have transferred their exclusive neighbouring rights.[209] The first measure relates to exploitation contracts where a transfer of rights – not a licence – is effected in return for a lump sum. Thus, it primarily applies to session musicians. It purports to grant such musicians an unwaivable right to annual supplementary remuneration during the extended term of protection of the phonogram.[210] This remuneration is payable by the record company and distributed through collective management.[211] In order to secure payment, the record label must set aside and reserve one-fifth of revenues

[202] Art 18(1) DSM Directive. Cf Art 15(5) DSM Directive, which provides that authors of works incorporated in press publications are to receive an 'appropriate share of the revenues' that press publishers obtain from licensing the new neighbouring right of press publishers concerning online uses.

[203] See eg Case C-62/79 *Coditel and Others* [1980] ECLI:EU:C:1980:84, para 13; Case C-92/92 *Phil Collins and Others* [1993] ECLI:EU:C:1993:847, paras 12, 21; Joined Cases C-403/08 and C-429/08 *Football Association Premier League and Others* [2011] ECLI:EU:C:2011:631, paras 107-8; Case C-351/12 *OSA v Léčebné lázně Mariánské Lázně* [2014] ECLI:EU:C:2014:110, para 23. Cf 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, 13.

[204] Commission, 'Proposal for a Directive of the European Parliament and of the Council on Copyright in the Digital Single Market' (14 September 2016) COM(2016) 593 final.

[205] Parliament, 'Report on the Proposal for a Directive of the European Parliament and of the Council on Copyright in the Digital Single Market (COM(2016)0593 – C8–0383/2016 – 2016/0280(COD)) (29 June 2018) A8–0245/2018, 67.

[206] See also below, Section 5.5.

[207] The reference to artists' right to appropriate reward is not new, see Recs 10–11 InfoSoc Directive, Rec 5 Rental and Lending Right Directive, Rec 3 Resale Right Directive.

[208] Art 18(2) DSM Directive.

[209] Rec 5 Term Extension Directive.

[210] Art 3(2b) Term Directive.

[211] Art 3(2d) Term Directive *jo* Rec 12 Term Extension Directive.

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derived from the exploitation of exclusive rights associated with the phonogram(s) at issue during that time, before deducting costs.[212] An extension of the annual supplementary remuneration for performing musicians on the basis of the Term Extension Directive to musicians having granted an exclusive licence to their rights should be considered, given that the economic effects of an exclusive licence are so similar to those of a full rights transfer that maintaining this difference could amount to a form of discrimination.

The second course of action, the 'clean slate' provision, is aimed at royalty-based contracts that include a transfer of rights – again not a licence.[213] It sets forth that record labels may not deduct unrecouped advances or contractually defined deductions from royalties associated with exploitation activities during the extended term of protection.[214] Both of these measures may assist in shaping the requirement of fair remuneration.

The principle of 'appropriate and proportionate' remuneration is in tune with this book's objective of securing a fair return in terms of economic capital for all contracting parties and therefore constitutes a significant step forward in terms of relational Rawlsian substantive fairness as to music contracts in the streaming age.[215] Indeed, a fair return infuses the idea of true reciprocity in the contracts under review. This principle may be seen as safeguarding parties' basic liberties as well as ensuring fair equality of opportunity and furthering the difference principle. First, fair remuneration contributes to the voluntary nature of the transactions under review.[216] The parties are free to determine the essence of the contractual bargain, thus safeguarding their individual autonomy. Second, it also allows musicians to work towards improving their position in the marketplace in terms of both economic and social capital.[217] Finally, the implicit objective of the principle of fair remuneration to secure a minimum level of remuneration can be linked with a Rawlsian baseline of resources that are to be allocated to members of society.[218]

The principle of fair remuneration as included in Article 18 DSM Directive is remarkably vague and allows a continuation of divergences between national laws.[219] The scope of appreciation for Member State legislators is significant, as is

[212] Art 3(2c) Term Directive *jo* Recs 11–12 Term Extension Directive.
[213] See Recs 10, 14 Term Extension Directive.
[214] Art 3(2e) Term Directive.
[215] Cf Oren Bracha and Talha Syed, 'Beyond Efficiency: Consequence-Sensitive Theories of Copyright' (no date) 29, 89, 295; Stephanie Plamondon, 'Rational Faith: The Utility of Fairness in Copyright' (2017) 97 BU L Rev 1487 1521.
[216] Cf in relation to consumer contracts Zhong Xing Tan, 'Where the Action Is: Macro and Micro Justice in Contract Law' (2020) 83 Mod Law Rev 725, 751–52.
[217] Cf in relation to consumer and/or employment contracts Lars Lindblom, 'The Structure of a Rawlsian Theory of Just Work' (2011) 101 Journal of Business Ethics 577, 580; Tan, 'Where the Action Is' (n 216) 751.
[218] Cf in relation to employment contracts Tan, 'Where the Action Is' (n 216) 753.
[219] Cf Dusollier, 'The 2019 Directive on Copyright in the Digital Single Market' (n 54) 1023; Giulia Priora, 'Catching Sight of a Glimmer of Light: Fair Remuneration and the Emerging

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shown by the use of broad concepts such as 'appropriate', 'disproportionate' and 'real' or 'potential' economic value, as well as the lack of concrete benchmarks for appreciation, especially in a digital context. This is bound to affect legal certainty in a negative way.[220] The inevitable further contractual definition of these concepts is associated with increased transaction costs and may perpetuate and reinforce imbalances in bargaining power. Below, the relevant legal framework at all three regulatory levels is reviewed, in a bid to further concretise the principle of fair remuneration in the streaming age.

First, a brief overview of the essence of the legal requirements as to remuneration in the chosen jurisdictions is provided, since 'fair remuneration' is intrinsically connected with the legal provisions that seek to attain this. Even before the implementation of the DSM Directive, both the German and Dutch legal frameworks already provided a general principle of fair remuneration to the benefit of both composers and performers, upon which Article 18 DSM Directive was modelled. Under German law, in the absence of contractual determination of the amount of remuneration, the contract is presumed to establish fair remuneration.[221] If the contractually agreed amount is unfair, the musician may require the corporate partner to consent to a modification of the agreement that remedies this and balances out the interests of both parties.[222] Conversely, a corporate partner may not invoke a clause that deviates from the legal regime to the detriment of the musician(s).[223] In practice, therefore, the right to fair remuneration under German law is unwaivable. Under Dutch law, both composers and performers have an unwaivable right to fair remuneration in return for the grant of exploitation rights to a third party, unless in an employment context or for commissioned content.[224]

Distributive Rationale in the Reform of EU Copyright Law' [2020] JIPITEC 330, 343; Xalabarder, 'The Principle of Appropriate and Proportionate Remuneration' (n 203) 10; 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) 83.

[220] Cf Dusollier and others, 'Contractual Arrangements Applicable to Creators' (n 17) 38.

[221] Art 32(1) *jo* 79(2a) German Copyright Act; Art 22(2) German Publishing Act; Schricker, *Urheberrecht. Kommentar* (n 58) 677–701, 1518; Fromm and Nordemann, *Urheberrecht* (n 58) 696–752; Dreyer and others, *Urheberrecht* (n 58) 725–48; Möhring and Nicolini, *Urheberrecht* (n 58) 424–50.

[222] Art 32(1) *jo* 79(2a) German Copyright Act; *Bundesverfassungsgericht* ('BVerfG', General Federal Constitutional Court), Order of the First Senate of 23 October 2013, 1 BvR 1842/11, paras 1–115, '*Destructive Emotions*' <https://bit.ly/3FzgUyi>.

[223] Art 32(3) *jo* 79(2a) German Copyright Act. This rule is subject to an exception for open licences.

[224] Arts 8 jo 25c(1) jo 25h(1) Dutch Copyright Act jo Art 2b Dutch Neighbouring Rights Act. See, however, Art 3 Dutch Neighbouring Rights Act, which grants employed performers a right to fair remuneration for each method of exploitation, unless the terms or nature of the contract provide otherwise, or if this follows from common practice or considerations of reasonableness. See Visser and others, *ACR: Auteurscontractenrecht* (n 44) 83–137; Spoor and others, *Auteursrecht* (n 60) 563–65; van Gompel and others, 'Evaluatie Wet Auteurscontractenrecht:

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France has traditionally taken a different approach. Instead of expressly requiring remuneration arrangements in the context of copyright exploitation contracts pertaining to copyright *sensu stricto* to be 'fair', French law requires such contracts to set proportionate remuneration, a rule that is qualified as pertaining to public order and is, therefore, unwaivable.[225] Prior to the implementation of the DSM Directive, this rule applied to authors only.[226] Subsequent to the implementation of the DSM Directive, performers have a right to appropriate and proportionate remuneration.[227] This principle of appropriate and proportionate remuneration is deemed to be of a public order nature.[228] The French legislator's choice not to add the requirement that the remuneration arrangement be 'appropriate' for authors was held to be incompatible with Article 18 DSM Directive.[229] While it has been argued that the principle of proportionality in itself implies a requirement of (fair) remuneration in copyright exploitation contracts, French law also expressly establishes the possibility for such contracts to be entered into without any remuneration.[230] For performing musicians whose performance has been fixed in a phonogram, French law has provided for a few years that the contract should set a minimum guaranteed remuneration per method of exploitation (with a separate provision for analogue

Eindrapport' (n 102) 27–29; ; Stef van Gompel, '"Non, Non, Rien n'a Changé": Over Vergoedingsaanspraken voor Makers uit Hoofde van Exploitatiecontracten' [2021] Auteursrecht 3, 5, 9.

[225] Art L 131-4 jo 131-5-3 French IP Code. See Art L 132-5 jo L 131-4, L 132-6 French IP Code for publishing contracts. In addition, Art L 132-17-6 French IP Code requires that authors obtain fair remuneration from all revenues that derive from the commercialisation and dissemination of digital editions of their literary works. See 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; Hugenholtz and Guibault, 'Auteurscontractenrecht' (n 58) 51–54; Markellou, *Le Contrat d'Exploitation d'Auteur* (n 17) 209–26; Dusollier and others, 'Contractual Arrangements Applicable to Creators' (n 17) 119–20; Europe Economics and others, 'Remuneration of Authors and Performers' (n 188) 39–40; Lucas and others, *Traité de la Propriété Littéraire et Artistique* (n 17) 651–71, 707–10, 728–33; Pierre Sirinelli, 'La Rémuneration de l'Auteur Dans La Réforme Française Du Contrat d'Edition Du 12 Novembre 2014' in Silke von Lewinski (ed), *Remuneration for the Use of Works. Exclusivity vs Other Approaches* (De Gruyter 2017) 244–54; Gautier, *Propriété Littéraire et Artistique* (n 17) 641–48; Caron, *Droit d'Auteur et Droits Voisins* (n 17) 428–38, 456–58.

[226] Europe Economics and others, 'Remuneration of Authors and Performers' (n 188) 40; Christophe Caron, 'La Fixation de La Rémunération de l'auteur' [2021] PI 16.

[227] Art L 212-3(II) French IP Code; Anne-Emmanuelle Kahn, 'La Fixation de La Rémunération de l'artiste-Interprète' [2021] PI 22.

[228] Art L 212-3-4 French IP Code.

[229] *Conseil d'État* 15 November 2022, docket number 454477 <https://bit.ly/3QVgI4P>; Séverine Dusollier and Léo Pascault, 'Contractual Protection of Authors and Performers in France after the CDSM Directive' in Simon Geiregat and Hendrik Vanhees (eds), *Copyright Contracts Tomorrow* (LeA 2023) 67–72.

[230] Art L 122-7 French IP Code; Raimond, *La Qualification du Contrat d'Auteur* (n 13) 106–09; Theodoros Chiou, 'On Royalties and Transfers without (Monetary) Consideration – Looking for the "Magic Formula" for Assessing the Validity of Remuneration Clauses of Copyright Transfers under French Copyright Law' (2013) 44 IIC 585; Lucas and others, *Traité de la Propriété Littéraire et Artistique* (n 17) 649–50. See also Art L 122-7-1 French IP Code.

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and digital use).[231] In addition, since 2016, the French IP Code mandates that performing musicians should receive a minimum remuneration for streaming, proportionate to the economic value of their rights.[232]

In Belgium, the principle of appropriate and proportionate remuneration to the benefit of both authors and performers was established in Articles XI.167/1 and XI.205/1 Belgian CEL, which is qualified as mandatory law.[233]

As to performers having entered into transfer contracts in particular, all five chosen jurisdictions have implemented the unwaivable, collectively managed right to annual supplementary remuneration and the 'clean slate' provision as harmonised under the Term Extension Directive.[234] The success of these measures has rightfully been called into question on various occasions.[235] While a royalty of 20 per cent of gross revenue is at the high end of what most performing musicians achieve through contract negotiations and while discounts and advances have a very real impact on musician revenue,[236] the concrete impact of these well-intended steps has remained limited. This may be linked to the fact that the temporal application of the measures is limited to twenty years. Moreover, empirical research has discerned a trend on the part of record labels to remaster and/or remix existing recordings and focus on the exploitation of newly released phonograms instead of the sustained exploitation of older phonograms that benefit from the term extension.[237] In the absence of further active marketing of the original phonograms, ensuing musician revenue appears to have stagnated. As to the right to annual supplementary remuneration, an EU study on the application of the Term Extension Directive has indicated that the revenues collected and distributed have been rather limited, as a result of difficulties in identifying performers that are entitled to such supplementary remuneration on

[231] Art L 212-13 French IP Code; Bently and others, 'Strengthening the Position' (n 199) 59.

[232] Art L 212-14 French IP Code. In French: *diffusions en flux*. See Lucas and others, *Traité de la Propriété Littéraire et Artistique* (n 17) 1155–56.

[233] Arts XI.167/6, XI.205/6 Belgian CEL; Raad voor de Intellectuele Eigendom, 'Advies' (n 64) 76.

[234] See (1) in Belgium: Art XI.210 Belgian CEL; (2) in France: Arts L 212-3-7, L 212-3-8 French IP Code (these provisions refer back to Art L 212-3 French IP Code, which pertains to both transfer and licence contracts); (3) in Germany: Art 79a German Copyright Act (this provision expressly refers to both transfer and licence contracts); (4) in the Netherlands: Art 9b Dutch Neighbouring Rights Act; and (5) in the United Kingdom: Art 191HB UK CDPA. The French regime provides for a limitation of the annual supplementary remuneration for record companies whose total yearly revenues do not exceed €2 million, on the basis of proportionality considerations.

[235] Dusollier and others, 'Contractual Arrangements Applicable to Creators' (n 17) 86; Richard Osborne, 'Is Equitable Remuneration Equitable? Performers' Rights in the UK' (2017) 40 Popular Music and Society 573, 581; Ramalho and Lopez-Tarruella, 'Implementation of the Directive 2011/77/EU' (n 45) 8–9, 26–28, 47; Xalabarder, 'The Principle of Appropriate and Proportionate Remuneration' (n 203) 6.

[236] See Chapter 2, Section 2.4.5.

[237] Ramalho and Lopez-Tarruella, 'Implementation of the Directive 2011/77/EU' (n 45) 8, 16, 20; Ananay Aguilar, 'The Collective Management of Performers' Rights in the UK: A Story of Competing Interests' (2019) 16 SCRIPTed 4, 40.

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the basis of record companies' databases.[238] Thus, despite the efforts of the EU legislator on this front, the intended effects seem to not have materialised in practice.

Other legal regimes may also have an impact on a musician's right to fair remuneration. Under general contract law, in addition to the overarching principle of good-faith contract performance that curtails excessively unfair behaviour,[239] particular reference may be made to Article 138(2) German Civil Code, which qualifies the acquisition of disproportionate pecuniary advantages through the exploitation of another party's weaker position as contrary to public policy, resulting in the nullity of the legal transaction at issue.[240] Reference may also be made to the regimes applicable to unfair B2B contract terms, namely the 'manifest imbalance' test under Belgian and French law, and the 'reasonableness' test under Dutch law.[241]

5.3.2.2.2 OPERATIONALISATION OF LEGAL REQUIREMENTS The inherent unpredictability of commercial success in the streaming age, combined with the wide spectrum of contractual relationships and technological advancements that open up new avenues for digital exploitation, render it particularly difficult to pinpoint ex ante what exactly constitutes 'fair' remuneration.

The international and EU regulatory levels offer some tentative tools for concretisation. On the international level, the Rome Convention and the WPPT refer to the need for rightsholders to receive 'equitable remuneration' in the context of the compulsory licence for secondary use, but without adding any further clarification of what should be considered 'equitable'.[242] The EU level holds significantly more potential for the concretisation of equitability in terms of remuneration. Indeed, 'appropriate' or 'equitable' remuneration is a recurring concept within the EU copyright acquis.[243] The objective of securing an appropriate economic reward for

[238] Ramalho and Lopez-Tarruella, 'Implementation of the Directive 2011/77/EU' (n 45) 26–27, 47. See also AEPO-ARTIS, 'Performers' Rights in International and European Legislation: Situation and Elements for Improvement' (2018) 138.

[239] See (1) in Belgium: Art 1134 para 3 Belgian CC; (2) in France: Art 1134 para 3 French CC; (3) in Germany: Art 242 German CC; and (4) in the Netherlands: Arts 6:2, 6:248 Dutch Civil Code. By way of illustration, see District Court Amsterdam 9 March 2021, docket number C/13/696035 / KG ZA 21-32, ECLI:NL:RBAMS:2021:1041, paras 5.12, 5.14. See also Chapter 3, Section 3.3.1 and sources referenced there. Cf Bryan Lesser, 'Record Labels Shot the Artists, but They Did Not Share the Equity' (2018) 16 Geo JL & Pub Pol'y 289.

[240] See Basil S Markesinis and others, *The German Law of Contract. A Comparative Treatise* (2nd edn, Hart 2006) 253–60; Dieter Medicus and Stephan Lorenz, *Schuldrecht I. Allgemeiner Teil* (Juristische Kurz-Lehrbücher, 21st edn, CH Beck 2015) 58, 90–91, 268–69; Wolfgang Fikentscher and Andreas Heinemann, *Schuldrecht: Allgemeiner und Besonderer Teil* (De Gruyter Studium, 11th edn, De Gruyter 2017) 85–86.

[241] See Chapter 4, Section 4.4.1.3. See Visser and others, *ACR: Auteurscontractenrecht* (n 44) 190–93.

[242] Art 12 Rome Convention; Art 15 WPPT. See also Art 12 Beijing Treaty.

[243] Valid criticism has been voiced over the lack of a clear delineation of these concepts, see eg Reto M Hilty and Valentina Moscon, 'Part D – Copyright Contract Law (Article 10 and Articles

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artists is a common theme throughout the recitals of various EU directives that pertain to copyright.[244] The concepts of 'equitable remuneration'[245] and 'fair compensation'[246] also return in the context of remuneration rights subject to collective management. On various occasions, the ECJ has had the opportunity to interpret the scope of these concepts and dubbed them autonomous concepts of EU law.[247] From this case law, a number of takeaways may be deduced. First, the broad margin for Member States to shape the form, detailed arrangements and level of compensation in the context of mechanisms for exceptions and limitations to copyright may be highlighted.[248] As indicated above, such leeway also exists for the benchmark of fair remuneration set by Article 18 DSM Directive. However, this freedom is not unlimited: in view of internal market considerations, Member States should avoid unnecessary inconsistencies between national regimes.[249] A harmonised interpretation would therefore be beneficial. Second – and unsurprisingly – the ECJ refers to the need to take account of, and find a balance between, the interests of all stakeholders.[250] On a more concrete level, fair compensation for rightsholders in the context of exceptions and limitations serves as a recompense for the harm suffered by the rightsholders, and a link is required between these negative effects and the remuneration granted.[251] The economic value of the content at issue serves

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) 75–76; Reto M Hilty and Valentina Moscon, 'Part F – Claims to Fair Compensation (Article 12 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) 89–93.

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

[245] See Arts 3(6), 5 Rental and Lending Directive.

[246] See Art 5(2)(a)–(b) InfoSoc Directive.

[247] See eg Case C-245/00 *SENA v NOS* [2003] ECLI:EU:C:2003:68, paras 23–24 regarding 'equitable remuneration' under the Rental and Lending Directive; Case C-467/08 *Padawan v SGAE* [2010] ECLI:EU:C:2010:620, para 33 regarding 'fair compensation' under the InfoSoc Directive.

[248] See eg Case C-245/00 *SENA v NOS* [2003] ECLI:EU:C:2003:68, paras 34, 40; Case C-521/11 *Amazon.com and Others v Austro-Mechana* [2013] ECLI:EU:C:2013:515, paras 20–21; Case C-463/12 *Copydan Båndkopi v Nokia Danmark* [2015] ECLI:EU:C:2015:144, para 20.

[249] Case C-467/08 *Padawan v SGAE* [2010] ECLI:EU:C:2010:620, paras 35–36; Case C-435/12 *ACI Adam and Others v Stichting de Thuiskopie and Others* [2014] ECLI:EU:C:2014:254, para 49.

[250] See eg Case C-245/00 *SENA v NOS* [2003] ECLI:EU:C:2003:68, para 36; C-462/09 *Stichting de Thuiskopie v Opus Supplies and Others* [2011] ECLI:EU:C:2011:397, para 25; Case C-435/12 *ACI Adam and Others v Stichting de Thuiskopie and Others* [2014] ECLI:EU:C:2014:254, para 53.

[251] See eg Case C-467/08 *Padawan v SGAE* [2010] ECLI:EU:C:2010:620, paras 39–40, 42; C-462/09 *Stichting de Thuiskopie v Opus Supplies and Others* [2011] ECLI:EU:C:2011:397, paras 24, 34; Joined Cases C-457/11 to C-460/11 *VG Wort v Kyocera and Others* [2013] ECLI:EU:

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as a particularly relevant criterion.[252] Moreover, the determination of what is fair should be based on objective criteria – be it variable or fixed.[253] Finally, the possible added value of collective bargaining is acknowledged.[254]

Similarly, there is a reference to 'appropriate remuneration' in Article 16 CRM Directive, which sets out the criteria for licensing terms set by CMOs.[255] Rightsholders are said to have a right to be remunerated appropriately, taking account of (again) the economic value of the rights at issue and the nature as well as scope of the use.[256]

Additional inspiration may be sourced from the competition law concept of excessive pricing under Article 102 TFEU, which labels a price as abusive – and thus unfair – if a contractual party has acquired an undue commercial advantage.[257] This is said to be the case in the absence of a reasonable proportion of the price at issue to the relevant economic value; if there is no objective economic justification for it.[258]

Applying the above by analogy to the concept of 'fair remuneration', it may be argued that the remuneration granted to parties to the music contracts under review can only be deemed 'fair' if there is an objective, sufficiently strong connection between the economic value of music (in a way the 'positive effects' thereof) and the division of revenues between those playing a primary role in securing this value.

Recital 73 DSM Directive seeks to clarify the principle of fair remuneration by specifying that artists' remuneration should be 'appropriate and proportionate to the

C:2013:426, para 31; Case C-521/11 *Amazon.com and Others v Austro-Mechana* [2013] ECLI:EU:C:2013:515, para 47; Case C-435/12 *ACI Adam and Others v Stichting de Thuiskopie and Others* [2014] ECLI:EU:C:2014:254, para 50; Case C-463/12 *Copydan Båndkopi v Nokia Danmark* [2015] ECLI:EU:C:2015:144, para 21.

[252] See eg Case C-245/00 *SENA v NOS* [2003] ECLI:EU:C:2003:68, para 37. cf Joined Cases C-403/08 and C-429/08 *FAPL and Others* [2011] ECLI:EU:C:2011:631, paras 108–109, confirming the need for remuneration for the use of IP-protected content to be reasonable, taking account of the economic value of said content.

[253] See eg Case C-245/00 *SENA v NOS* [2003] ECLI:EU:C:2003:68.

[254] See eg ibid para 45.

[255] See also Rec 61 DSM Directive.

[256] Art 16(2) *jo* Rec 31 CRM Directive; Tristan Azzi, 'Exclusive Rights. General Report: Mechanisms to Ensure Adequate Remuneration for Creators and Performers' in Silke von Lewinski (ed), *Remuneration for the Use of Works. Exclusivity vs Other Approaches* (De Gruyter 2017) 86; Matanovac Vučković, 'The Role of Collective Management Organisations in New Business Models – Challenges for the Legislature and Courts' in Silke von Lewinski (ed), *Remuneration for the Use of Works. Exclusivity vs Other Approaches* (De Gruyter 2017) 416; Xalabarder, 'The Principle of Appropriate and Proportionate Remuneration' (n 203) 14; Paramythiotis, 'Fairness in Copyright Contract Law' (n 219) 82.

[257] Case C-27/76, *United Brands v Commission* [1978] ECLI:EU:C:1978:22, para 249.

[258] Case C-26/75, *General Motors Continental v Commission* [1975] ECLI:EU:C:1975:150, para 12; Case C-27/76, *United Brands v Commission* [1978] ECLI:EU:C:1978:22, para 250; Case C-226/84, *British Leyland v Commission* [1986] ECLI:EU:C:1986:421, para 27; Case C-52/07, *Kanal 5, TV 4 v Föreningen Svenska Tonsättares Internationella Musikbyrå (STIM)* [2008] ECLI:EU:C:2008:703, paras 28; Case C-372/19 *Belgische Vereniging van Auteurs, Componisten en Uitgevers (SABAM) v Weareone.World, Wecandance* [2020] ECLI:EU:C:2020:598, para 28.

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actual or potential economic value of the licensed or transferred rights'.[259] The inherent demand uncertainty in CCIs such as the music industry and the qualification of music as a so-called experience good render the task of quantifying the economic value of music particularly hard.[260] In the CCIs, '[r]ather than asymmetrical information, there is symmetrical ignorance'.[261] Since neither party can calculate the exact economic value of music in advance, ex ante assessing the fairness of remuneration arrangements may be problematic.[262] Instead of relying on the 'actual or potential' economic value of music, it may be more fruitful to look at the value that may be ex ante 'reasonably expected' on the basis of a number of guiding criteria. As was done for the scope of fair exploitation in Section 5.2.2.4 above, the following analysis again leans on relevant tools provided by legislation, case law and legal doctrine in the chosen jurisdictions.

First, the conceptual question arises whether the terminology of 'appropriate and proportionate' remuneration has certain implications for the nature of such remuneration as either a royalty or a lump sum payment. In other words, can a lump sum be 'proportionate', or does this provision require a royalty payment for all copyright exploitation contracts – either in combination with a flat fee or not? Recital 73 DSM Directive confirms that a lump sum may be proportionate and thus satisfy the 'fairness' threshold set by Article 18 DSM Directive, while it should not be the rule.[263] At the European level, therefore, no absolute requirement of proportionate remuneration appears to exist. This may be contrasted with the sustained, fierce criticism on the part of artist organisations of 'buy-out contracts', whereby a full transfer of rights is agreed for a flat fee.[264]

[259] The reference to the economic value of the rights corresponds to what was stated above regarding rightsholders' right to compensation in the context of exceptions and limitations, as well as in the context of the CRM Directive.

[260] Martin Kretschmer and others, 'The Relationship between Copyright and Contract Law' (2010) <https://ssrn.com/abstract=2624945> 19–21; Dusollier and others, 'Contractual Arrangements Applicable to Creators' (n 17) 22; Europe Economics and others, 'Remuneration of Authors and Performers' (n 188) 105.

[261] Richard Caves, *Creative Industries. Contracts Between Art and Commerce* (Harvard University Press 2002) 14.

[262] Dusollier, 'EU Contractual Protection of Creators' (n 6) 446.

[263] Cf Answer given by Mr Breton on behalf of the European Commission, E-006228/2020 (29 January 2021); Answer given by Mr Breton on behalf of the European Commission, E-001244/2022 (30 June 2022).

[264] See eg Dusollier and others, 'Contractual Arrangements Applicable to Creators' (n 17) 84; Fair Internet Coalition, 'Joint Guidelines' (n 54) 5–6; European Copyright Society, 'Comment' (n 54) 141–42; Xalabarder, 'The Remuneration of Authors and Performers' (n 52) 137; Raquel Xalabarder, 'Role of Collective Administration in Such Business Models? Introduction' in Silke von Lewinski (ed), *Remuneration for the Use of Works. Exclusivity vs Other Approaches* (De Gruyter 2017) 15; ECSA, 'ECSA's Vision on How Europe Can Prevent Buyout Contracts. An Insight into Buyouts Affecting Audiovisual Composers and Actual Solutions to Prevent Them' (2021).

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In the chosen EU jurisdictions, a requirement of proportionality only applies under certain circumstances. As the law stands, France is the only country of these jurisdictions where the legal framework sets out a general rule of proportionate compensation for contracts with both authors and performers.[265] This general rule of proportionate remuneration is subject to a range of exceptions.[266] Relevant exceptions include situations where there is no practical calculation basis and/or no adequate means of supervision, where a proportionate payment would lead to disproportionate costs or where this would be impossible in view of the artist's insignificant contribution to the work, or when the artist requests the royalty to be converted to a lump sum payment.[267] In the specific context of publishing contracts, a lump sum is also allowed if one of the parties is established abroad.[268] Conversely, the German legislator has shied away from setting a generally applicable requirement of proportionality. Regardless, relevant case law has repeatedly held that a lump sum payment is often not appropriate and therefore unfair, especially when exploitation rights are granted without limitation in time or scope and a reasonable interest in the overall exploitation revenues is not secured.[269] Moreover, German law now provides that a lump sum is only allowed if it guarantees an appropriate share for the artist in the expected total income from exploitation and is justified by the specifics of the industry.[270] Finally, Belgian law does not establish a general obligation of proportionality for copyright exploitation contracts. The requirement of proportionate remuneration for publishing contracts is waivable.[271]

A final aspect is the calculation basis of a proportionate remuneration arrangement. In France, the basis deemed appropriate is the retail price, which is the actual price paid by users and therefore includes the margin for the distributor.[272] Since the

[265] Arts L 131-4, L 212-3(II) French IP Code.

[266] Dusollier and others, 'Contractual Arrangements Applicable to Creators' (n 17) 38, 120; Bently and others, 'Strengthening the Position' (n 199) 58; Lucas and others, *Traité de la Propriété Littéraire et Artistique* (n 17) 660–64.

[267] Arts L 131-4, L 212-3 French IP Code; Markellou, *Le Contrat d'Exploitation d'Auteur* (n 17) 246–56.

[268] Art L 132-6 para 2 French IP Code.

[269] See eg German Federal Court of Justice 7 October 2009, docket number I ZR 38/07 <https://openjur.de/u/71662.html>; German Federal Court of Justice 31 May 2012, docket number I ZR 73/10 <https://openjur.de/u/434129.html>. See also Dusollier and others, 'Contractual Arrangements Applicable to Creators' (n 17) 57, 128–30; Bently and others, 'Strengthening the Position' (n 199) 66; Lucas-Schloetter, 'European Copyright Contract Law' (n 26) 898; Lucas-Schloetter, 'The Remuneration of Authors and Performers in Copyright Contract Law' (n 26) 259.

[270] Art 32(2) *jo* 79(2a) German Copyright Act. On the temporal application of this new rule to ongoing contracts, see Chapter 3, Section 3.3.2.6.

[271] Berenboom, *Le Nouveau Droit d'Auteur et les Droits Voisins* (n 16) 230; Dusollier and others, 'Contractual Arrangements Applicable to Creators' (n 17) 38.

[272] Dusollier and others, 'Contractual Arrangements Applicable to Creators' (n 17) 37–38, 46. Regarding literary publishing, see also in particular Art L 132-17-6 French IP Code, which refers to the sales price without taxes.

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retail price is often not known to the primary corporate partner, the lack of a clear reference point renders the operationalisation of proportionate remuneration difficult.[273] An alternative position may be found under Belgian law for publishing contracts, whereby the gross revenue accumulated by the publisher is used as the basis for calculation, unless there is a contractual provision to the contrary.[274]

Instinct and logic draw us firmly towards a proportionate allocation of revenues amassed by the exploitation of artistic content over time.[275] In practice, the choice between a lump sum and proportionate remuneration ultimately depends on administrative considerations, risk-sharing arrangements and incentives for the parties.[276] In the absence of risk – and/or if large groups of musicians with minor individual contributions are involved – a lump sum is the logical choice.[277] However, success is highly unpredictable, resulting in the need for risk allocation. In case the contract sets a non-recoupable lump sum advance, the risk falls upon the corporate partner – a risk that is mitigated if the advance is recoupable. Under a royalty arrangement without any advances, the parties share the risk.[278] All of these risk allocation choices may be considered fair under certain circumstances.[279] By way of example, artists may deem a lump sum 'appropriate' if they are risk averse and prefer short-term financial certainty to uncertain incremental payments over an extended period of time, regardless of the net present value of such a royalty.[280]

[273] Lucas-Schloetter, 'The Remuneration of Authors and Performers in Copyright Contract Law' (n 26) 256–57.

[274] Dusollier and others, 'Contractual Arrangements Applicable to Creators' (n 17) 46.

[275] Cf Lucas-Schloetter, 'The Remuneration of Authors and Performers in Copyright Contract Law' (n 26) 259; European Copyright Society, 'Comment' (n 54) 133.

[276] For a detailed economic analysis in this regard, see Europe Economics and others, 'Remuneration of Authors and Performers' (n 188) 104–11.

[277] 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> 33; Hugenholtz and Guibault, 'Auteurscontractenrecht' (n 58) 50; Kretschmer and others, 'The Relationship between Copyright and Contract Law' (n 260) 25–26; Kate Darling, 'Occupy Copyright: A Law & Economic Analysis of US Author Termination Rights' (2015) 63 Buffalo Law Review 147, 165; Dirk Visser, 'Pippi Langkous en het nieuwe auteurscontractenrecht' [2015] NJB 1289, 1294. cf Xalabarder, 'The Principle of Appropriate and Proportionate Remuneration' (n 203) 15.

[278] Kretschmer and others, 'The Relationship between Copyright and Contract Law' (n 260) 24.

[279] In exceptional circumstances, the allocation of risk to one of the contracting parties may be considered contrary to the provisions on unfair B2B contract terms. See eg Art VI.91/5 3° Belgian CEL.

[280] Dusollier and others, 'Contractual Arrangements Applicable to Creators' (n 17) 120; Darling, 'Occupy Copyright' (n 277) 181–84, 202; Europe Economics and others, 'Remuneration of Authors and Performers' (n 188) 106–07; Azzi, 'Exclusive Rights' (n 256) 90; Lucas-Schloetter, 'The Remuneration of Authors and Performers in Copyright Contract Law' (n 26) 256; Michael Karas and Roland Kirstein, 'Efficient Contracting under the US Copyright Termination Law' (2018) 54 Int Rev Law Econ 39, 45; Dusollier, 'The 2019 Directive on Copyright in the Digital Single Market' (n 54) 1023; van Gompel and others, 'Evaluatie Wet Auteurscontractenrecht: Eindrapport' (n 102) 56; Xalabarder, 'The Principle of Appropriate and Proportionate Remuneration' (n 203) 16; DCMS Committee, 'Economics of Music Streaming. Second

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Especially in the streaming age, which is characterised by a shift in focus from a phonogram's release to the objective of achieving sustained listening over time, a choice for instant gratification is defensible. However, it would be unfair for such an immediate payment to be wildly non-commensurate with the long-term value of the musical content. While royalty arrangements are usually considered to be more musician-friendly, corporate partners may wish to provide proportionate remuneration to ensure the cooperation of musicians in promoting the music at issue.[281] Indeed, musicians who receive royalties have a commercial incentive in this sense.[282] However, the lower proportion of revenues accorded to corporate partners under a royalty arrangement may decrease their incentive to exploit and thus indirectly result in lower musician revenue in absolute terms.[283]

Depending on the circumstances, therefore, both lump sum and royalty arrangements may be deemed 'appropriate and proportionate'. In view of this, it appears unwise to simplistically remove parties' freedom in this regard.[284] Instead, we must look beyond the distinction between lump sums and royalties and shape the requirement of fair remuneration in an alternative way.

Below, a set of guiding criteria is developed, based on an analysis of relevant legislation, case law and legal doctrine. A clear parallel may be discerned with the criteria applied to the concept of fair exploitation. Again, focus first lies with substantive aspects and the impact of digitisation, before bringing personal, geographical and temporal dimensions into the equation. Sector practices and collectively bargained solutions serve as an additional guideline. The application of these criteria may lead to a broad spectrum of results in practice – indeed, it could be argued that, under some circumstances, a fair remuneration may equal zero.

Substantively speaking, the significance of individual musicians' contributions[285] and their perceived intrinsic value is pertinent, as is the concrete frequency and extent of exploitation of the protected content as a unit.[286] The former two aspects

Report of Session 2021–22' (15 July 2021) 33. Cf regarding the audio-visual sector Shapiro, 'Remuneration Provisions in the DSM Copyright Directive and the Audiovisual Industry in the EU' (n 38) 781.

[281] Kretschmer and others, 'The Relationship between Copyright and Contract Law' (n 260) 24, 66; 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) 41; Europe Economics and others, 'Remuneration of Authors and Performers' (n 188) 110.

[282] Musicians who are remunerated by way of a lump sum also have such an incentive, but only to the extent that this would help them to secure future contracts.

[283] Europe Economics and others, 'Remuneration of Authors and Performers' (n 188) 111.

[284] The EU legislator allows Member States 'to define specific cases for the application of lump sums, taking into account the specificities of each sector', see Rec 73 DSM Directive.

[285] Rec 73 DSM Directive; Art L 212-3(II) French IP Code for performers; Case C-265/19 *Recorded Artists Actors Performers v Phonographic Performance (Ireland) and Others* [2020] ECLI:EU:C:2020:677, para 56; Brison, *Het Naburig Recht van de Uitvoerende Kunstenaar* (n 116) 440–41.

[286] Cf Arts XI.167/1, XI.205/1 Belgian CEL; Art L 212-3(II) French IP Code for performers; Art 32(2) *jo* 79(2a) German Copyright Act.

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relate to the use of the contribution in the music and are difficult to quantify and assess in advance. Above, an attempt was made to render these concepts more concrete.[287] However, the fact-specific nature of such concretisation makes it difficult to accord a high degree of relevance to this first criterion in the conceptualisation of 'fair remuneration'. Regardless, as an overarching observation, it is submitted that a higher degree of use of a musician's contribution should correspond to a higher remuneration for such musician.

Since remuneration is garnered through exploitation activities, the following relevant criterion is the concrete scope of such activities, with the concept of fair exploitation both on- and offline[288] as a pertinent benchmark.[289] However, while fair exploitation should focus on methods of exploitation deemed significant, the calculation base for fair remuneration should include *all* methods of exploitation.

An interlinked question is whether the remuneration should be contractually specified for each separate method of exploitation and in how much detail the calculation method should be described in the contract.[290] Reference may be made to the duty to specify that applies under both Belgian and French law.[291] While such a specification is in principle beneficial for both transparency and legal certainty through the reduction of information asymmetries, the substantive added value is questionable.[292] It is likely to merely lead to the inclusion of long, complex lists in the contract, thus resulting in a negative follow-on effect in terms of transparency.[293]

The legal framework regarding fair remuneration must respond to the challenges set by digitisation.[294] Traditional, analogue revenue sources grafted onto the sale of 'copies' have been joined – and, to a significant extent, even replaced – by new, digital models where income is derived from consumer subscriptions and/or advertising. Futureproof fairness in terms of remuneration may only be achieved if all parties receive a fair share of all relevant revenues connected with the exploitation of music, whatever the source.[295] Digital methods of exploitation should be accompanied by appropriately tailored remuneration arrangements.[296] Restrictions

[287] See above, Section 5.2.2.4.
[288] See Section 5.2.2.4. See also Rec 73 DSM Directive.
[289] Cf Art L 212-3(II) French IP Code for performers; Art 32(2) *jo* 79(2a) German Copyright Act.
[290] Dusollier and others, 'Contractual Arrangements Applicable to Creators' (n 17) 15; Europe Economics and others, 'Remuneration of Authors and Performers' (n 188) 156; Bently and others, 'Strengthening the Position' (n 199) 51–52; Dusollier, 'EU Contractual Protection of Creators' (n 6) 439, 449, 456; Xalabarder, 'The Remuneration of Authors and Performers' (n 52) 136. The difficulties for musicians in obtaining transparency and achieving control over their corporate partners' activities are treated in more detail in Chapter 7.
[291] See Chapter 4, Section 4.4.2.
[292] Cf Dusollier and others, 'Contractual Arrangements Applicable to Creators' (n 17) 103–04; Europe Economics and others, 'Remuneration of Authors and Performers' (n 188) 143.
[293] Europe Economics and others, 'Remuneration of Authors and Performers' (n 188) 143, 145.
[294] European Copyright Society, 'Comment' (n 54) 133.
[295] Dusollier, 'An Effective and Comprehensive Contractual Protection of Creators and Performers' (n 89).
[296] European Copyright Society, 'Comment' (n 54) 138.

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regarding the scope of rights granted may provide a (partial) solution.[297] Another positive mitigating strategy, which has been followed in both Germany and the Netherlands, is to link emerging methods of exploitation with an unwaivable right to additional remuneration on the part of both composing and performing musicians.[298] This combines efficiency considerations as to exploitation with the objective of securing fair remuneration. The criteria that may shape fair remuneration should apply in order to ensure that this additional remuneration for new methods of exploitation does not remain purely symbolic. In case no guarantee may be provided, the grant of rights for new methods of exploitation should be reversible.[299]

Many of the discounts applied in the analogue age are unfit for a digitised context.[300] Yet while many music industry deals have become more artist-friendly, discounts still apply to a certain extent and the lion's share of digital revenue still accrues to the major rights owners.[301] Fairness in royalty arrangements requires discounts, deductions and other costs indicated as 'overheads' to be limited to what is reasonable. These should correspond to justifiable costs incurred by corporate partners throughout the exploitation process. Structural discounts and deductions that cannot be justified by specific actions by the corporate partner should be avoided.[302] Full transparency on applied discounts and deductions is required.[303]

[297] See Chapter 4, Section 4.4.1.

[298] See (1) in Germany: Arts 32c, 79b German Copyright Act (see also Art 137l(5) German Copyright Act); Fromm and Nordemann, *Urheberrecht* (n 58) 781–86; Dreyer and others, *Urheberrecht* (n 58) 771–75; Möhring and Nicolini, *Urheberrecht* (n 58) 467–77 and (2) in the Netherlands: Arts 25c(6) *jo* 25h(1) Dutch Copyright Act *jo* Art 2b Dutch Neighbouring Rights Act; Visser and others, *ACR: Auteurscontractenrecht* (n 44) 132–37; Spoor and others, *Auteursrecht* (n 60) 565–67. See also European Copyright Society, 'Comment' (n 54) 138. Regarding audio-visual works, see in particular Art 45d Dutch Copyright Act, Art 3 Dutch Neighbouring Rights Act; Visser and others, *ACR: Auteurscontractenrecht* (n 44) 275–85. On the application of this right to additional remuneration in the context of secondary relationships, see below, Section 5.4.3.1.

[299] On the termination phase of the contract, see Chapter 6.

[300] Gulinck, *Hier Tekenen!* (n 1) 452.

[301] Donald Passman, *All You Need to Know about the Music Business* (10th edn, Simon & Schuster 2019) 94; Chris Cooke, *Dissecting the Digital Dollar* (3rd edn, Music Managers Forum and CMU Insights 2020) 86–91; van Gompel and others, 'Evaluatie Wet Auteurscontractenrecht: Eindrapport' (n 102) 106; DCMS Committee, 'Economics of Music Streaming' (n 280) 39, 61, 63.

[302] Gulinck, *Hier Tekenen!* (n 1) 452; van Gompel and others, 'Evaluatie Wet Auteurscontractenrecht: Eindrapport' (n 102) 54. See Visser and others, *ACR: Auteurscontractenrecht* (n 44) 190–93; Spoor and others, *Auteursrecht* (n 60) 581. As this potential ground of unreasonableness refers to the corporate partner's contract performance, it may be argued that Art 25f(2) Dutch Copyright Act cannot apply subsequent to the Dutch Supreme Court judgment in the Garrix case (see Chapter 4, Section 4.4.1.3 and Dutch Supreme Court 17 December 2021, docket numbers 20/01155, 20/01158, ECLI:NL:HR:2021:1923, paras 3.1.1–3.1.4, 3.4.1–3.4.2). Such an interpretation of the judgment at issue is unmerited, especially if the structural disproportion at issue was already present at the moment of contract formation. Cf Art 12 *jo* Recs 28, 30 CRM Directive.

[303] Cf CMU, 'Performer Payments from Streaming' (2021) 13. On transparency, see below, Section 5.3.3.

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As to the calculation of royalties, the royalty percentage applied to digital downloads and streaming revenue should be significantly higher than what is the case for physical sales.[304] Indeed, the overhead costs associated with shipping, packing, manufacturing and distributing physical products have all but disappeared, as has the risk of damaged goods.[305] However, in order to maintain the flexibility needed to ensure a futureproof legal framework, this book does not argue in favour of a regulatory minimum royalty percentage. Regardless, a royalty rate of 30 per cent for streaming should be a standard, rather than an outlier. In many cases, a convincing argument may even be made in favour of a 50/50 division of streaming revenue, such as for artists who signed only recently, after having nurtured their own fan base until a corporate partner took note of them.[306] Moreover, the use of a sliding royalty scale is to be supported, as is the use of profit-sharing deals over recoupment deals – including the potential cancellation of unrecouped advances after a given period.[307] Conversely, excessive kickback arrangements that force a musician to forgo a part of CMO revenue obtained through remuneration rights to their corporate partners should be (more than) frowned upon, as should instances of excess cross-collateralisation and controlled composition clauses.[308]

The primary takeaways as to the distribution of streaming revenue are that musician revenue (1) should be calculated on the basis of all quantifiable revenues stemming from exploitation, (2) using a fair royalty rate and (3) without excessive

[304] Rogers, *The Death & Life of the Music Industry in the Digital Age* (n 5) 11; Mulligan, *Awakening* (n 7) 160; Baym, *Playing to the Crowd* (n 113) 68; Gulinck, *Hier Tekenen!* (n 1) 294–96, 443, 446, 465; CMU, 'Performer Payments from Streaming' (n 303) 14–15; DCMS Committee, 'Economics of Music Streaming' (n 280) 39, 67–68.

[305] Rogers, *The Death & Life of the Music Industry in the Digital Age* (n 5) 11; Baym, *Playing to the Crowd* (n 113) 68; Gulinck, *Hier Tekenen!* (n 1) 443, 446; DCMS Committee, 'Economics of Music Streaming' (n 280) 39, 67–68; Rebecca Giblin and Cory Doctorow, *Chokepoint Capitalism: How Big Tech and Big Content Captured Creative Labor Markets and How We'll Win Them Back* (Beacon Press 2022) 60.

[306] Cf Pierre-É Lalonde, 'Study Concerning Fair Compensation for Music Creators in the Digital Age' (2014) 2–4, 24, 27; Hannibal Travis, *Copyright Class Struggle: Creative Economies in a Social Media Age* (1st edn, Cambridge University Press 2018) 161–62; 'The Ten Things People Get Wrong about Streaming – Part Two' directed by Andy Malt and Chris Cooke (Podcast, 18 May 2020) <https://bit.ly/3ZVkoYl>; Raad voor de Intellectuele Eigendom, 'Advies' (n 64) 80; Giblin and Doctorow, *Chokepoint Capitalism* (n 305) 222.

[307] Mulligan, *Awakening* (n 7) 160; Gulinck, *Hier Tekenen!* (n 1) 294–96, 465; van Gompel and others, 'Evaluatie Wet Auteurscontractenrecht: Eindrapport' (n 102) 37; Christian Castle and Claudio Feijóo, 'Study on the Artists in the Digital Music Marketplace: Economics and Legal Considerations' (WIPO 2021) 19; DCMS Committee, 'Economics of Music Streaming' (n 280) 28–29, 103.

[308] See Chapter 2, Section 2.4.5. See also Ginsburg, 'The Role of the Author in Copyright' (n 113) 78; Passman, *All You Need to Know About the Music Business* (n 301) 89; van Gompel, 'Non, Non, Rien n'a Changé' (n 224) 55. Cf Code of Conduct Muziekuitgevers (15 June 2020) s a). On the possible applicability of Art 25f(2) Dutch Copyright Act, quoting the relevant sections of the Explanatory Memorandum of the 2015 Dutch Copyright Contract Act, see Visser and others, *ACR: Auteurscontractenrecht* (n 44) 190–93; Spoor and others, *Auteursrecht* (n 60) 581.

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analogue discounts and/or deductions. In general, a move away from recoupment deals and toward profit-sharing deals is to be stimulated.

Things are moving in the right direction. A first example relates to the long-standing practice of recoupment deals. The specific nature of such deals implies that corporate partners are often already making a profit on the music while incoming revenues are still subject to recoupment.[309] The majors' initiatives not to apply existing unrecouped balances to certain revenues obtained on the basis of legacy contracts hold promise.[310] Other notable examples include the policy of the Beggars group to write off a quarter of the unrecouped balance after fifteen years.[311]

Article 18 DSM Directive does not expressly refer to forms of revenue flowing to corporate partners that are not directly linked with particular exploitation activities, such as breakage, equity and profits from sale, non-allocable income assigned to corporate partners and, finally, the economic value of the ability to leverage back catalogue to secure coveted positions on streaming playlists.[312] Many of these revenues cannot be attributed to a given piece of music, let alone to a specific musician. In view of the significant commercial value of indirect remuneration arrangements, the requirement of fair remuneration should also cover indirect revenue flows – provided that these are quantifiable.[313] Reference may be made to revenues flowing from breakage, equity and non-allocable income. An analogue rule has already been included in French law for literary publishing.[314] As is the case in Germany, the corporate partner's profits may serve as an additional criterion, if applicable profit margins are excessive.

The identity of the parties may also play a role in determining what remuneration arrangements qualify as fair. A uniform approach to composing and performing musicians is merited. For the musician, an increase in fame should go hand in hand with an increase in remuneration, at least to a certain extent. The application of

[309] See Chapter 2, Section 2.4.5.

[310] Andre Paine, 'UMG Wipes Out Unrecouped Balances for Legacy Artists' Royalties' (*Music Week*, 1 April 2022) <https://bit.ly/46WMYcB>; Murray Stassen, 'Sony Music to Expand Unrecouped Balance Program to More Artist and Songwriters' (*Music Business Worldwide*, 26 May 2022) <https://bit.ly/3tBNyyo>; Murray Stassen, 'Warner's Dismissal of Legacy Unrecouped Advances Has already Increased Earnings of 4.500 Artists and Producers Globally' (*Music Business Worldwide*, 26 January 2023) <https://bit.ly/46zBbRw>. See also Richard Osborne and Hyojung Sun, 'Economics of Streaming: Contract Adjustment and Rights Reversion' (6 February 2023) s 4.2–4.3.

[311] Castle and Feijóo, 'Study on the Artists in the Digital Music Marketplace' (n 307) 19, 48; DCMS Committee, 'Economics of Music Streaming' (n 280) 29; David Hesmondhalgh and others, 'Music Creators' Earnings in the Digital Era' (2021) 99; Giblin and Doctorow (n 305) 59.

[312] Dusollier, 'An Effective and Comprehensive Contractual Protection of Creators and Performers' (n 89).

[313] Cf Dusollier and others, 'Contractual Arrangements Applicable to Creators' (n 17) 104.

[314] See Art L 132-17-6 French IP Code, which expressly requires indirect revenues stemming from digital exploitation to be included in the calculation base. For music publishing, see Code des Usages et des Bonnes Pratiques de l'Edition des Œuvres Musicales (n 172) s 3.6.

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sliding-scale remuneration arrangements, whereby the royalty rate increases in a way commensurate to the music's commercial success, may be helpful. If a group of musicians is involved, reference may be made to conventional relations of hierarchy, such as those between different roles in an orchestra and/or in a band, while shying away from undue generalisation.[315] On the corporate partner's side, account should be taken of the market conditions at the time of investment, as well as the costs incurred and the amount of risk.[316] In addition, the structure, size and profit margin of corporate partners may be considered relevant – suggesting a somewhat more lenient application of the law vis-à-vis SMEs.

The next question is whether remuneration is provided for the entire time of exploitation, as well as when it is paid out.[317] Payment should take place within a reasonable period following the exploitation to which the remuneration relates. A certain diligence on the part of corporate partners may be expected, by way of a specification of the general duty of good-faith contract performance, which implies the need for a mechanism that efficiently collects revenues from external corporate partners and pays musicians what they are due without unnecessary delay.[318] Inspiration may be drawn from the regime applicable to literary publishing under French law, according to which the publisher must pay authors what is due to them within six months after closing the accounts for a given period, unless a collective agreement specifies otherwise.[319]

In terms of geographical scope, fair remuneration requires sharing revenues with musicians for exploitation in all relevant territories where exploitation takes place. A clear preference goes out to an 'at source' calculation of royalties that does not deduct potentially excessive commissions charged by additional intermediaries, such as sub-publishers.[320]

The shaping of the concept of fair remuneration should also take due account of sector practices, referring to the compensation that is common in the sector for the

[315] European Copyright Society, 'Comment' (n 54) 141.

[316] Malevanny, *Online Music Distribution* (n 109) 92; van Gompel and others, 'Evaluatie Wet Auteurscontractenrecht: Eindrapport' (n 102) 28.

[317] Cf Art 32(2) *jo* 79(2a) German Copyright Act.

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

[319] Art L 132-17-3-1 French IP Code. If the literary publisher fails to deliver, the author may send a notice of default within a year, which grants the publisher an additional three months. If no payment is made, the publishing contract is automatically rescinded. This rule mandating timely payment was rendered generally binding by the French Act of 7 July 2016 and also applies to contracts that were already ongoing at that time (see Art 107(IV) French Act of 7 July 2016). See also Code des Usages et des Bonnes Pratiques de l'Edition des Œuvres Musicales (n 172) s 3.5.

[320] Cf Art 15 *jo* Rec 30 CRM Directive as to limitations that apply to deductions in the context of the international collective management of copyright through reciprocity agreements.

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exploitation activity at issue.[321] The parameters used by CMOs in the context of revenue distribution may provide a source of inspiration.[322]

Further, when nearly all market participants receive a similar amount for a similar grant of rights, this consideration may contribute to a finding of fairness concerning a given remuneration arrangement.[323] However, existing practices should not be followed blindly. Indeed, the mere fact that a certain type of remuneration arrangement is customary does not in itself imply that it is fair.[324]

Together with relevant rules stemming from provisions on unfair B2B contract terms and provisions of general contract law, this may lead to many of the unfair remuneration practices in the music industry becoming a thing of the past. The express prohibition of contractual deviations from this right in the chosen jurisdictions is a promising step.[325] As to the temporal application of Article 18 DSM Directive, a balance must be found between legal certainty and enhanced fairness. In view of the internal balancing measures, such as the principled allowance of a lump sum, the temporal application to ongoing contracts from 7 June 2021 onwards is defensible, provided that any retroactive application to past exploitation activities is excluded.[326]

5.3.2.2.3 COLLECTIVE BARGAINING Collectiveness may enhance fairness within the music value chain. Collective entities such as trade unions may support and even represent musicians in the context of specific negotiations with certain corporate partners, as well as contribute to industry-wide good practices. Several forms of self-regulation may be envisaged, such as guidelines, best practices, codes of

[321] Rec 73 DSM Directive; Art L 212-3(II) French IP Code for Performers; Art 32(2) *jo* 79(2a) German Copyright Act; Lucas-Schloetter, 'The Remuneration of Authors and Performers in Copyright Contract Law' (n 26) 259; Dusollier, 'EU Contractual Protection of Creators' (n 6) 439–40.

[322] See above, Section 5.2.2.4. Cf Tobias Holzmüller, 'Remuneration Rights. General Report: Mechanisms to Ensure Adequate Remuneration for Authors and Performers' in Silke von Lewinski (ed), *Remuneration for the Use of Works. Exclusivity vs Other Approaches* (De Gruyter 2017) 198, 201.

[323] Malevanny, *Online Music Distribution* (n 109) 92.

[324] German Federal Court of Justice 7 October 2009, docket number I ZR 38/7 <https://openjur.de/u/71662.html>; Hugenholtz and Guibault, 'Auteurscontractenrecht' (n 58) 50; Visser, 'Pippi Langkous en het nieuwe auteurscontractenrecht' (n 277) 1292; Hugenholtz, 'Towards Author's Paradise' (n 36) 402; Visser and others, *ACR: Auteurscontractenrecht* (n 44) 86; Bently and others, 'Strengthening the Position' (n 199) 65; Lucas-Schloetter, 'The Remuneration of Authors and Performers in Copyright Contract Law' (n 26) 259; Martin Senftleben, 'More Money for Creators and More Support for Copyright in Society – Fair Remuneration Rights in Germany and the Netherlands' (2018) 41 Colum J L & Arts 413, 424–25; Caron, *Droit d'Auteur et Droits Voisins* (n 17) 417; Raad voor de Intellectuele Eigendom, 'Advies' (n 64) 80; Paramythiotis, 'Fairness in Copyright Contract Law' (n 219) 85.

[325] Cf Dusollier and others, 'Contractual Arrangements Applicable to Creators' (n 17) 15.

[326] Cf European Copyright Society, 'Comment' (n 54) 140.

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conduct, memoranda of understanding and/or model agreements.[327] By way of example, such arrangements may determine non-mandatory remuneration rates for digital exploitation.[328] The active promotion of such best practices by public authorities is likely to be beneficial.[329] In this context, too, much is to be said for an industry-wide dialogue that brings together all significant stakeholder representatives, as was included in the initial Commission Proposal for the DSM Directive regarding the operationalisation of the chapter on copyright exploitation contracts.[330] Some of the existing good practices relevant to the music industry were already discussed.[331] On the international level, illustrative reference may, among other things, be made to the 2014 'Fair Digital Deals Declaration' championed by WIN, which commits independent record companies (not the majors) to transparency in DSP contracts and revenue sharing with artists.[332]

Taking the idea of self-regulation one step further is the potential recourse to collective bargaining. Positive aspects thereof include an undeniable reduction in transaction costs, as well as the advantage of transcending the problems of enforcement associated with the application of the protective legal framework to individual contractual relationships.[333] In the music industry, initiatives like Merlin are gaining significant traction in the – traditionally very fragmented – independent music community.[334] The leverage of digital aggregators in negotiations with DSPs may fulfil a similar role for independent musicians. The opportunities offered by collective bargaining with primary corporate partners bear particular relevance to session musicians (including orchestra musicians), whose relative bargaining power in individual negotiations is especially limited.[335] It is therefore unsurprising that the legal framework repeatedly refers to the role of collective bargaining in further

[327] Lardinois, *Les Contrats Commentés de l'Industrie de La Musique* 2.0 (n 18) 78–105; Dusollier and others, 'Contractual Arrangements Applicable to Creators' (n 17) 15, 105; European Copyright Society, 'Comment' (n 54) 138; van Gompel and others, 'Evaluatie Wet Auteurscontractenrecht: Eindrapport' (n 102) 11, 45, 86; van Gompel, 'Non, Non, Rien n'a Changé' (n 224) 8; Amy Thomas and others, 'Authors' Earnings in the UK' (17 August 2023) 10.

[328] Cf Dusollier and others, 'Contractual Arrangements Applicable to Creators' (n 17) 76.

[329] Bruno Racine, 'L'Auteur et l'Acte de Création' (January 2020) 62–64.

[330] Commission, SWD(2016) 301 final (n 4) 41. Cf Rec 77 DSM Directive on the consultation of all stakeholders as to the operationalisation of the transparency obligations under Art 19 DSM Directive.

[331] See *Protocole d'Accord pour un Développement Equitable de la Musique En Ligne* – Memorandum of Understanding for the Equitable Development of Music Online (2 October 2015); Code des Usages et des Bonnes Pratiques de l'Edition des Œuvres Musicales (n 172); Code of Conduct Muziekuitgevers (n 308).

[332] See <https://winformusic.org/fair-digital-deals>.

[333] Silke von Lewinski, 'Collectivism and Its Role in the Frame of Individual Contracts' in Jan Rosén (ed), *Individualism and Collectiveness in Intellectual Property Law* (ATRIP Intellectual Property, Edward Elgar 2012) 118; Dusollier, 'An Effective and Comprehensive Contractual Protection of Creators and Performers' (n 89); European Copyright Society, 'Comment' (n 54) 142.

[334] See Chapter 2, Section 2.3.3.

[335] Cf Europe Economics and others, 'Remuneration of Authors and Performers' (n 188) 45.

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shaping the applicable legal framework – especially for the performance phase of the contract.[336]

Collective bargaining appears to be on the rise in all jurisdictions under review here – at least in theory. Germany, for one, has been a strong proponent of self-regulation in the CCIs for some years, and this has shone through in the legal framework.[337] Most notably, joint remuneration arrangements that set general guidelines for appropriate fees[338] – to be distinguished from traditional collective bargaining between trade unions – are irrefutably presumed to be fair in the sense of German copyright contract law.[339] This process is meant to enable representatives of both artists and corporate partners to enter into negotiations on joint remuneration agreements.[340] Joint remuneration agreements may be established either through informal negotiations, or with the intervention of an arbitration board.[341] The representative associations must be independent and have the requisite competence to enter into such agreements.[342] If they represent a significant proportion of artists in a certain CCI, their competence is presumed until proof to the contrary.[343] Where a joint remuneration agreement applies (including when the corporate partner is not a party to it but is a member of an association that entered into the joint remuneration agreement), no deviations are allowed to the detriment of the

[336] As to publishing contracts under French law, see Art L 132-17-8 French IP Code. See also Jeremy de Beer, 'Making Copyright Markets Work for Creators, Consumers and the Public Interest' in Rebecca Giblin and Kimberlee Weatherall (eds), *What If We Could Reimagine Copyright?* (ANU Press 2017) 167; European Copyright Society, 'Comment' (n 54) 133.

[337] Dusollier and others, 'Contractual Arrangements Applicable to Creators' (n 17) 62; Malevanny, *Online Music Distribution* (n 109) 91.

[338] In German: *Gemeinsame Vergütungsregeln*.

[339] Arts 32(2), (4) *jo* 79(2a) German Copyright Act; Nikolaus Reber, 'The "Further Fair Participation" Provision in Art 32 a (2) German Copyright Act – Claims against a Third-Party Exploiter of a Work' (2016) 11 Journal of Intellectual Property Law & Practice 382, 382; Senftleben, 'More Money for Creators and More Support for Copyright in Society' (n 234) 428; Malevanny, *Online Music Distribution* (n 109) 91. Collectively bargained remuneration arrangements may also be used as a basis to determine what constitutes fair remuneration in music contracts that were concluded at an earlier stage, see Art 32(2a) *jo* 79(2a) German Copyright Act. A similar rule is on the table in the Netherlands at the time of writing. More specifically, an addition in this sense to Art 25c Dutch Copyright Act is envisaged, see <https://bit.ly/3Uze3Ov>.

[340] Von Lewinski, 'Collectivism and Its Role in the Frame of Individual Contracts' (n 333) 119–20. For detail on the German regime regarding joint remuneration agreements, see ia Schricker, *Urheberrecht. Kommentar* (n 58) 755–814; Fromm and Nordemann, *Urheberrecht* (n 58) 811–29; Dreyer and others, *Urheberrecht* (n 58) 797–807; Möhring and Nicolini, *Urheberrecht* (n 58) 503–37.

[341] In German: *Schlichtungsstelle*. Arts 36(3)–(4) *jo* 36a *jo* 79(2a) German Copyright Act; Fromm and Nordemann, *Urheberrecht* (n 58) 829–35; Dreyer and others, *Urheberrecht* (n 58) 807–14; Möhring and Nicolini, *Urheberrecht* (n 58) 537–52.

[342] Arts 36(2) *jo* 79(2a) German Copyright Act.

[343] ibid.

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artist.[344] Courts may extend the application of a joint remuneration agreement to the entire sector, and may moreover use an existing agreement in a similar sector to guide them in the determination of what is fair in situations that, strictly speaking, fall outside its scope.[345] Despite these extensive rules, it appears that the system of joint remuneration agreements has had little success so far, due to an unwillingness on the part of corporate partners to participate.[346]

The French legislator has also expressly enabled collective bargaining for remuneration arrangements under national law.[347] Moreover, collective agreements relating to remuneration between representative organisations may be certified by the minister for culture and thus made mandatory for a particular sector.[348] Reference may be made to the collective labour agreement on phonographic publishing, dating back to 2008.[349] The effect of this agreement was legally extended to the entire music sector in 2009 and, since then, negotiations as to its amendment have been taking place on an annual basis.[350] This collective agreement has not been without criticism, as it is said to lead to standardised contracts whereby the transfer of exclusive rights is the norm and where the room left for negotiation on the part of individual musicians is too limited.[351] Under the impetus of French performers' CMO Spedidam, lengthy judicial proceedings were conducted against its application.[352] Outside the sphere of employment, in 2015 French stakeholders signed a Memorandum of Understanding in which they expressed their committal

[344] Violations of this prohibition are sanctioned with a right to injunctive relief on the part of the author, see Art 36b German Copyright Act. Subsequent to Art 36c German Copyright Act, artists may demand the agreement at issue be amended so as to remove the deviation at issue.

[345] See eg German Federal Court of Justice 7 October 2009, docket number I ZR 38/7 <https://openjur.de/u/71662.html>; German Federal Court of Justice 21 May 2015, docket number I ZR 62/14 <https://openjur.de/u/862676.html>; Senftleben, 'More Money for Creators and More Support for Copyright in Society' (n 234) 425.

[346] See eg Thomas Hoeren, 'Was bleibt von §§ 32, 32a, 36 UrhG? Überlegungen zur Zukunft des Urhebervertragsrechts' in Kirsten-Inger Wöhrn and others (eds), *Festschrift für Artur-Axel Wandtke zum 70 Geburtstag am 26 März 2013* (Walter De Gruyter 2013) 174–79, 186; Visser and others, *ACR: Auteurscontractenrecht* (n 44) 103–05; Lucas-Schloetter, 'European Copyright Contract Law' (n 26) 898.

[347] See extensively Séverine Dusollier, 'L'expérience française des négociations sectorielles et collectives' (Studiedag Belgische Vereniging voor Auteursrecht, Brussels, 21 April 2023). See also *Conseil d'État* 28 December 2021 and 15 November 2022, docket number 454477 <https://bit.ly/3QVgI4P>.

[348] Lucas-Schloetter, 'The Remuneration of Authors and Performers in Copyright Contract Law' (n 26) 261.

[349] *Convention Collective Nationale de l'Édition Phonographique* of 30 June 2008 <https://bit.ly/3Dr2EGk>.

[350] This was done through a decree of 20 March 2009; Europe Economics and others, 'Remuneration of Authors and Performers' (n 188) 46.

[351] ibid.

[352] See most recently Court of Appeal Versailles 27 January 2022, docket number 21/01141 <https://bit.ly/44AJQBj>; French Supreme Court 13 January 2021, docket number 19-13.977, ECLI:FR:CCASS:2021:SO00072.

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to securing fair remuneration of musicians in the digital sphere.[353] They affirmed many of the points made in this chapter, such as the need to include indirect revenues in the calculation base for musician remuneration[354] and to limit contractual deductions to what is reasonable,[355] as well as to ensure a minimum remuneration for performers as to online exploitation.[356] Furthermore, the abovementioned minimum remuneration for streaming for performing musicians under French law[357] led to a stakeholder agreement, the application of which was extended by Ministerial Decree on 1 July 2022.[358]

In 2015, the Dutch legislator established a regime of government approval of remuneration schemes that result from collective bargaining. Upon the joint request of relevant independent associations representing both artists and their corporate partners, the competent minister may certify the amount of such fair remuneration in a sector-specific way.[359] An attempt to have recourse to this system by representatives of composers and music publishers was rejected in 2019.[360] The successful completion of this procedure has yet to occur at the time of writing. The same is true for the possibility to set up a so-called *standaardregeling*[361] under Dutch civil law, which allows a commission that consists of the majority of representatives of collective organisations to establish a regime that is subsequently meant to apply in a general way.[362] Alternatively, cooperation in the context of collective negotiations may be sought from the *Autoriteit Consument & Markt* (ACM, the Dutch competition authority).[363] As to performers, there are multiple recommended models for copyright exploitation contracts dating from 2018 and 2019, provided jointly by Dutch representative organisations for record companies and

[353] Memorandum of Understanding 2 October 2015 (n 331). While this Memorandum was due to be renewed in 2018, that did not happen: see Denis Berthomier, 'Médiateur de la musique. Rapport annuel 2019–2020' (2020) 5. Nevertheless, its contents are still relevant today.

[354] Memorandum of Understanding 2 October 2015 (n 331) s 5.2. The issue of equity shares in DSPs is also expressly acknowledged, see ibid s 5.3. As to music publishing, see also Code des Usages et des Bonnes Pratiques de l'Edition des Œuvres Musicales (n 1727) s 3.5.

[355] Memorandum of Understanding 2 October 2015 (n 331) s 5.4.

[356] ibid s 5.5.

[357] Art L 212-14 French IP Code.

[358] *Arrêté du 29 juin 2022 pris en application de l'article L 212-14 du code de la propriété intellectuelle et rendant obligatoire l'accord du 12 mai 2022 relatif à la garantie de rémunération minimale*, JORF No 0151, 1 July 2022. See also <https://bit.ly/3Pgrov1>; Dusollier and Pascault, 'Contractual Protection of Authors and Performers in France after the CDSM Directive' (n 229) 72.

[359] Art 25c(2)-(5) Dutch Copyright Act *jo* Art 2b Dutch Neighbouring Rights Act; Visser and others, *ACR: Auteurscontractenrecht* (n 44) 98–131.

[360] See van Gompel and others, 'Evaluatie Wet Auteurscontractenrecht: Eindrapport' (n 102) 33.

[361] In English: 'standard arrangement' or 'standard regulation'.

[362] Art 6:214 Dutch Civil Code and *Wet Commissies Standaardregelingen* <https://bit.ly/3BLEE01>; van Gompel and others, 'Evaluatie Wet Auteurscontractenrecht: Eindrapport' (n 102) 89.

[363] ibid 34; van Gompel, 'Non, Non, Rien n'a Changé' (n 224) 9.

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musicians.[364] In addition, on 15 June 2020, representative organisations from the music publishing sector entered into a sector agreement that, among other things, guarantees musicians two-thirds of revenue from collectively managed remuneration rights.[365] More generally, for all CCIs, the launch of a 'Fair Practice Code' is noted, which expressly refers to the need to fairly remunerate artists.[366] Finally, the Dutch government recently proposed to (1) establish a legal presumption that a collectively negotiated remuneration is fair, mirroring the abovementioned German rule and (2) allow for specification of the Dutch provisions of copyright contract law through collective bargaining.[367]

Subsequent to the implementation of the DSM Directive, Belgian law establishes a collective mechanism meant to intervene in the determination of fair remuneration.[368] Some industry-led collective initiatives may already be highlighted, such as the *Juist is Juist* soft law principles for collaborations in the CCIs, that focus on transparency and shared responsibility.[369]

The most notable example in the UK music industry, finally, are the agreed rates, terms and conditions between the Musicians' Union and the BPI (British Recorded Music Industry) for session musicians for commercial audio release.[370]

Despite legislative efforts to bolster collective bargaining, available data suggests a limited impact on the level of remuneration in the music sector – albeit with some exceptions.[371] This has been attributed to the procedural steps involved, as well as the limited number of representative artist associations, combined with an apparent unwillingness of corporate partners to participate, leading to delay strategies in the negotiation process.[372] While laudable initiatives are ongoing, the opportunities of enhanced collectiveness are yet to be fully mined.

[364] See (1) *Aanbevelingen Artiestenovereenkomsten* <https://bit.ly/30RGAAF>; (2) *Aanbevelingen Licentiecontracten* <https://bit.ly/2YBC260>; and (3) *Sessie-overeenkomst* <https://bit.ly/3FxX8U8>.

[365] Code of Conduct Muziekuitgevers (n 308).

[366] <https://fairpracticecode.nl>.

[367] See draft amendments to Arts 25c, 25h Dutch Copyright Code <https://bit.ly/4407vot>.

[368] Arts XI.167/5, 205/5 Belgian CEL; Explanatory Memorandum Belgian Draft DSM Implementation Act (n 64) 40–41, 63–65 jo 107; Raad voor de Intellectuele Eigendom, 'Advies' (n 64) 79–80.

[369] <www.juistisjuist.be>.

[370] <https://bit.ly/3KOzVRJ>; Richard Arnold, *Performers' Rights* (6th edn, Sweet & Maxwell 2021) 283–87.

[371] Von Lewinski, 'Collectivism and Its Role in the Frame of Individual Contracts' (n 333) 120; Europe Economics and others, 'Remuneration of Authors and Performers' (n 188) 44–45, 131; Bently and others, 'Strengthening the Position' (n 199) 65; Lucas-Schloetter, 'The Remuneration of Authors and Performers in Copyright Contract Law' (n 26) 260–61; Dusollier, 'EU Contractual Protection of Creators' (n 6) 443; Senftleben, 'More Money for Creators and More Support for Copyright in Society' (n 234) 433; Malevanny, *Online Music Distribution* (n 109) 94–95; van Gompel and others, 'Evaluatie Wet Auteurscontractenrecht: Eindrapport' (n 102) 34–35; van Gompel, 'Non, Non, Rien n'a Changé' (n 224) 8.

[372] Von Lewinski, 'Collectivism and Its Role in the Frame of Individual Contracts' (n 333) 120; Lucas-Schloetter, 'The Remuneration of Authors and Performers in Copyright Contract Law'

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There are limits as to what collective action through interest groups can achieve. Certain legal constraints apply. In particular, guild-style collective bargaining in the contract negotiation process leading to standard agreements may run counter to the applicable principles of competition law, in particular Article 101 TFEU[373] and its equivalent under UK law, Section 2 Competition Act 1998,[374] which prohibit anticompetitive agreements, decisions and concerted practices.[375]

Collective labour agreements contravene competition law when they are concluded between undertakings. By contrast, employees – including employed musicians – do not constitute separate undertakings. Given that they perform work for and under the direction of undertakings, they form a single economic unit with that undertaking.[376] As a result, they can freely enter into agreements among themselves without falling foul of the cartel provision.[377]

The possibility of artists to enter into collective bargaining agreements thus turns on their status as undertaking or employee. Freelance musicians are generally considered as undertakings, while orchestra musicians may be employed by 'their' orchestra. Undertakings may try to prevent musicians from bargaining collectively by explicitly qualifying them as non-workers. In the *FNV Kiem* judgment, however, the ECJ held that such strategies were ineffective.[378]

This case concerned a number of substitute orchestra musicians who had entered into a collective labour agreement setting minimum fees. These freelance musicians carried out the same work as the musicians employed by the orchestra, but did so on a self-employed basis. A Dutch court wondered whether such collective agreements

(n 26) 260; Xalabarder, 'The Remuneration of Authors and Performers' (n 52) 140; van Gompel, 'Non, Non, Rien n'a Changé' (n 224) 8.

[373] Treaty on the Functioning of the European Union [2012] OJ C326/47.

[374] See <www.legislation.gov.uk/ukpga/1998/41/section/2>.

[375] Kretschmer and others, 'The Relationship between Copyright and Contract Law' (n 260) 11; Commission, 'Report on the Responses to the Public Consultation on the Review of the EU Copyright Rules' (July 2014) 80; Visser and others, *ACR: Auteurscontractenrecht* (n 44) 99–101; Lucas-Schloetter, 'The Remuneration of Authors and Performers in Copyright Contract Law' (n 26) 261; Senftleben, 'More Money for Creators and More Support for Copyright in Society' (n 234) 433; Dirk Visser, 'Copyright Contract Law in the DSM Directive' (Copyright in the Digital Single Market, Brussels, 30 January 2020); 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; Bernd Waas and Christina Hießl (eds), *Collective Bargaining for Self-Employed Workers in Europe* (Bulletin of Comparative Labour Relations, Kluwer Law International 2021).

[376] Case C-22/98 *Criminal Proceedings against Jean Claude Becu and Others* [1999] ECLI:EU:C:1999:419, para 26.

[377] Case C-67/96 *Albany International v Stichting Bedrijfspensioenfonds Textielindustrie* [1999] ECLI:EU:C:1999:430, paras 52–69 (see also the opinion of Advocate General Jacobs, in particular paras 191–93).

[378] See also Victoria Daskalova, 'Regulating the New Self-Employed in the Uber Economy: What Role for EU Competition Law?' (2018) 19 Ger Law J 461; Friso Bostoen, 'Competition Law in the Peer-to-Peer Economy' in Bram Devolder (ed), *The Platform Economy* (Intersentia 2019) 154–55.

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fell under the cartel prohibition. However, the ECJ clarified that this situation falls outside of the provision's scope if the service providers 'are in fact "false self-employed", that is to say, service providers in a situation comparable to that of employees'.[379] The most pertinent criterion is whether the musicians independently determine their conduct on the market. This is affected by their ability to choose the time, place and content of their activities and whether they bear any commercial risk.[380] If the musicians can determine their own market conduct, they are marked as 'undertakings' from a competition law standpoint and, as a result, subject to the cartel prohibition. *FNV Kiem* prevents misclassified workers from being subject to competition law.[381] This judgment does not allow actual freelance musicians to bargain collectively in the EU. However, a significant margin is offered by the 2022 EC 'Guidelines on the application of EU competition law to collective agreements regarding the working conditions of solo self-employed persons'.[382] These Guidelines apply to persons who are not employed and who rely primarily on their personal labour for the provision of certain services.[383] Solo self-employed persons who are in a comparable situation in terms of subordination and similarity of tasks as employees of the same counterparty should be able to bargain collectively without falling foul of competition law.[384] This proviso is likely to apply to freelance orchestra musicians whose colleagues operate under an employment contract.[385] Such situations fall outside the scope of the cartel prohibition. In addition, the Guidelines specify that the EC will not intervene against certain categories of

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

[380] Europe Economics and others, 'Remuneration of Authors and Performers' (n 188) 56, 140.

[381] The exact consequences of the *FNV Kiem* judgment of the ECJ on the dichotomy between 'worker' and 'undertaking' that determines the scope of this prohibition are yet to be definitively delineated, see in detail Daskalova, 'Regulating the New Self-Employed in the Uber Economy' (n 378).

[382] Commission, 'Guidelines on the application of Union competition law to collective agreements regarding the working conditions of solo self-employed persons' (Communication) 2022/C 374/02. See also Commission, 'Collective Bargaining Agreements for Self-Employed – Scope of Application of EU Competition Rules' (Inception Impact Assessment) Ares(2021) 102652; Commission, 'Impact Assessment Report accompanying the document Communication from the Commission, Guidelines on the application of EU competition law to collective agreements regarding the working conditions of solo self-employed persons (Commission Staff Working Document) SWD(2022)321 final; Parliament, 'Recommendations to the Commission on an EU Framework for the Social and Professional Situation of Artists and Workers in the Cultural and Creative Sectors' (Draft Report) 2023/2051(INL), paras 15–17; Ecorys et al, *Study to Support the Impact Assessment of a Possible EU Initiative to the Application of Competition Rules to Collective Bargaining by Self-Employed (COMP/2020/008): Final Report* (Publications Office 2022).

[383] Commission, 'Guidelines on the application of Union competition law to collective agreements regarding the working conditions of solo self-employed persons' (Communication) 2022/C 374/02, para 2(a).

[384] ibid, paras 26–27.

[385] ibid, Example 4.

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collective agreements entered into by solo self-employed persons who are not in a similar situation to employees.[386] Prior to the Guidelines, the Dutch legislator had already expressly labelled its scheme providing for government approval of collectively bargained remuneration arrangements[387] as being compliant with competition law standards.[388] Reference may also be made to the German Collective Bargaining Act, which expressly allows collective labour agreements for specific categories of authors and performers – albeit mainly in the press and audio-visual sectors.[389] Finally, neither the EC nor any of the national competition authorities have taken any action against collective bargaining in the CCIs in the past.

This indicates that collective bargaining in the music industry has little to fear in terms of competition law enforcement.[390] Indeed, it seems logical that the original gig economy workers – musicians, and possibly also artists in other CCIs, who often depend on corporate partners in a way analogous to employees despite their potential formal status as self-employed freelancers – would be able to benefit from a potential derogation or exemption.[391]

A hard law amendment that simplifies existing procedures concerning government approval of collectively bargained remuneration schemes could further bolster collective bargaining. By way of example, the removal of the need under Dutch law for a joint request to the competent minister if a good-faith attempt at negotiation was unsuccessful[392] may help in bringing corporate partners to the collective negotiation table. A final question is whether it should be possible to extend the mandatory nature of collectively bargained solutions to sector stakeholders that did not take part in the collective negotiation process. This possibility has been established under Belgian, French, German and Dutch law subsequent to the implementation of the DSM Directive.[393] This could lead to a disproportionate encroachment upon either the freedom of contract or the freedom to provide

[386] ibid, para 32.

[387] Art 25c Dutch Copyright Act *jo* Art 2b Dutch Neighbouring Rights Act.

[388] Visser, 'Pippi Langkous en het nieuwe auteurscontractenrecht' (n 277) 1293; Hugenholtz, 'Towards Author's Paradise' (n 36) 402; van Gompel and others, 'Evaluatie Wet Auteurscontractenrecht: Eindrapport' (n 102) 85; van Gompel, 'Non, Non, Rien n'a Changé' (n 224) 9. On the position of the Dutch competition authority, see ACM, 'Leidraad Tariefafspraken Zzp'ers' [2020] 26. See also P Bernt Hugenholtz, 'Artikel 18-23 DSM-richtlijn: Exploitatiecontracten' [2020] AMI 187, 188.

[389] Art 12a Collective Bargaining Act; Hugenholtz and Guibault, 'Auteurscontractenrecht' (n 58) 29, 60–62; Europe Economics and others, 'Remuneration of Authors and Performers' (n 188) 56–58, 140–41, 150–51.

[390] Senftleben, 'More Money for Creators and More Support for Copyright in Society' (n 234) 428.

[391] Hugenholtz and Guibault, 'Auteurscontractenrecht' (n 58) vii, xiii, 84–85; Senftleben, 'More Money for Creators and More Support for Copyright in Society' (n 234) 428. cf Commission, 'Report on the Responses to the Public Consultation on the Review of the EU Copyright Rules' (n 375) 80; European Copyright Society, 'Comment' (n 54) 142.

[392] Van Gompel and others, 'Evaluatie Wet Auteurscontractenrecht: Eindrapport' (n 102) 34, 36–37; van Gompel, 'Non, Non, Rien n'a Changé' (n 224) 8.

[393] European Copyright Society, 'Comment' (n 54) 138, 142.

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services, or both.[394] However, such a hard law regulatory choice goes a long way in promoting not only collectively negotiated remuneration arrangements, but also the resulting substantive fairness in practice.[395] Moreover, for want of extension of the binding effect thereof, the application of such collectively bargained arrangements in practice may prove to be problematic.

The law is not the only obstacle to collective bargaining. In addition, a number of practical obstacles have led to a slow uptake of collective bargaining processes. In the multi-layered music industry, practical issues arise in bringing all stakeholders to the negotiation table. Corporate partners may need a greater incentive to participate, such as the potential qualification of cooperation to collective bargaining processes as a prerequisite to government subsidisation for certain specific projects.[396] The stakeholders ultimately occupying a place at the negotiation table must be representative and accountable, while the bargaining process itself must be transparent.[397] Building a tradition of collective bargaining that satisfies these conditions is difficult and takes time.[398] Another limitation of collective bargaining in practice is that it risks having little to no impact on fairness in situations where usually a full transfer of exclusive rights takes place at the outset of the contract, such as is the case for session musicians.[399] In such a case, the leverage of artists' representatives is limited, even when acting collectively.

5.3.2.2.4 SANCTIONS The final aspect of the analysis is how unfair behaviour should be sanctioned. Securing fair remuneration largely qualifies as an obligation of means, whereby a party's (in)action is tested against the benchmark of what is reasonable. If this minimum threshold is not reached, sanctions applicable under general national contract law apply.[400] Serious breach of contract may be

[394] Visser and others, *ACR: Auteurscontractenrecht* (n 44) 101–02; Senftleben, 'More Money for Creators and More Support for Copyright in Society' (n 234) 427–28; OECD, 'The Future of Work. Expert Meeting on Collective Bargaining for Own-Account Workers (Summary Report)' (2020) 5.

[395] Lucas-Schloetter, 'European Copyright Contract Law' (n 26) 898–99; Xalabarder, 'The Principle of Appropriate and Proportionate Remuneration' (n 203) 21.

[396] Van Gompel and others, 'Evaluatie Wet Auteurscontractenrecht: Eindrapport' (n 102) 37, 87–89; van Gompel, 'Non, Non, Rien n'a Changé' (n 224) 8.

[397] European Copyright Society, 'Comment' (n 54) 138, 142.

[398] Xalabarder, 'The Principle of Appropriate and Proportionate Remuneration' (n 203) 21, 46.

[399] Cf ibid 21.

[400] See ia (1) in Belgium: Arts 1134–1155, 1184 Belgian Civil Code; Ignace Claeys and Thijs Tanghe, *Algemeen Contractenrecht. Handboek voor Nu en Straks* (Intersentia 2021) 429–55, 573–742; W Van Gerven and A Van Oevelen, *Verbintenissenrecht* (Studie Juri, 6th edn, Acco 2021) 184–216; (2) in Germany: Arts 241–292, 320–326 German Civil Code; Markesinis and others, *The German Law of Contract* (n 240) 379–540; Medicus and Lorenz, *Schuldrecht I. Allgemeiner Teil* (n 240) 47–103, 137–78, 238–70; Fikentscher and Heinemann, *Schuldrecht* (n 240) 278–97; (3) in France: Arts 1217–1231-7 French CC; Yvaine Buffelan-Lanore and Virginie Larribau-Terneyre, *Droit Civil. Les obligations* (16th edn, Sirey 2018) 593–644; François Terré and others, *Droit Civil. Les Obligations* (Précis. Droit privé, 12th edn, Dalloz

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sanctioned with contract rescission and ensuing rights reversion, possibly accompanied with a right to claim damages. However, the primary sanction of specific performance should lead to the potential adjustment of the remuneration set in the contract to what is deemed fair and, thus, a renegotiation of the contractual conditions.[401] Such ex post mechanisms to modify remuneration arrangements in the contracts under review are analysed in the next subsection.

5.3.2.3 Modification of Remuneration Arrangements

5.3.2.3.1 COPYRIGHT CONTRACT LAW: CONTRACT ADJUSTMENT MECHANISMS Above, the focus was on the principle of fair remuneration. This ex ante form of contract regulation risks leading to a static analysis that does not take appropriate account of the dynamic, evolving nature of a contractual relationship. Therefore, an ex post approach in the form of a contract adjustment mechanism that remedies disproportionate remuneration arrangements is merited, again from the perspective of reciprocity that is associated with the application of Rawlsian principles of distributive justice to a contractual setting.[402] While the costs and inevitable legal uncertainty associated with contract renegotiations are acknowledged, it is believed that the enhanced substantive fairness that a balanced contract adjustment mechanism entails counterbalances such legitimate considerations of procedural fairness.[403] A well-functioning contract adjustment mechanism may nudge corporate partners towards the ex ante inclusion of fair remuneration arrangements in primary music industry contracts.[404] In addition, a certain ex post effect may be envisaged. However, given the significant interference of the application of a contract adjustment mechanism with freedom of contract, shaping such a mechanism requires due attention to the interests of both musicians and their corporate partners.[405]

The contract adjustment mechanism included in Article 20 DSM Directive effectuates a partial harmonisation of the contract adjustment mechanisms in the

2019) 807–968; (4) in the Netherlands: primarily Arts 6:74–94 Dutch Civil Code; Jan M van Dunné, *Verbintenissenrecht. Deel 1. Contractenrecht* (5th edn, Kluwer 2004) 607–63; Carel Asser, *Verbintenissenrecht. De Verbintenis in het Algemeen, Eerste Gedeelte* (Asser Serie 6.I*, 14th edn, Kluwer 2012) 221–346, 567–600; and (5) in the United Kingdom: Neil Andrews, *Contract Rules: Decoding English Law* (Intersentia 2016) 266–364.

[401] See eg van Gompel and others, 'Evaluatie Wet Auteurscontractenrecht: Eindrapport' (n 102) 28.

[402] Cf Tan, 'Where the Action Is' (n 216) 746–47.

[403] Cf Visser, 'Pippi Langkous en het nieuwe auteurscontractenrecht' (n 277) 1290; Commission, SWD(2016) 301 final (n 4) 187–88.

[404] Justin Hughes and Robert Merges, 'Copyright and Distributive Justice' (2016) 92 Notre Dame L Rev 513, 575.

[405] Hugenholtz and Guibault, 'Auteurscontractenrecht' (n 58) 55; Dusollier and others, 'Contractual Arrangements Applicable to Creators' (n 17) 40; Lucas-Schloetter, 'The Remuneration of Authors and Performers in Copyright Contract Law' (n 26) 258.

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chosen EU jurisdictions. It applies to all musicians, regulates both transfers and licences, and the rights it grants are mandatory.[406] Analogue provisions were proposed in the United Kingdom in 2021, albeit limited to transfers and exclusive licences.[407]

In terms of material scope, no alternative regime is (or should be) expressly established for SMEs. While the position of SMEs in the CCIs may be tenuous at times, other measures aimed at furthering the position of SMEs on the market, such as incubators and government support, are a better fit to take account of the specific needs of SMEs.[408] Moreover, the conceptualisation of fair remuneration leaves room for personal considerations, such as the size and structure of the corporate partner. Regardless, musicians should not be penalised for choosing to cooperate with a corporate partner having SME status.

Further, while the EU mechanism is primarily intended for contracts of long duration, its scope is not limited to contracts of a certain length, or to artists' contributions that meet a certain quantitative or qualitative threshold.[409] No limitation based on the amount of remuneration agreed in the contract is anticipated either. As a result, in theory, its scope extends to contracts where the initially set remuneration equals zero – unless it is accepted that the harmonising provisions of the DSM Directive *only* apply to contracts where a form of remuneration is set. In any case, the inclusion of such contracts would be undesirable in some cases, such as where the musician has granted an open licence (for example, a CC licence) to their work – a concept that is anathema to a request for additional remuneration.[410] Extending the scope of application of contract adjustment mechanisms to open licences risks leading to a chilling effect for users, who may not be willing to risk having to pay a licence fee at a later stage. While Recital 82 DSM Directive expressly refers to the possibility for rightsholders to grant open licences, an express exclusion of open licences from the scope of the harmonised contract adjustment mechanism would have been beneficial. The corresponding provision of German law could have served as a source of inspiration, as it expressly acknowledges artists' right to grant an 'unremunerated non-exclusive exploitation right for every person'.[411]

[406] Art 23(1) *jo* Rec 81 DSM Directive.

[407] Arts 2–3 Copyright (Rights and Remuneration of Musicians, Etc.) HC Bill (2021–22) 19, proposing Arts 93E, 191O UK CDPA.

[408] Cf Shapiro, 'Remuneration Provisions in the DSM Copyright Directive and the Audiovisual Industry in the EU' (n 38) 778.

[409] Rec 78 DSM Directive.

[410] Cf Thomas Dysart, 'Author-Protective Rules and Alternative Licences: A Review of the Dutch Copyright Contract Act' (2015) 37 EIPR 601, 605–07; Bently and others, 'Strengthening the Position' (n 199) 52–53.

[411] Art 32a(3) German Copyright Act. cf Bently and others, 'Strengthening the Position' (n 199) 64, 84. See also Arts 31a(1), 32c(3) German Copyright Act.

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Article 20 DSM Directive only applies to exploitation rights that have been harmonised under EU law.[412] In principle, therefore, it has no bearing on the right of adaptation.[413] Given the minimum harmonising nature of Article 20 DSM Directive, an extension of the contract adjustment mechanism to non-harmonised rights under national law is in any case allowed – and merited.

All four chosen EU jurisdictions already provided for some form of contract adjustment mechanism prior to the implementation of the DSM Directive, either for all copyright exploitation contracts (Germany[414] and the Netherlands[415]) or in the context of publishing relationships only (Belgium[416] and France[417]).[418] While the implementation of the DSM Directive leads to only minor changes in both the German and Dutch systems, it has a more significant impact on the Belgian and French regimes.[419]

The waivability of the contract adjustment mechanism is severely restricted. Under German law, no advance waiver is possible.[420] Also in Belgium, the rights granted to artists are expressly qualified as mandatory law.[421] Third, the rights under the Dutch regime are categorised as unwaivable.[422] The draft regime under UK law also expressly qualified contrary contractual arrangements as ineffective.[423] Finally, the most restrictive rule applies under the new French regime, which qualifies the relevant provisions as pertaining to public order.[424]

The harmonised contract adjustment mechanism is affected by the collective dimension to copyright management in several ways. First, it does not apply to

[412] Recs 72, 78 DSM Directive.

[413] See *contra* Explanatory Memorandum Belgian Draft DSM Implementation Act (n 64) 57.

[414] Arts 32a *jo* 79(2a) German Copyright Act. For detail on the contract adjustment mechanism under German law, see Schricker, *Urheberrecht. Kommentar* (n 58) 701–18; Fromm and Nordemann, *Urheberrecht* (n 58) 752–72; Markellou, *Le Contrat d'Exploitation d'Auteur* (n 17) 277–80; Dreyer and others, *Urheberrecht* (n 58) 748–67; Möhring and Nicolini, *Urheberrecht* (n 58) 450–65.

[415] Art 25d Dutch Copyright Act *jo* Art 2b Dutch Neighbouring Rights Act; Visser and others, *ACR: Auteurscontractenrecht* (n 44) 139–61; Spoor and others, *Auteursrecht* (n 60) 567–69.

[416] Art XI.196(2) Belgian CEL; Markellou, *Le Contrat d'Exploitation d'Auteur* (n 17) 257–62.

[417] Former Art L 131-5 French IP Code; Markellou, *Le Contrat d'Exploitation d'Auteur* (n 17) 257–62; Lucas and others, *Traité de la Propriété Littéraire et Artistique* (n 17) 665–71.

[418] All pre-DSM contract adjustment mechanisms in the chosen jurisdictions applied to both transfers and licences.

[419] See (1) in Belgium: Arts XI.167/3, XI.205/3 Belgian CEL and (2) in France: Arts L 131-5(I)-(II), 212-3-2 French IP Code; Jean-Michel Bruguière, 'La Révision de La Rémunération de l'auteur et de l'artiste-Interprète' [2021] PI 28.

[420] Art 32a(3) *jo* 79(2a) German Copyright Act; Rahmatian, 'Dealing with Rights in Copyright-Protected Works' (n 185) 307; Bently and others, 'Strengthening the Position' (n 199) 64. This rule is subject to an exception for open licences.

[421] Arts XI.167/6, XI.205/6 Belgian CEL.

[422] Art 25h(1) Dutch Copyright Act *jo* Art 2b Dutch Neighbouring Rights Act; Visser and others, *ACR: Auteurscontractenrecht* (n 44) 142.

[423] Draft Arts 93E, 191O UK CDPA.

[424] Arts L 131-5-3 *jo* L 131-5, L 212-3-4 *jo* L 212-3-2 French IP Code.

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CMOs.[425] Second, Member States may substitute this mechanism by a comparable regime based on collective bargaining.[426] A cautious approach is merited: the collective nature of a remuneration arrangement does not entirely exclude the possibility for a disproportion to arise in terms of remuneration.[427] This possibility was prompted by German law. The relevant provision of the German Copyright Act excludes its application where the remuneration arrangement at issue has been collectively determined, but expressly safeguards artists' right to claim additional remuneration under the substantive conditions set by the contract adjustment mechanism.[428] Subsequent to the implementation of the DSM Directive, the Belgian and French contract adjustment mechanisms contain a similar reference to collective bargaining: where a sector agreement provides a comparable regime, the contract adjustment mechanism is substituted by the collectively bargained alternative.[429] Dutch law does not expressly mention the influence of a collectively bargained solution on the application of the contract adjustment mechanism. Regardless, even if the collectively bargained nature of a remuneration arrangement does not exclude it from the scope of the contract adjustment mechanism, it may be relevant for the interpretation of the criterion of disproportionality analysed below.[430]

The additional compensation that is available to musicians under the harmonised contract adjustment mechanism may be claimed not only by the musicians themselves, but also by their duly mandated representatives – a concept that deserves a broad interpretation, to include CMOs, artist guilds, trade unions and other representative organisations.[431]

Article 20 DSM Directive grants Member States significant leeway as to its implementation. Consequently, its impact in practice risks remaining limited.[432] The Member States have a margin of appreciation as to the substantive conditions, the procedure to be followed, and the consequences of the application of the contract adjustment mechanism in practice.

The contract adjustment mechanism under Article 20 DSM Directive applies if the remuneration that was initially set 'turns out to be disproportionately low compared to all the subsequent relevant revenues derived from the exploitation of the works or performances'.[433] This benchmark of disproportionality is, in itself,

[425] Art 20(2) *jo* Rec 78 DSM Directive; draft Art 93E(4) UK CDPA.
[426] This reference to collective bargaining did not figure in the initial Commission Proposal for the DSM Directive. It did figure in draft Art 93E(4)(b) UK CDPA.
[427] Cf Fair Internet Coalition, 'Joint Guidelines' (n 54) 18.
[428] Art 32a(4) German Copyright Act.
[429] Arts XI.167/3, XI.205/3 Belgian CEL *jo* Arts XI.167/5, XI.205/5 Belgian CEL; Arts L 131-5(III), L 212-3-2 French IP Code.
[430] Rec 78 DSM Directive. cf Art 32a(4) *jo* 32(2a) German Copyright Act.
[431] Art 20(1) DSM Directive; Fair Internet Coalition, 'Joint Guidelines' (n 54) 19.
[432] Cf Bently and others, 'Strengthening the Position' (n 199) 51, 84.
[433] Art 20(1) DSM Directive. See also drafts Arts 93E(1), 191O(1) UK CDPA.

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rather vague and engenders questions concerning both the amount and requisite timing and nature of the success.

The first aspect is the reference point to determine whether or not a given remuneration is disproportionately low. The appropriate calculation base consists of all relevant revenues derived from the exploitation of the content at issue.[434] Since there is no express categorisation, revenues from both existing and emerging methods of exploitation qualify as 'revenues'. As was argued regarding the principle of fair remuneration,[435] 'revenues' should be held to include both direct and indirect revenues.[436] This is supported by Recital 78 DSM Directive, which notes that the relevant base includes merchandising revenue – a source of revenue that is not directly linked to the exploitation of a certain piece of music. Finally, in order to avoid excessive cost deduction, a calculation taking account of gross revenues appears appropriate.[437]

Due consideration of the interests of corporate partners requires the calculation to take account of the entire contractual relationship.[438] In other words: the calculation for a musician who has released a chart-topping fourth album while the first three albums flopped should bring all four albums into the equation – at least to a certain extent.[439] The nature of the initial deal between musician and corporate partner, namely a recoupment versus a profit-sharing arrangement, bears relevance.[440] As a recoupment deal is significantly more beneficial to the corporate partner, the application of the contract adjustment mechanism in such a case may demand a correspondingly greater focus on the legitimate interests of musicians. In addition, the practice of cross-financing is noted, whereby (part of) the revenues garnered through the exploitation of commercially successful content are used as a way to compensate for content exploited at a loss. Corporate partners that are not able to cross-finance within their portfolio may be inclined to offer fewer opportunities to emerging artists, or musicians active in niche genres.

[434] Art 20 DSM Directive. See: (1) in Belgium: Arts XI.167/3, XI.205/3 Belgian CEL; (2) in France: Art L 131-5(I)-(II) French IP Code; (3) in Germany: Art 32a(1) *jo* 79(2a) German Copyright Act; and (4) in the Netherlands: Art 25d Dutch Copyright Act *jo* Art 2b Dutch Neighbouring Rights Act. In the *Soof 2* case, the Dutch ADR commission considered that the relevant calculation base consisted of the total (net) revenues of the entire value chain. In the absence of full transparency in this regard, the calculation in this case took place solely on the basis of the revenues garnered by the primary corporate partners, see *Geschillencommissie Auteurscontractenrecht* (hereinafter: Geschillencie ACR) 18 April 2018, docket numbers 113417 (director) and 113462 (screenwriter), <www.degeschillencommissie.nl>. See also Joost Poort and Dirk Visser in IER 2018/43 and by P Bernt Hugenholtz in AMI 2018/15. See also van Gompel and others, 'Evaluatie Wet Auteurscontractenrecht: Eindrapport' (n 102) 39–40.

[435] See above, Section 5.3.2.2.

[436] Cf European Copyright Society, 'Comment' (n 54) 133.

[437] Van Gompel and others, 'Evaluatie Wet Auteurscontractenrecht: Eindrapport' (n 102) 41.

[438] Cf ibid 37.

[439] Cf Vanhees, *Een Juridische Analyse van de Grondslagen* (n 22) 264; Visser, 'Pippi Langkous en het nieuwe auteurscontractenrecht' (n 277) 1295.

[440] On the difference between recoupment and profit-sharing deals, see Chapter 2, Section 2.4.5.

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An associated question is whether focus should only lie with the amount of revenue collected, or whether the size of a corporate partner's profits may be relevant too. Neither French nor Dutch law expressly refer to the relevance of a corporate partner's profits. The German regime mentions the corporate partner's revenues as well as their profits.[441] Finally, while the pre-DSM Belgian regime relating to publishing contracts posited the publisher's profits as the relevant calculation base, the new mechanism refers to the revenues garnered through exploitation.[442]

The condition of disproportionality also offers grounds for debate.[443] While Recital 78 requires the disproportion to be 'clear', corresponding provisions of national law refer to this as needing to be 'manifest' (Belgium[444]), 'exaggerated' or 'excessive' (France for royalty arrangements applicable to authors[445] and for performers[446]). The relevant provision of Dutch law used to require the disproportionality to be 'serious',[447] while the German equivalent referred to the need for the disproportion to be 'conspicuous'.[448] The latter two qualifications were removed on the implementation of the DSM Directive.[449]

Recital 78 offers a number of relevant circumstances, including the artist's contribution, sector practices and whether the contract is based on a collective agreement – criteria that were also discussed above as contributing to the conceptualisation of fair remuneration.[450] The assessment should include revenues accrued through both existing and emerging methods of exploitation as well as both direct and indirect revenues, and that it should take account of the entire contractual relationship. Both lump sums and royalty arrangements may lead to disproportionality under certain circumstances. This still gives us no real wieldable tool to determine what should be considered disproportionate 'enough' to warrant modification of contractual remuneration arrangements. German case law predating the abolition of the requirement of 'conspicuous' disproportionality has deemed such a

[441] Art 32a(1) German Copyright Act. On secondary relationships, see Art 32a(2) German Copyright Act.
[442] Art XI.196(2) para 2 Belgian CEL; Arts XI.167/3, XI.205/3 Belgian CEL.
[443] Osborne and Sun, 'Economics of Streaming' (n 310) s 3.2.1.
[444] Vanhees, 'Art XI.195' (n 158) 315.
[445] Art L 131-5(II) French IP Code (in French: *exagérément*).
[446] Art L 212-3-2 French IP Code (in French: *exagérément*).
[447] Former Art 25d Dutch Copyright Act (in Dutch: *ernstig*); van Gompel, 'Non, Non, Rien n'a Changé' (n 224) 7–8.
[448] Former Art 32a(1) German Copyright Act (in German: *auffällig*). See eg Senftleben, 'More Money for Creators and More Support for Copyright in Society' (n 234) 430.
[449] See (1) in the Netherlands: Art 25d Dutch Copyright Act and (2) in Germany: Art 32a(1) German Copyright Act; Zurth, 'Implementation of the DSM Directive's Contract Provisions into German Law' (n 77) 56–57. See also drafts Arts 93E(1), 191O(1) UK CDPA.
[450] See eg the reference to the artist's contribution in Art L 131-5(II) French IP Code.

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disproportionality to be definitely present if the fee paid is less than half – and a fortiori one-third – of what would have been reasonable.[451]

Further, the disproportion must arise after the formation of the contract – that is, in the course of contract performance. Indeed, the objective of the harmonised contract adjustment mechanism is to remedy unfairness in terms of remuneration that arises over time, not remuneration arrangements that may be qualified as unfair at the outset of the contract.[452] The latter are meant to be covered by the principle of fair remuneration.[453]

Questions also arise on the nature of the disproportion – namely whether the reasons and/or the source(s) thereof are relevant, as well as whether the disproportion must be unforeseen. Unnecessary sub-conditions should be avoided. As to the former, therefore, the reason of the disproportion is – or should be – irrelevant.[454] The same is true for the source: it should not matter whether the disproportion stems from existing or new methods of exploitation. The relevant legal provisions do not provide any indication to the contrary. As to the latter, Article 20 DSM Directive does not really provide a plain answer. The relevant provision of German law expressly qualifies the foreseen or foreseeable nature of the disproportionality as irrelevant.[455] This qualification appears to be largely unnecessary when it comes to disproportionality resulting from commercial success, given its inherently unpredictable nature in CCIs such as the music industry. In view of this, the nature of disproportion does not – and should not – substantively affect the application of the contract adjustment mechanism.[456]

The next step is to analyse the procedural aspects. Also on this point, Article 20 DSM Directive remains characteristically vague. Member States are free to determine the appropriate procedural steps, as long as they ensure that artists are 'entitled to claim' what is due to them.[457] This implies that the modification of the contract must be expressly requested, either by the artist (Belgium,[458] Germany,[459]

[451] German Federal Court of Justice 10 May 2012, docket number I ZR 145/11 <https://openjur.de/u/557201.html>; Bently and others, 'Strengthening the Position' (n 199) 53, 63; Senftleben, 'More Money for Creators and More Support for Copyright in Society' (n 234) 430. Cf Malevanny, *Online Music Distribution* (n 109) 97. See also Hugenholtz and Guibault, 'Auteurscontractenrecht' (n 58) 57; Fromm and Nordemann, *Urheberrecht* (n 58) 758–59; Visser and others, *ACR: Auteurscontractenrecht* (n 44) 143; Shapiro, 'Remuneration Provisions in the DSM Copyright Directive and the Audiovisual Industry in the EU' (n 38) 782.

[452] Bently and others, 'Strengthening the Position' (n 199) 48–49.

[453] See above, Section 5.3.2.2.

[454] Cf Vanhees, 'Art XI.195' (n 158) 315; van Gompel and others, 'Evaluatie Wet Auteurscontractenrecht: Eindrapport' (n 102) 38.

[455] Art 32a(1) German Copyright Act.

[456] Cf European Copyright Society, 'Comment' (n 54) 144.

[457] Art 20(1) DSM Directive.

[458] Arts XI.167/3, XI.205/3 Belgian CEL.

[459] Art 32a(1) German Copyright Act.

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France,[460] the Netherlands[461] and the draft UK mechanism[462]) or their representative (expressly in this sense, France[463] and the draft UK mechanism[464]). The regulatory framework should accord more express attention to the invocation of the contract adjustment mechanism in case of large productions with many collaborators. The potential for collective invocation of rights should not be negated, including for the follow-on effect that this would engender.[465] Considerations of good faith may set a certain benchmark of reasonable behaviour.[466] This not only points towards the need for an accommodating stance on the part of the corporate partner, but also restricts the musician's behaviour, who should, for example, take action within a reasonable period after having discovered the disproportionality at issue. If no outcome is reached that is satisfactory to both parties, judicial or extra-judicial proceedings may be commenced.[467] In such a case, a reversion of rights may provide an alternative solution.[468]

The final stage of the analysis is to establish the consequences of successful recourse to the contract adjustment mechanism – namely the review of the contractual remuneration arrangements and the ensuing payment of 'additional, appropriate and fair remuneration'.[469] The adjustment is meant to remove the perceived disproportionality and bring the remuneration in line with the economic value of the music at issue.[470] The link with the requirement of fair remuneration is clear: the remuneration arrangements must be amended to reflect what is deemed fair based on the criteria analysed above.[471] While relevant case law is limited, it may be tentatively found that external (either judicial or extra-judicial) review of remuneration arrangements on the basis of contract adjustment mechanisms may lead to an increase in remuneration by about half of the remuneration (flat fee or royalty) that was initially set.[472] However, if the result of the application of a contract adjustment

[460] Arts L 141-5(III) para 2, L 212-3-2 para 2 French IP Code.
[461] Art 25d(1) Dutch Copyright Act *jo* Art 2b Dutch Neighbouring Rights Act.
[462] Draft Arts 93E(1), 191O(1) UK CDPA.
[463] Arts L 141-5(III) para 2, L 212-3-2 para 2 French IP Code.
[464] Draft Arts 93E(1), 191O(1) UK CDPA.
[465] See Chapter 7.
[466] Cf (1) in Belgium: Art 1134 para 3 Belgian CC; (2) in France: Art 1134 para 3 French CC; (3) in Germany: Art 242 German CC; and (4) in the Netherlands: Arts 6:2, 6:248 Dutch Civil Code.
[467] See Rec 78 DSM Directive.
[468] Cf Dusollier and others, 'Contractual Arrangements Applicable to Creators' (n 17) 15.
[469] Art 20(1) DSM Directive.
[470] Cf Art 32a(1) German Copyright Act.
[471] See above, Section 5.3.2.2.
[472] See eg District Court Amsterdam 1 November 2019, docket number 7329753 CV EXPL 18-24837, ECLI:NL:RBAMS:2019:8099 and District Court Amsterdam 1 November 2019, docket number 7329738 CV EXPL 18-24835, ECLI:NL:RBAMS:2019:8119, where the original remuneration arrangement was increased by 50 per cent. This case has in the meantime been settled, as noted in Dirk Visser, 'EU Copyright Contract Law from a Dutch Perspective' (Copyright Contracts Tomorrow, Ghent, 23 September 2022). See also eg Geschillencie ACR 18 April 2018, docket numbers 113417 (director) and 113462 (screenwriter), <www

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mechanism is the award of a remuneration that significantly surpasses the market price for a given piece of artistic content, corporate partners are likely to shy away from further investments.[473] Consequently, an initial bias in favour of the interests of musicians, resulting in an overly broad application of contract adjustment mechanisms, risks negatively affecting the music industry ecosystem, especially given the exceptionally limited commercial success rate of music.[474] In such a situation, both corporate partners and musicians risk losing out.[475] Therefore, contract adjustment mechanisms should be limited to exceptional circumstances, through an effective application of the requirement of disproportionality.[476]

Further, the application of the contract adjustment mechanism should have retroactive effect, in the sense that the resulting adjustment of the remuneration arrangement should retroactively ensure fairness over the entire course of the contract term – not only starting from the moment of successful renegotiation. A hard law confirmation of this position would remove any existing uncertainties. Moreover, this would contribute to remuneration arrangements that are in tune with both the actual and potential value of the music to which the contract relates, as required by the principle of appropriate and proportionate remuneration and the underlying objective of ensuring Rawlsian reciprocity, translated into a fair return for all contracting parties.

More generally, from the point of view of musicians, a big question arises as to the application of contract adjustment mechanisms in practice, given the very limited nature of available case law.[477] This may point towards a lack of recourse to the contract adjustment mechanism and/or to the potential use of this mechanism as leverage in the context of contract negotiations.[478] Recent research on the Dutch music industry indicates that contract adjustment mechanisms are seldom invoked, in view of the (laudable and abovementioned) practice of sliding scale royalties.[479] Moreover, in case of overwhelming success, despite the principled binding force of contracts, contract renegotiations appear to take place frequently.[480] In such a context, successful musicians may leverage their enhanced bargaining power to claim higher royalties.[481] This allows corporate partners to extend the contractual

.degeschillencommissie.nl>, where the original remuneration was increased by 50 per cent for the screenwriter and from 7 to 12 per cent for the director.

[473] Visser, 'Pippi Langkous en het nieuwe auteurscontractenrecht' (n 277) 1293; Visser, 'Copyright Contract Law in the DSM Directive' (n 375).

[474] See Chapter 3, Sections 3.3–3.4.

[475] Cf Shapiro, 'Remuneration Provisions in the DSM Copyright Directive and the Audiovisual Industry in the EU' (n 38) 778; Visser, 'Copyright Contract Law in the DSM Directive' (n 375).

[476] Visser, 'Copyright Contract Law in the DSM Directive' (n 375).

[477] See in more detail, Chapter 7, Section 7.4.

[478] Commission, SWD(2016) 301 final (n 4) 187.

[479] Van Gompel and others, 'Evaluatie Wet Auteurscontractenrecht: Eindrapport' (n 102) 41.

[480] ibid 30, 41, 45, 106.

[481] ibid.

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relationship.[482] To the extent fairness in scope, exploitation and remuneration is maintained, such industry evolutions should not be hindered. In case contractual renegotiation fails, however, an argument may be made in favour of termination of the contractual relationship under certain circumstances.[483]

Finally, to the extent that a balance between the interests of all parties is attained, there is no convincing argument against the immediate application of the harmonised contract adjustment mechanism to ongoing contracts, provided that exploitation activities predating 7 June 2021 remain unaffected.[484] At the most, consideration may be given to the proviso that the grace period set for reporting obligations until 7 June 2022[485] may be (partially) extended to the contract adjustment mechanism, given that the objective of the reporting obligations established by the DSM Directive is to secure the operationalisation of the contract adjustment mechanism.[486]

5.3.2.3.2 GENERAL CONTRACT LAW: CHANGED CIRCUMSTANCES In addition to the above, the question arises whether it is possible and desirable to revise contract terms if the circumstances of the contract (including the economic conditions thereof) change significantly.[487] Such a measure would have as its objective to ensure the continued fairness of the remuneration arrangements in a given contract and, in some cases, operate as an alternative to rights reversion through contract rescission or application of the use-it-or-lose-it clause.[488] It could also have a beneficial effect in the context of negotiations pertaining to emerging methods of exploitation, in countries where no express right to additional remuneration for such emerging use applies.[489] Some provisions of (copyright) contract law already entertain the possibility of periodically reviewing the conditions of (copyright exploitation) contracts.

At the EU level, reference may be made to the express – albeit rather vague – reference in the Term Extension Directive to the possibility for Member States to provide that certain terms in royalty-based copyright exploitation contracts may be renegotiated in favour of performers.[490] This broadly worded provision applies to

[482] ibid 41.
[483] See Chapter 6.
[484] Cf Rosati, *Copyright in the Digital Single Market* (n 81) 391–92.
[485] See Chapter 3, Section 3.3.2.6 and below Section 5.3.3.2.
[486] Cf European Copyright Society, 'Comment' (n 54) 139.
[487] Dusollier and others, 'Contractual Arrangements Applicable to Creators' (n 17) 15; Lucas-Schloetter, 'The Remuneration of Authors and Performers in Copyright Contract Law' (n 26) 264; Dusollier, 'EU Contractual Protection of Creators' (n 6) 449; Dusollier, 'An Effective and Comprehensive Contractual Protection of Creators and Performers' (n 89); European Copyright Society, 'Comment' (n 54) 147.
[488] European Copyright Society, 'Comment' (n 54) 147.
[489] Cf ibid.
[490] Art 10a *jo* Rec 16 Term Extension Directive; Ramalho and Lopez-Tarruella, 'Implementation of the Directive 2011/77/EU' (n 45) 21, 30.

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both transfers and licences, but its personal scope is limited to performers and thus excludes composers. If Member States decide to allow such a possibility of renegotiation, the relevant recital of the Term Extension Directive adds that they should also have 'procedures in place to cover the eventuality that the renegotiation fails'.[491] This appears to do nothing else than confirm parties' freedom to amend contracts with mutual consent as well as the need for a functioning dispute resolution system. It does not delineate any conditions, such as a substantive benchmark that establishes when renegotiations should take place, the procedure that should be followed in such a context, or the desired result. The language is wholly non-committal and offers no protection in the context of contractual negotiations. Its added value is therefore limited. Regardless, the Belgian and French legislator acted upon this possibility and provided, without any further specification, that royalty contracts entered into before 1 November 2013 may be amended during the extended term of protection.[492] As for the required 'procedures', the general rules on judicial and extra-judicial dispute resolution were ostensibly deemed to be sufficient.[493]

Other national legal arrangements applicable to changed contract circumstances also already exist as a *lex generalis*.[494] By way of example, that publishing contracts that relate to e-books must, under French law, include a clause establishing a periodic review of remuneration arrangements over time.[495] While this provision does not apply to the music industry, it may serve as an indication that recurring contract revision in the context of exploitation contracts is not taboo at present, especially in a digital context.

Under general contract law, there may also be a possibility to revise the terms to a contract if unforeseen changes occur that significantly affect the contractual balance between the parties. UK law does not contain separate rules allowing for contract revision and instead relies on associated doctrines such the doctrine of frustration, which only applies in exceptional cases.[496] Among the other researched jurisdictions, conditions for recourse to such potential contract revision vary. First, the new

[491] Rec 16 Term Extension Directive.

[492] Art 40(4) para 5 Belgian Act 19 April 2014; Art 8(II) French Act of 20 February 2015. This provision was not expressly implemented in either Germany or the Netherlands, in view of the existing contract adjustment regimes, see Ramalho and Lopez-Tarruella, 'Implementation of the Directive 2011/77/EU' (n 45) 30–31.

[493] See eg Explanatory Memorandum Belgian Act 19 April 2014, 79.

[494] Rec 78 DSM Directive. The language used in this recital ('without prejudice to the law applicable to contracts in Member States') is rather imprecise and may serve as a tool for the ECJ to expand its jurisdiction in the field of contract law, cf Bently and others, 'Strengthening the Position' (n 199) 49.

[495] Art L 132-17-7 French IP Code; Lucas-Schloetter, 'The Remuneration of Authors and Performers in Copyright Contract Law' (n 26) 264.

[496] Andrews, *Contract Rules* (n 400) 246–63; Thomas Kadner Graziano, *Comparative Contract Law: Cases, Materials and Exercises* (2nd edn, Edward Elgar 2019) 426–32.

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Article 5.74 Belgian Civil Code allows contract revision under the strict conditions that the changes are both significant and unforeseeable, that they are not imputable to or flowing from a risk assumed by the party invoking the circumstances and that the other party does not have legitimate expectations as to the further performance of the unrevised contract.[497] Second, Article 1195 French Civil Code provides that a party that did not assume the risk regarding a set of unforeseeable changed circumstances can request the contract to be revised if those circumstances render the contract excessively onerous for that party.[498] The German Civil Code also attaches the possibility of contract revision to several conditions. The changes at issue must be both significant and unforeseen.[499] Moreover, it is required that prior knowledge of these changes would have induced the parties not to enter into the contract, or under different conditions. Finally, the changes must lead to one of the parties not being able to reasonably expect the contract to be upheld without alteration. Under Dutch law, parties to a contract can ask a judge to modify the contract in view of unforeseen circumstances that lead to the other party not being able to legitimately expect the contract to remain as it is.[500] Given the inherently unpredictable nature of success in CCIs such as the music industry, the condition of lack of foreseeability may be fulfilled in the case of remuneration arrangements in music contracts that become unfair over time. However, the restrictive application of the other conditions limits the potential use of the doctrine of changed circumstances to extreme situations, to safeguard legal certainty.[501]

Finally, it may be argued that the continued insistence on the enforcement of remuneration arrangements that lead to unfair situations in practice, without offering the possibility of renegotiation, may be qualified as an abuse of law.[502] In turn, this may lead to judicial moderation of the remuneration arrangement(s) at issue – albeit again only in exceptional circumstances.

[497] Art 5.74 new Belgian Civil Code.

[498] See Buffelan-Lanore and Larribau-Terneyre, *Droit Civil. Les obligations* (n 400) 529–42; Kadner Graziano, *Comparative Contract Law* (n 496) 416–25; Terré and others, *Droit Civil. Les Obligations* (n 400) 704–22.

[499] Art 313(1) German Civil Code; Medicus and Lorenz, *Schuldrecht I. Allgemeiner Teil* (n 240) 260–65; Fikentscher and Heinemann, *Schuldrecht* (n 240) 148–56.

[500] Art 6:258 Dutch Civil Code; Hugenholtz and Guibault, 'Auteurscontractenrecht' (n 58) 12; van Dunné, *Verbintenissenrecht* (n 400) 751–96; Carel Asser, *Verbintenissenrecht. Algemeen Overeenkomstenrecht* (Asser Serie 6.III*, 13th edn, Kluwer 2008) 369–86; Barbara Baarsma and Nicole Rosenboom, 'Oneerlijke Handelspraktijken. Voldoet Bestaande (Zelf)regulering?' (2013) 10; Jac Hijma and others, *Rechtshandeling en Overeenkomst* (Studiereeks burgerlijk recht 3, 9th edn, Kluwer 2019) 318–29; Iris Houben and Dirk Visser, 'De Beëindiging van Muziekexploitatieovereenkomsten' [2022] ATR 135, 143.

[501] Dusollier and others, 'Contractual Arrangements Applicable to Creators' (n 17) 60.

[502] 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) 422; Dusollier and others, 'Contractual Arrangements Applicable to Creators' (n 17) 60.

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5.3.3 *Transparency*

5.3.3.1 Passive Reporting Obligations

Following the analysis of the amount of remuneration required for it to be considered 'fair', the next step is to make fair remuneration work in practice. The music value chain is notoriously complex and opaque. This pervading lack of transparency gives rise to a significant information asymmetry and leads to unfairness in practice.[503] There is a commercial incentive towards secrecy.[504] However, parties to music contracts must be able to effectively assess the economic value of music and, ultimately, ascertain whether the remuneration they receive is 'fair'.[505] Without a transparent royalty chain, fair remuneration cannot be guaranteed. Musicians cannot decide whether or not to invoke a contract adjustment mechanism if they do not have access to the information required to assess the economic value of their contributions and establish whether the payments they receive correspond to this value.[506] A transparent value chain empowers musicians to claim what they are due and enhances musician agency. Moreover, detailed knowledge of this economic value is likely to assist musicians in future contract negotiations.[507] Royalty portals operated by both DSPs and corporate partners should therefore offer a high level of transparency in terms of both exploitation and remuneration.

Several legislative measures seek to enhance transparency by way of reporting obligations. Passive obligations imply a duty for the corporate partner to comply with requests for information.[508] The express inclusion of a contractual clause in this sense is an important step. It has also been proposed to mandate a right to audit under national law.[509] A relevant precedent in this context is the 'right of access' granted to authors (not performers) under some national laws.[510] Such a right is meant to allow the artist to make copies or adaptations of their work, and can hardly be said to imply a full-fledged right to audit.[511] Moreover, it only applies in case of

[503] See extensively, Chapter 2, Section 2.5.

[504] Giblin and Doctorow, *Chokepoint Capitalism* (n 305) 160–61.

[505] Recs 74–75 DSM Directive. Reference may be made to the Das Boot case, whereby the director of photography (Jost Vacano) invoked the German contract adjustment mechanism (see Section 5.3.2.3.1) after having requested information on the basis of the German transparency provision.

[506] Cf Giblin and Doctorow, *Chokepoint Capitalism* (n 305) 161.

[507] Commission, SWD(2016) 301 final (n 4) 183; Giblin and Doctorow, *Chokepoint Capitalism* (n 305) 161–62.

[508] The next subsection focuses on active reporting obligations.

[509] See eg European Copyright Society, 'Comment' (n 54) 143. See also Art 4 UK Voluntary Code of Good Practice on Transparency in Music Streaming (31 January 2024) <https://bit.ly/4bbBx32>.

[510] See (1) in Belgium: Art XI.167(1) para 3 Belgian CEL; (2) in France: Art L 111-3 French IP Code; and (3) in Germany: Art 25(1) German Copyright Act.

[511] Hendrik Vanhees, 'Art XI.167' in Fabienne Brison and Hendrik Vanhees (eds), *Hommage à Jan Corbet Huldeboek* (3rd edn, Larcier 2018) 85–86; Keustermans and Blomme, *Auteursrecht* (n 179) 208–09.

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need, such as when the artist does not own a sufficiently qualitative copy.[512] Its effect is therefore limited. However, there is merit to an effective audit of corporate partners' activities, for both ongoing and future contracts.[513] A right to request access to relevant information should extend to all relevant information on both exploitation and remuneration, allowing artists to determine whether they have either a right to revocation and/or additional remuneration.[514] Reference may be made to the code of practice for French music publishers, which establishes a right for composers to request an audit of the music publisher's exploitation activities every five years.[515] There is a similar right to audit for the music publisher's revenues.[516] However, even if a generalised right to audit were to be mandated by law, obstacles to its implementation remain.[517]

At the EU level, Article 3(2c) Term Extension Directive requires Member States to ensure that, upon request, record companies provide performers (or their CMOs[518]) who are entitled to annual supplementary remuneration[519] with any information required to secure payment thereof. This provision, which only applies to transfer contracts with performers where the remuneration takes the form of a lump sum, was implemented in all five chosen jurisdictions.[520] In addition, a right to audit may be implied in the formulation of Article 19 DSM Directive, which is discussed in the next subsection.[521]

5.3.3.2 Active Reporting Obligations

While rules allowing artists to request information from their corporate counterparties undoubtedly contribute to transparency, requiring the active cooperation of corporate partners has a much larger impact. While the (ex post) associated consequences for the freedom of contract are undeniable, it is difficult to see on what

[512] Vanhees, 'Art XI.167' (n 511) 86.

[513] Cf Hall Jr, 'Smells Like Slavery' (n 3) 227–28; Cooke, *Dissecting the Digital Dollar* (n 301) 153, 176; Giblin and Doctorow, *Chokepoint Capitalism* (n 305) 54–55. That such a right to audit is not a panacea is illustrated by a recent judgment in the *Garrix v Spinnin Records* case, see District Court Amsterdam 4 August 2023, docket number C/13/735802 / KG ZA 23-550 VVV/MB, ECLI:NL:RBAMS:2023:4976.

[514] See above, Sections 5.2.2.3 and 5.3.2.3.

[515] Code des Usages et des Bonnes Pratiques de l'Edition des Œuvres Musicales (n 172) s 3.4.

[516] ibid 3.6.

[517] Osborne and Sun, 'Economics of Streaming' (n 310) s 1.4.3.

[518] Cf Ramalho and Lopez-Tarruella, 'Implementation of the Directive 2011/77/EU' (n 45) 35, 49.

[519] See above, Section 5.3.2.3.

[520] See (1) in Belgium: Art XI.210(3) para 2 Belgian CEL (the right to request information under Belgian law is exercised in a purely collective manner, the compatibility of which with the Term Extension Directive is questionable, see Brison, 'Art XI.210' (n 46) 388; (2) in France: Art L 212-3-7(III) French IP Code; (3) in Germany: Art 79a(4) German Copyright Act; (4) in the Netherlands: Art 15g(2)–(3) *jo* 9b Dutch Neighbouring Rights Act; and (5) in the United Kingdom: Art 181HB(5)–(6) UK CDPA.

[521] Cf Bently and others, 'Strengthening the Position' (n 199) 45–46.

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basis corporate partners may object to enhanced transparency – if not to perpetuate the current lack of transparency to their (commercial) advantage.[522]

This subsection focuses on the reporting obligations applicable to primary music contracts.[523] In the EU jurisdictions, these national provisions were partially harmonised by Article 19 DSM Directive. Analogue provisions were proposed in the United Kingdom in 2021.[524]

5.3.3.2.1 SCOPE OF ACTIVE REPORTING OBLIGATIONS Article 19(1) DSM Directive sets forth the first general, unwaivable[525] minimum benchmark for transparency as imposed by Member State laws on corporate partners who enter into a copyright exploitation contract with one or multiple musicians. It imposes on corporate partners an active duty to inform during the course of contract performance. The mechanism proposed in the United Kingdom in 2021 also expressly excluded contractual deviations, but was limited to transfers and exclusive licences and excluded employed artists from its scope.[526]

In Belgium and France, unwaivable active reporting obligations for contracts with both authors and performers were established in 2022.[527] The French legislator has opted to leave some aspects of the implementation of Article 19 DSM Directive open to sector-specific collective bargaining.[528] In the absence of a collective agreement, the modalities of the reporting obligations are to be set by the copyright exploitation contract. If the collective negotiation process is successful, the government may declare its results binding to all stakeholders – if not, the French Conseil d'État is set to intervene.[529] The pre-existing obligation under French law for record companies to actively report to performing musicians if the contract sets a royalty that is payable directly to the musician by the record company continues to apply.[530] This is also true for the waivable regime for publishing contracts under which the publisher has to provide the author with a detailed set of data upon request.[531]

[522] Cf Commission, SWD(2016) 301 final (n 4) 183, 187.

[523] As to secondary relationships, see below Section 5.4.3.2.

[524] Arts 2–3 Copyright (Rights and Remuneration of Musicians, Etc.) HC Bill (2021–22) 19, proposing Arts 93D, 191N UK CDPA.

[525] Art 23(1) *jo* Rec 81 DSM Directive.

[526] Draft Arts 93D(1), (5), (6)(b), 191N(1), (5), (6) UK CDPA.

[527] See (1) in Belgium: Arts XI.167/2 *jo* XI.167/6, XI.205/2 *jo* XI.205/6 Belgian CEL – the pre-existing Art XI.198 Belgian CEL was abolished and (2) in France: Arts L 131-5-3 *jo* L 131-5-1, L 212-3-4 *jo* 212-3-1 French IP Code; Vincent Varet, 'L'obligation de Transparence' [2021] PI 45.

[528] Such as the frequency of reporting and the applicability exemption for insignificant contributions, see Arts L 131-5-1, 212-3-1 French IP Code.

[529] Arts L 131-5-1(III), L 212-3-1(III) French IP Code.

[530] Art L 212-15 French IP Code; Lucas and others, *Traité de la Propriété Littéraire et Artistique* (n 17) 1156. This rule was rendered generally binding by the French Act of 7 July 2016 and also applies to contracts that were already ongoing at that time (see Art 110 French Act of 7 July 2016).

[531] Art L 132-13 French IP Code; Lucas and others, *Traité de la Propriété Littéraire et Artistique* (n 17) 710–12. Cf Art L 131-7 French IP Code. See also in the context of literary publishing, Arts

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The German Copyright Act did not provide for general active reporting prior to the implementation of the DSM Directive – only a right to request information, which applied to both transfers (for performers) and licences (for composers and performers).[532] In 2022, the German legislator transformed this obligation into a generalised active reporting obligation.[533] The German Publishing Act also still establishes a (waivable) reporting obligation for publishing contracts.[534]

Dutch law, finally, used to only provide a right to audit aimed at operationalising artists' right to termination of the contract in case of non-exploitation.[535] Article 25ca Dutch Copyright Act establishes an unwaivable[536] general reporting obligation under Dutch law.[537]

Specific reporting obligations may apply to other types of copyright exploitation contracts, such as performance contracts[538] and audio-visual production contracts.[539] Moreover, EU copyright law sets other analogous reporting obligations, such as the transparency obligations imposed on CMOs through the CRM Directive,[540] the right to information established in the context of the value gap provision[541] and the resale right.[542]

The first step of the analysis of Article 19 DSM Directive is to determine its scope. Article 19 covers contracts resulting in either a transfer or a licence to exclusive exploitation rights and covers both composing and performing musicians.[543] As is the case for Articles 20 and 22 DSM Directive, Article 19 DSM Directive covers the exploitation rights that have been harmonised under EU law – so not the right to

L 132-17-3, L 132-17-4 French IP Code; Lucas and others, *Traité de la Propriété Littéraire et Artistique* (n 17) 735–37.

[532] Former Art 32d *jo* 79(2a) German Copyright Act. See Schulze, 'Das Urhebervertragsrecht' (n 58) 684.

[533] Amended Art 32d *jo* 79(2a) German Copyright Act; Jan Bernd Nordemann and others, 'Transposition of the DSM Copyright Directive 2019/790 in Germany' [2021] AM 325, 327.

[534] Art 24 German Publishing Act; Fromm and Nordemann, *Urheberrecht* (n 58) 2105–07.

[535] Art 25e(4) Dutch Copyright Act *jo* Art 2b Dutch Neighbouring Rights Act; Visser and others, *ACR: Auteurscontractenrecht* (n 44) 166. On the use-it-or-lose-it provision under Dutch law, see above Section 5.2.2.3.2.

[536] New Art 25h(1) Dutch Copyright Act *jo* Art 2b Dutch Neighbouring Rights Act.

[537] As to performers, see Art 2b Dutch Neighbouring Rights Act.

[538] See (1) in Belgium: Art XI.202 Belgian CEL and (2) in France: Art L 132-21 French IP Code. No specific rules applicable to performance contracts were found under German, Dutch or UK law.

[539] See (1) in Belgium: former Arts XI.183(2), XI.206(4) Belgian CEL (both abolished in 2022) and (2) in France: Art L 132-28 French IP Code. Except for the presumption of transfer of exploitation rights, no specific rules applicable to audio-visual production contracts were found under German, Dutch or UK law.

[540] Arts 18–23 CRM Directive.

[541] Art 17(8) DSM Directive. See (1) in Belgium: Arts XI.228/5(2), XI.228/6 Belgian CEL; (2) in France: Arts L 137-3, L 219-3 French IP Code; (3) in Germany: Art 19 German OCSSP Act; and (4) in the Netherlands: Art 29c(4) Dutch Copyright Act.

[542] Art 9 Resale Right Directive. See (1) in Belgium: Art XI.178(4) Belgian CEL; (2) in France: Art L 122-8 para 4 French IP Code; (3) in Germany: Art 26(4)–(5) German Copyright Act; and (4) in the Netherlands: Art 43d Dutch Copyright Act.

[543] Art 19(1) *jo* Rec 77 DSM Directive. On secondary relationships, see below, Section 5.4.3.2.

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adaptation.[544] Recital 75 DSM Directive refers somewhat vaguely to rights that are 'relevant' to the exploitation, including merchandising revenues.[545] The type and amount of remuneration set in the contract are irrelevant. Thus the reporting obligation affects contracts with either royalty arrangements or lump sum fees – in order for the artist to be able to secure relevant information for the application of contract adjustment mechanisms under national law.[546] Finally, as opposed to the relevant provision under German law,[547] Article 19 does not expressly exclude contracts where the agreed remuneration equals zero, such as open licences. While Recital 74 indicates that the need for reporting obligations does not arise in such a case, an express exclusion of open licences would have been beneficial.[548]

The harmonised active reporting obligation does not apply to contributions deemed 'not significant' and cases where this would be 'disproportionate'.[549] The open language of these exemptions engenders legal uncertainty[550] and leaves significant margin for abuse. A broad interpretation of those 'escape routes' would result in reporting obligations that ultimately only benefit a small minority.[551] An additional reason for a restrictive interpretation of these exemptions is that the harmonised contract adjustment mechanism is not subject to a limitation based on the insignificance of artists' contributions, or a proportionality clause. As reporting obligations seek to operationalise contract adjustment mechanisms, coherency considerations advocate in favour of a broad scope of the reporting obligation.

First, Member States may render the reporting obligations inapplicable if the artist's contribution is 'not significant having regard to the overall work or performance', unless the artist needs to obtain access to the information in order to be able to have recourse to the contract adjustment mechanism.[552] Germany, the Netherlands and Belgium have opted to include such an exemption in their national legal framework.[553] German law refers to 'secondary' contributions.

[544] Rec 74 DSM Directive.

[545] Despite the absence of EU harmonisation regarding merchandising (save as to trademark law), merchandising revenues are also expressly included in the amount to be taken into account for the application of the harmonised contract adjustment mechanism, see above, Section 5.3.2.3.1.

[546] See above, Section 5.3.2.3.

[547] Art 32d(1) German Copyright Act.

[548] Cf Bently and others, 'Strengthening the Position' (n 199) 84; European Copyright Society, 'Comment' (n 54) 137.

[549] Ananay Aguilar, 'The New Copyright Directive: Fair Remuneration in Exploitation Contracts of Authors and Performers – Part 1, Articles 18 and 19' (*Kluwer Copyright Blog*, 15 July 2019) <https://bit.ly/3PTLw3L>.

[550] Shapiro, 'Remuneration Provisions in the DSM Copyright Directive and the Audiovisual Industry in the EU' (n 38) 778, 782.

[551] 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, 167; European Copyright Society, 'Comment' (n 54) 132, 134.

[552] Art 19(4) DSM Directive. See also Rec 77 DSM Directive.

[553] See (1) in Germany: Art 32d(2)(1) German Copyright Act; (2) in the Netherlands: Art 25ca(3) Dutch Copyright Act *jo* Art 2b Dutch Neighbouring Rights Act; and (3) in Belgium: Art XI.167/2(3), XI.205/2(3) Belgian CEL.

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A contribution is deemed secondary and thus insignificant if it has little influence on the overall impression created by the content at issue, for example because it is not the typical content.[554] France leaves the issue open for determination through sector-specific collective bargaining.[555]

This reference to the 'significance' of a certain contribution may be linked to the substantive criterion of the use of a certain contribution in a given piece of music as a way to determine what is 'fair'.[556] Actually determining the 'significance' of a given (musical) contribution in the context of a larger whole amounts to guesswork in many cases, and moreover runs counter to the collaborative process of music-making.[557] While the use of a flexible sliding scale may be helpful in establishing what is 'fair' exploitation and/or remuneration, drawing a line in the sand between an 'insignificant' and a 'significant' contribution is an altogether different story. Contractual modulation and a broad interpretation of this concept are to be expected – presumably to the disadvantage of musicians.[558] The initial removal of this cut-off criterion by the European Parliament is therefore understandable.[559] This limitation was reinserted at a later stage of the legislative process at the EU level, but with a proviso meant to safeguard the interests of artists, namely that the application of the contract adjustment mechanism should be assured. The scope of this specification is unclear. Indeed, all musicians' requests for information may be associated with the application of the contract adjustment mechanism. Why would musicians want transparency in terms of remuneration if not to determine whether they are paid what is due to them and whether they have a right to claim additional remuneration? This would render the exemption of insignificant contributions very difficult to operationalise. This, in turn, begs the question what the remaining scope of this exemption is.[560] The application of the general prohibition on abuse of law may have been a (significantly) more elegant solution. The next best alternative may be to interpret the exclusion of insignificant contributions restrictively.[561] Inspiration may be sought from the draft UK mechanism, which excluded 'incidental' embodiments of a work from its scope.[562]

In addition, Member States may limit the reporting obligation to what may reasonably be expected in view of the (modest) amount of revenues garnered by

[554] Art 32d(2)(1) German Copyright Act; Bently and others, 'Strengthening the Position' (n 199) 61; Dreyer and others, *Urheberrecht* (n 58) 777; Möhring and Nicolini, *Urheberrecht* (n 58) 482.
[555] Arts L 131-5-1(I) para 2, L 212-3-1(I) para 2 French IP Code.
[556] See above, Sections 5.2.2.4 and 5.3.2.2.
[557] See above, Section 5.2.2.4.
[558] Cf Bently and others, 'Strengthening the Position' (n 199) 47.
[559] Parliament, 'Report on the Proposal for a Directive of the European Parliament, A8–0245/2018 (n 205) 69.
[560] The answer to this question likely lies in the lobbying process leading up to the DSM Directive, see Fair Internet Coalition, 'Joint Guidelines' (n 54) 16.
[561] Cf Hilty and Moscon, 'Part D – Copyright Contract Law (Article 10 and Articles 14–16 COM (2016) 593 Final)' (n 243) 74; Fair Internet Coalition, 'Joint Guidelines' (n 54) 15, 16.
[562] Draft Art 93D(6)(a) UK CDPA.

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the content.[563] This is done under Belgian, German and Dutch law.[564] Conversely, the French regime does not include an express limitation based on proportionality considerations. However, such a limitation may yet arise from sector-specific collective bargaining. This limitation is meant to avoid disproportionate administrative burdens for corporate partners (such as SMEs) and leads to less stringent information obligations in terms of the types and level of information to be provided.[565]

For corporate partners, the compliance cost associated with the increased reporting obligations is undeniable.[566] The amount depends, first, on the size and roster of artists of the corporate partner: major corporate partners may divide these costs over a large number of artists, while smaller players do not have that luxury. As a result, reporting obligations affect SMEs in a particularly unfavourable way.[567] However, the objective of securing transparency is too essential to truly allow for a reporting obligation 'light' for SMEs.[568] Musicians should not be the 'victim' of the size of their corporate partner.[569]

Other criteria that affect the amount of compliance costs include the relevant methods of exploitation, the frequency of required reporting, the quality of data received from secondary exploiters such as DSPs, and already existing reporting practices.[570] In the music industry, the practice of active reporting is well-established.[571] While administrative costs may be quite high at present, technological progress leads to a significant and increasing degree of automation. Reference may be made to the automatic content recognition technology and rights management systems offered by companies like Audible Magic.[572] In the near future, this may lead to a further steep decrease in costs associated with the collection, processing and management of relevant data.[573] Moreover, if blockchain technology ever fulfils

[563] Art 19(3) DSM Directive.
[564] See (1) under Belgian law: Art XI.167/2(2); XI.205/2(2) Belgian CEL; (2) under German law: Art 32d(2)(2) German Copyright Act; and (3) under Dutch law: Art 25ca Dutch Copyright Act *jo* Art 2b Dutch Neighbouring Rights Act.
[565] Art 19(3) DSM Directive.
[566] Cf Europe Economics and others, 'Remuneration of Authors and Performers' (n 188) 146; Shapiro, 'Remuneration Provisions in the DSM Copyright Directive and the Audiovisual Industry in the EU' (n 38) 782.
[567] Cf Shapiro, 'Remuneration Provisions in the DSM Copyright Directive and the Audiovisual Industry in the EU' (n 38) 778.
[568] Cf Commission, SWD(2016) 301 final (n 4) 186.
[569] On other ways in which SMEs could be supported, see Racine, 'L'Auteur et l'Acte de Création' (n 329) 65.
[570] Cf Commission, SWD(2016) 301 final (n 4) 183–85.
[571] Cf ibid.
[572] <www.audiblemagic.com>.
[573] Cf Europe Economics and others, 'Remuneration of Authors and Performers' (n 188) 146; Commission, SWD(2016) 301 final (n 4) 185; Aguilar, 'The New Copyright Directive: Part 1, Articles 18 and 19' (n 549).

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its promise of an accurate, decentralised global copyright database, administrative costs may decrease even further.[574]

However, this optimistic view is unlikely to fully materialise in practice if no satisfactory solution is found to the metadata issue in the music industry.[575] Regardless, the vagueness of the disproportionality exemption may render it excessive. Moreover, its added value vis-à-vis the general contract law framework may be questioned. Indeed, if the application of a reporting obligation were actually disproportionate, such a claim could be deflected by the general prohibition on abuse of law. Therefore, a restrictive interpretation is merited.[576]

The scope of the harmonised reporting obligation is further affected by the collective dimension of copyright. First, Article 19 DSM Directive does not apply to contracts concluded between rightsholders and CMOs.[577] Further, as is the case for exploitation and remuneration,[578] collective bargaining may play a beneficial role in terms of enhancing transparency.[579] The EU legislator has sought to bolster this opportunity in the DSM Directive, by allowing Member States to favour collective bargaining agreements between stakeholders on transparency. In order to benefit from this, the transparency resulting from such collective agreements must be of the same or a higher level than the minimum requirements established by Article 19 DSM Directive.[580]

The French legislator has taken the opportunity to call upon the collective negotiation process in order to shape the new reporting obligations in the different CCIs.[581] The abovementioned 2017 code of practice of French music publishers contains express commitments in this sense.[582] Another example of more stringent transparency requirements based on collective action is provided by the Memorandum of Understanding signed by French music industry stakeholders in 2015.[583] The corresponding provision of German law also allows derogations from the right to information resulting from collective bargaining, assuming that such collective solutions guarantee a level of transparency comparable to the statutory

[574] Hilty and Moscon, 'Part D – Copyright Contract Law (Article 10 and Articles 14–16 COM(2016) 593 Final)' (n 243) 74.
[575] See Chapter 2, Section 2.5.
[576] Cf Hilty and Moscon, 'Part D – Copyright Contract Law (Article 10 and Articles 14–16 COM (2016) 593 Final)' (n 243) 74; Fair Internet Coalition, 'Joint Guidelines' (n 54) 15, 16.
[577] Art 19(6) *jo* Rec 77 DSM Directive; European Copyright Society, 'Comment' (n 54) 137.
[578] See above, Sections 5.2.2.4 and 5.3.2.2.
[579] Cf Aguilar, 'The New Copyright Directive: Part 1, Articles 18 and 19' (n 549); Fair Internet Coalition, 'Joint Guidelines' (n 54) 16; European Copyright Society, 'Comment' (n 54) 133, 138, 143; Xalabarder, 'The Remuneration of Authors and Performers' (n 52) 145–46.
[580] Art 19(5) *jo* Rec 77 DSM Directive.
[581] Arts L 131-5-1, L 212-3-1 French IP Code.
[582] Code des Usages et des Bonnes Pratiques de l'Edition des Œuvres Musicales (n 172) s 3.5, 3.6.
[583] Memorandum of Understanding 2 October 2015 (n 331).

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benchmark.[584] A similar solution has been implemented under Belgian law.[585] The corresponding provision of Dutch law does not expressly refer to the added value of collective bargaining in further shaping active reporting obligations.[586]

Finally, a note on the temporal scope of reporting obligations is merited. The argument against their application to ongoing contracts is not convincing, given the seminal importance of transparency throughout the music value chain. As the DSM Directive already dates from 2019, corporate partners had sufficient time by June 2022 to enhance their reporting practices in a way that adheres to the minimum benchmarks.[587] Conversely, any retroactive application of reporting obligations to past exploitation activities is to be excluded.

5.3.3.2.2 CONTENT OF ACTIVE REPORTING OBLIGATIONS The next step is to review the content of the active reporting obligations and interpret the resulting commitments for corporate partners. The objective is to ensure a high level of transparency.[588]

The first issue to be tackled is which information is covered by the reporting obligations.[589] Article 19 DSM Directive requires information to be transmitted as regards both exploitation and remuneration. Recital 75 DSM Directive adds that the information must be up-to-date, relevant and comprehensive. The first requirement refers to the need for artists to have access to recent data. The second requirement indicates that the information must relate to exploitation[590] of the music for which the musician(s) is(are) supposed to obtain remuneration. If there is no exploitation, logic dictates that the reporting obligation should cease to apply.[591] However, a musician also has the right to know that no exploitation takes place, to allow effective recourse to the use-it-or-lose-it clause.[592] In any case, if the music is (again) subject to exploitation, information relating to it must be adequate and accurate for

[584] Art 32d(3) German Copyright Act; Dreyer and others, *Urheberrecht* (n 58) 778; Möhring and Nicolini, *Urheberrecht* (n 58) 789.

[585] Art XI.167/5(4°), XI.205/5(4°) Belgian CEL.

[586] See, however, the reference to transparency in the Dutch Fair Practice Code at <https://bit.ly/3joPsQv>.

[587] Cf European Copyright Society, 'Comment' (n 54) 139; Rosati, *Copyright in the Digital Single Market* (n 81) 380.

[588] Art 19(3) DSM Directive. The initial Commission proposal referred to the need to secure an 'appropriate' level of transparency. This was changed to a 'high' level by the European Parliament, see Parliament, 'Report on the Proposal for a Directive of the European Parliament, A8–0245/2018 (n 205) 68–69.

[589] An associated issue is the interplay of reporting obligations with trade secrets and data protection rules. Both regimes may lead to obstacles to the implementation of reporting obligations in practice, see Chapter 7, Section 7.3.

[590] See above, Section 5.2.

[591] See Recs 72, 74 DSM Directive; Rosati, *Copyright in the Digital Single Market* (n 81) 376–77. See expressly in Belgium: Arts XI.167/2, XI.205/2 Belgian CEL, subject to a requirement to notify the artist(s) that exploitation has ceased.

[592] See above, Section 5.2.2.3.

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the requirement of relevance to be fulfilled. Third, the information must cover all relevant sources of revenue.[593]

In addition to the three general requirements set forth above, sector-specific regulation established through scoping stakeholder consultations may further concretise the information that is to be provided.[594] Important work has already been done. In particular, reference may be made to the Transparency Guide compiled by Chris Cooke with the aid of the Music Manager's Forum (MMF, based in the United Kingdom),[595] the 2015 memorandum of understanding signed by French music industry stakeholders[596] and the 2023 UK Industry Agreement on Music Streaming Metadata.[597]

Information should first and foremost be available on the content itself, such as the ISRC and ISWC codes and information on all contributors and/or rightsholders.[598] Further information to be provided consists of three pillars, namely the relevant exploitation activities, the revenues garnered by the corporate partner(s) and the remuneration provided to the artist on this basis.[599]

The first aspect of the relevant information pertains to the way in which the content is exploited. We can rely on the conceptualisation of 'methods of exploitation'.[600] The main distinction is that between physical sales, digital sales and streaming.

For physical and digital sales, the relevant information may be usefully linked with the concept of 'copies'. For physical sales, the information includes the number of copies manufactured in the course of the year, the number in stock, the number sold, the number used for marketing purposes or otherwise provided for free, as well as the number of copies that have been returned or destroyed, or otherwise deemed unusable.[601] The information regarding digital sales may also refer to copies, but without specifications particular to analogue copies, such as the number manufactured, in stock, returned or destroyed. Thus, relevant information regarding digital copies includes the number of sales, the number provided for free and the number deemed unusable for technical reasons.

[593] As indicated above, Art 19 DSM Directive includes merchandising revenues in the potentially relevant sources of revenue.
[594] Rec 77 DSM Directive. Cf Commission, SWD(2016) 301 final (n 4) 178.
[595] Cooke, *Dissecting the Digital Dollar* (n 301) 142–55. See also Chris Cooke, 'CMU + TGE: Music + Data' (The Great Escape Conference, Brighton and Hove, 2022).
[596] Memorandum of Understanding 2 October 2015 (n 331).
[597] UK IPO, Guidance: United Kingdom Industry Agreement on Music Streaming Metadata (31 July 2023) <https://bit.ly/3EqYsZI>.
[598] Cooke, *Dissecting the Digital Dollar* (n 301) 113.
[599] Cf European Copyright Society, 'Comment' (n 54) 143.
[600] See Chapter 4, Section 4.4.1.2.
[601] This list was largely based Art L 132-13 French IP Code (and, by analogy, Art L 132-17-3 French IP Code).

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When it comes to streaming, the concept of 'copies' is moot.[602] In the streaming age, the relevant unit is a stream. This is why the total number of streams or 'track plays' should be reported, as well as the source of such plays – a direct user request, the user's feed or personal library, or a playlist.[603] Additional relevant information includes whether the user skipped (part of) a track and whether it was added to a playlist and/or personal library.[604] Finally, it is important for musicians to know their total listener count and/or follower numbers, including their demographics (such as gender or age) and location, the latter in order to inform the organisation of concert tours.[605]

For physical sales, digital downloads and streaming, the information should be provided separately per method of exploitation.[606] As to digital downloads and streaming, the report should provide separate information per DSP as to number of units. Finally, the report should clearly state what territories are covered.[607]

On the revenue side, for both physical and digital sales, the relevant information includes the unit price (the income received by the corporate partner from the sales per unit[608]), information regarding value-added tax (VAT), as applicable, and an overview of the total revenues.[609] For streaming, information should be provided as to the ex post calculated per-stream rate, applicable VAT and the total revenues – with distinct information per DSP.[610] For all methods of exploitation, the revenues should be distinguished per relevant territory, given that separate remuneration arrangements may apply.

Transparency is also required as to quantifiable indirect revenue sources, in particular breakage, equity and non-allocable income assigned to corporate partners.[611] Article 19 does not expressly include such indirect revenue flows. The requirement of relevance seems to indicate the need for a causal link between the revenues to which the reporting obligation applies and the exploitation of the content. The same conclusion follows from an analysis of the relevant provisions of national law.[612] The requisite strength of such causal link, however, is up for debate. Full transparency is merited for all quantifiable revenue flows, including

[602] See also above, Sections 5.2.2 and 5.3.2.2.
[603] Commission, SWD(2016) 301 final (n 4) 212; Cooke, *Dissecting the Digital Dollar* (n 301) 146, 167.
[604] Cooke, *Dissecting the Digital Dollar* (n 301) 146–47.
[605] ibid 147.
[606] Memorandum of Understanding 2 October 2015 (n 331) s 5.6.
[607] ibid; Commission, SWD(2016) 301 final (n 4) 212.
[608] Cf what is foreseen for literary publishing in Art L 132-17-3(I)(2) French IP Code.
[609] Memorandum of Understanding 2 October 2015 (n 331) s 5.6; Commission, SWD(2016) 301 final (n 4) 212.
[610] Commission, SWD(2016) 301 final (n 4) 212; Cooke, *Dissecting the Digital Dollar* (n 301) 148.
[611] Cf European Copyright Society, 'Comment' (n 54) 143.
[612] See (1) in Belgium: Arts XI.167/2, XI.205/2 Belgian CEL; (2) in France: Arts L 131-5-1(I), L 212-3-1 (I) French IP Code (which refer to the *revenus générés par l'exploitation*, ie the revenues generated by the exploitation); (3) in Germany: Art 32d(1) German Copyright Act (which refers to the *Umfang der Werknutzung und die hieraus gezogenen Erträge und Vorteile*, ie the extent of the exploitation of the work and the revenues and profits *derived therefrom*); (4) in the Netherlands: Art 25ca(1) Dutch Copyright Act (which refers to the methods of exploitation and

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indirect sources of revenues. Article 19 DSM Directive does not stand in the way of such an interpretation.[613] This position is supported by the express inclusion of merchandising revenue in the scope of the harmonised reporting obligation, as confirmed by Recital 75 DSM Directive. Moreover, even if Article 19 DSM Directive were not to include indirect revenues, Member States may include them in the national regimes, in view of the minimum harmonising nature of Article 19 DSM Directive. Artists should be able to gain access to the total revenues generated, as well as the total remuneration due.

The question further arises whether the artist should also obtain access to information regarding their corporate partners' profits. This is linked with the appropriate scope of the contract adjustment mechanism. If the application of the contract adjustment mechanism depends on the corporate partner's revenues, the provision of information on revenues may be sufficient. If the contract adjustment mechanism is linked with profits, the operationalisation of the contract adjustment mechanism requires the artist to also have access to this information. The relevant provisions in Belgium, France and the Netherlands do not expressly mandate transparency as to the corporate partner's profits. Nor does the draft UK mechanism. Conversely, the German reporting obligation refers to both revenues and profits.[614] Independent of that, it may be argued that the good-faith performance of contracts requires corporate partners to inform artists of their profits, while the overarching principle of freedom of contract cautions against overreach in this regard.

The final pillar of the reporting obligation consists of comprehensive information concerning the remuneration due. Reports should not only provide the total amount due and the payment date(s), but also give a clear overview of the applicable royalty rates for each separate category of units (if a sliding scale of remuneration is used), indicating clearly which deductions and/or discounts are applied (including those by intermediary parties) – as well as the contractual basis.[615] In addition, clear information should be provided as to the calculation method of an artist's share relating to a given exploitation activity in case of collaborations.[616] In order to allow artists to fully grasp and assess their overall remuneration, the average royalty rate per unit should be provided as well. The total amounts due and paid should also be included.[617] If the remuneration arrangement makes use of an advance, the total

de daarmee gegenereerde inkomsten, ie the revenues *generated therewith*); and (5) in the United Kingdom: draft Arts 93D(1), 191N(1) UK CDPA.

[613] Cf European Copyright Society, 'Comment' (n 54) 133.

[614] Art 32d(1) German Copyright Act.

[615] Memorandum of Understanding 2 October 2015 (n 331) s 5.6; Cooke, *Dissecting the Digital Dollar* (n 301) 148–49, 200, 207–08. Cf Arts 1(h), 2(b)(v)–(vi) *jo* 3 of the Annex to the CRM Directive.

[616] Cf European Copyright Society, 'Comment' (n 54) 143.

[617] Art L 132-13 French IP Code.

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amount should be clearly indicated, as should the unrecouped part of this advance, if it is recoupable.[618]

The provision of all of the data listed above is necessary to give musicians insight into the fairness of their remuneration. However, it also risks leading to an information overload, with stakeholders drowning in data.[619] Digitisation has caused a dramatic increase in potentially available information on music exploitation and remuneration as well as general information pertaining to listeners in terms of listening and spending behaviour – 'audience data'.[620] An effective implementation of reporting obligations gives rise to an enormous and ever-expanding flow of data.[621] Much of the effectiveness of these reporting obligations will depend on how the relevant information is provided to corporate partners and, ultimately, musicians.[622]

The next step is to determine *how* corporate partners should provide information to musicians. Subsequent to Article 19 DSM Directive, corporate partners have an active duty to provide this information on a recurring basis throughout the course of contract performance.[623] At a minimum, artists should receive a report once every year.[624] The draft UK mechanism even speaks of quarterly reports, while the 2024 UK Voluntary Code of Good Practice on Transparency in Music Streaming refers to a report 'no less than twice a year'.[625] Further, under the EU mechanism, information relevant to a certain exploitation activity should be transmitted within a reasonable period following the exploitation.[626] The obligation to provide this report may be qualified as an obligation of result, while its quality (as well as that of the information included in it) rather implies an obligation of means. The report should be comprehensible and user-friendly, and should moreover allow artists to effectively assess the economic value of the rights – and thus whether the remuneration they

[618] Commission, SWD(2016) 301 final (n 4) 212.

[619] See eg Emmanuel Legrand, 'Synchtank Panel Addresses the Issue of Too Much Data' (*Legrand Network*, 18 May 2021) <https://bit.ly/3pb79k9>.

[620] Cf Baym, *Playing to the Crowd* (n 113) 115–19; Cooke, *Dissecting the Digital Dollar* (n 301) 112, 114, 135, 143.

[621] Rethink Music Initiative, 'Fair Music: Transparency and Payment Flows in the Music Industry' (n 8) 19; Cooke, *Dissecting the Digital Dollar* (n 301) 112, 143–44.

[622] See below, Section 5.4.3.2.

[623] Rec 75 DSM Directive.

[624] Art 19(1), Rec 75 DSM Directive. See (1) in Belgium: Arts 167(1), 205(3) Belgian CEL, requiring at least yearly reporting; (2) in France: Art L 132-13 French IP Code granting an at least annual right to request information in the context publishing contracts; Art L 212-15 French IP Code requiring bi-annual reporting in the context of royalty contracts with performing musicians; new Arts L 131-5-1, L 212-3-1 French IP Code, requiring at least yearly reporting; (3) in Germany: amended Art 32d(1) *jo* 79(2a) German Copyright Act, requiring at least yearly reporting; and (4) in the Netherlands: new Art 25ca Dutch Copyright Act *jo* Art 2b Dutch Neighbouring Rights Act, requiring at least yearly reporting.

[625] Draft Arts 93D(1), 191N(1) UK CDPA; Art 1.6 UK Voluntary Code of Good Practice on Transparency in Music Streaming (31 January 2024) <https://bit.ly/4bbBx32>.

[626] Cf Explanatory Memorandum Belgian Draft DSM Implementation Act (n 64) 48.

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have received is appropriate and proportionate.[627] The link with the requirement of fair remuneration[628] is thus rendered explicit. Further, for efficiency reasons and to promote full transparency, the provision of information should be standardised.[629] More specific good practices refer to the use of an electronic format and the appointment of a representative acting as a one-stop-shop for reporting obligations within large(r) corporate partners.[630]

At the time of writing, it is too soon to gauge the substantive effects of Article 19 DSM Directive and assess whether additional regulatory intervention is desirable. This being said, the minimum benchmarks set by the DSM Directive are less stringent than the detailed accounting and reporting requirements that apply to CMOs, vis-à-vis both their members and users of protected content.[631] This is remarkable, especially since the interests of CMOs may be more aligned with those of artists than is the case for corporate partners.[632] The express link between the active reporting obligation and the transparency requirements for CMOs under UK law in the draft UK mechanism may therefore be welcomed.[633] Further concretisation and ensuing upward harmonisation of active reporting obligations of corporate partners may be merited, perhaps by way of a soft law instrument. The detailed operationalisation of reporting obligations in the music industry set out above may serve as a source of inspiration. Moreover, the establishment of a detailed industry standard as to the form and content of reports by corporate partners would be beneficial. An argument may also be made in favour of obliging transparency regarding the legal and governance structure of the corporate partner, relevant sister and parent companies, the revenues collected from DSPs that have not (yet) been allocated to a specific (group of) musician(s), and so forth.[634] As to the latter, requiring corporate partners to share certain information on the remuneration arrangements set up in secondary contracts with DSPs may be possible.[635] However, care must be taken to tailor the applicable rules in a sector-specific way.

[627] Rec 75 DSM Directive; Commission, SWD(2016) 301 final (n 4) 201.
[628] See above, Section 5.3.2.2.
[629] Cf Bently and others, 'Strengthening the Position' (n 199) 73.
[630] Memorandum of Understanding 2 October 2015 (n 331) s 5.6.
[631] See in particular Arts 18–22 *jo* Recs 34, 36, 55 CRM Directive.
[632] Cf Sylvie Nérisson, 'L'Article 5.7 de La Directive 2014/26/UE, Une Introduction Diabolique Du Droit Des Contrats Dans Le Droit d'Auteur de l'Union Européenne' in Silke von Lewinski (ed), *Remuneration for the Use of Works. Exclusivity vs Other Approaches* (De Gruyter 2017) 262–63; Pál Tomori, 'Need and Options for Regulatory Intervention' in Silke von Lewinski (ed), *Remuneration for the Use of Works. Exclusivity vs Other Approaches* (De Gruyter 2017) 403; AEPO-ARTIS, 'Performers' Rights in International and European Legislation: Situation and Elements for Improvement' (n 238) 141.
[633] Draft Arts 93D(2), 191N(2) UK CDPA.
[634] Cf the content of the annual transparency report mandated by Art 22(2) CRM Directive, as set forth in of the Annex to the CRM Directive.
[635] Cf Cooke, *Dissecting the Digital Dollar* (n 301) 150–52.

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The final issue is what happens if corporate partners fail to fulfil their obligations. In order for transparency requirements to be effective, a clear sanction mechanism must be available. This issue is not addressed at the EU level. National legislators are free to determine the applicable sanction(s).[636] Given the importance of transparency to the functioning of the music ecosystem, the corporate partner's sustained inaction should be sanctionable with termination of the contract and rights reversion – independent of the amount of information that is to be provided.[637] The proposed amendments of the European Parliament to the Commission Proposal for the DSM Directive covered the extension of the scope of the harmonised right of revocation – including the right to revoke exclusivity – to function as a sanction for sustained non-compliance with the active reporting obligation.[638] The proposed revocation mechanism was to apply to transfers and exclusive licences by authors or performers in case of a 'continuous lack of regular reporting' in accordance with the active reporting obligation.[639] Moreover, it allowed Member States to establish sector-specific national rules and set certain procedural requirements, including the need to grant corporate partners a reasonable time to comply following a written notification of their shortcomings.[640] This proposal eventually did not make the cut. While a similar outcome could be reached through the application of general contract rules regulating breach of contract, an express provision in this sense, allowing for contract termination in case of serious breach of applicable reporting obligations, would have been beneficial.[641] Moreover, this would increase coherency with the revocation mechanism harmonised through Article 22 DSM Directive.[642] It would also increase incentives for corporate partners to comply with active reporting obligations. The French regime as to literary publishing may serve as an additional source of inspiration.[643] In the context of music publishing, the French 2017 code of conduct establishes a sanction of termination both if the music publisher does not provide a report within three months after having been put on notice, as well as if the deadline for active reporting is missed too often over the course of three years.[644]

[636] Cf Rosati, *Copyright in the Digital Single Market* (n 81) 378.

[637] Raad voor de Intellectuele Eigendom, 'Advies' (n 64) 101; European Copyright Society, 'Comment' (n 54) 143.

[638] See Parliament, 'Report on the Proposal for a Directive of the European Parliament, A8–0245/2018 (n 205) 70–71.

[639] Draft Art 16a(1) DSM Directive, as proposed by the European Parliament.

[640] Draft Art 16a(1)–(2) DSM Directive, as proposed by the European Parliament.

[641] Cf the outcome in *Crosstown Music Co 1 LLC v Rive Droite Music Ltd* [2010] *EWCA Civ* 1222; [2012] Ch 68.

[642] See above, Section 5.2.2.3.

[643] See relevant case law referred to in Lardinois, *Les Contrats Commentés de l'Industrie de La Musique* 2.0 (n 18) 122. French law provides for additional specifications for the book sector, see Art L 132-17-3(II)-(III), 132-17-4 French IP Code.

[644] Code des Usages et des Bonnes Pratiques de l'Edition des Œuvres Musicales (n 172) s 3.6. Cf Hugenholtz and Guibault, 'Auteurscontractenrecht' (n 58) 74; Racine, 'L'Auteur et l'Acte de Création' (n 329) 111.

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If the corporate partner produces a report, but no corroborating evidence, the sanction under French law is to force the corporate partner to provide the evidence that is needed to establish the accuracy of information provided.[645] Reference may also be made to the new injunction right under German law, which comes into play if an exploiter systematically violates active reporting obligations.[646] These sanctions are quite far-reaching, but appear justified given the large potential contribution of transparency to the music ecosystem. If the information is deficient, musicians should be able to obtain supplementary information that fulfils the substantive requirements set out above. If the corporate partner refuses to provide such information, the route of rights reversion should be available.[647]

5.4 REGULATION OF SECONDARY RELATIONSHIPS

5.4.1 *Structure*

This section reviews the scattered regulatory framework applicable to the performance phase of secondary relationships between musicians' initial corporate partners and third parties. These relationships play a seminal role in the music ecosystem and affect contracts with musicians in a significant way. This is especially true for streaming services, whose exploitation (and ensuing remuneration) activities are governed by contracts to which musicians are not a party. This section analyses how musicians can leverage the legal framework to exert influence on questions of exploitation and/or remuneration of protected music vis-à-vis parties who have been granted rights through a transfer or a sub-licence from the musician's initial contracting partner.

5.4.2 *Exploitation*

In accordance with the relative effect of contracts, an agreement in principle only binds the parties thereto; only the parties may insist upon its performance.[648]

[645] Art L 132-14 French IP Code.

[646] Art 36d German Copyright Act.

[647] Cf Dusollier and others, 'Contractual Arrangements Applicable to Creators' (n 17) 15; Racine, 'L'Auteur et l'Acte de Création' (n 329) 110.

[648] See (1) in Belgium: Art 1165 Belgian Civil Code; Lardinois, *Les Contrats Commentés de l'Industrie de La Musique* 2.0 (n 18) 25; Claeys and Tanghe, *Algemeen Contractenrecht* (n 400) 379–428; (2) in France: Art 1199 French Civil Code; Buffelan-Lanore and Larribau-Terneyre, *Droit Civil. Les obligations* (n 400) 296, 547–51; Terré and others, *Droit Civil. Les Obligations* (n 400) 744–47; (3) in Germany: Art 311(1) German Civil Code; Markesinis and others, *The German Law of Contract* (n 240) 181–86; Medicus and Lorenz, *Schuldrecht I. Allgemeiner Teil* (n 240) 12; Fikentscher and Heinemann, *Schuldrecht* (n 240) 51–53; (4) in the Netherlands: while the old Art 1376 Dutch Civil Code was not included in the new Dutch Civil Code, the underlying principle remains applicable, see eg Dutch Supreme Court 11 July 2014, docket number 13/02493, ECLI:NL:HR:2014:1627; van Dunné, *Verbintenissenrecht*

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Subject to a number of exceptions, contracts do not give rise to rights or obligations of third parties, unless a contractual arrangement to the contrary has been made.[649] If the musician is not a party to the contract with a secondary exploiter, they can in principle not force that third party to carry out certain exploitation activities. This is the case if the initial corporate partner transfers only the exploitation rights and not the corresponding obligations, or if they grant a sub-licence. In such cases, the musician is still likely to be able to have recourse to the initial corporate partner, but not to the third party. The secondary contract may expressly grant musicians the right to assert a duty to exploit vis-à-vis the third party, but this is unlikely. In case of a full contract transfer, the third party takes the place of the initial corporate partner in the initial contract and becomes subject to all the rights and obligations set out in that initial contract.[650]

If a third party is called upon to perform some or all of the exploitation activities concerning a given piece of music, musicians should be able to retain some degree of control (and thus agency) – especially in case of a transfer or an exclusive licence. Musicians should have some form of recourse vis-à-vis their initial contracting party regarding the (in)activity of the third party. There is therefore definitely an argument in favour of extending the scope of the use-it-or-lose-it clause to third parties.[651] This is the case under Dutch law.[652] Considerations that apply to initial corporate partners also ring true by analogy as to secondary relationships: music deserves to be heard – for efforts to be made for it to receive an audience.

It may be argued that the requirement for musicians' consent[653] at the moment of formation of the secondary contract suffices, and that an additional form of control would constitute a disproportionate encroachment upon both initial corporate partners' and secondary parties' freedom of contract. According to this line of argument, musicians have the possibility – and maybe even the duty – to research the identity and the characteristics of the secondary contracting party before consenting to the secondary grant. However, this is also true for the initial corporate partner, where the mere fact that consent is required at the start of the contract does

(n 400) 797–809; Carel Asser, *Verbintenissenrecht. Algemeen Overeenkomstenrecht* (Asser Serie 6. III*, 13th edn, Kluwer 2008) 435–42; Hijma and others, *Rechtshandeling en Overeenkomst* (n 500) 331–32; and (5) in the UK: Joseph Chitty and Hugh Beale, *Chitty on Contracts* (32nd edn, Sweet & Maxwell 2015) ch 18; Edwin Peel, *Treitel on the Law of Contract* (15th edn, Sweet & Maxwell 2020) ch 14; Mindy Chen-Wishart, *Contract Law* (7th edn, Oxford University Press 2022) 167–202.

[649] See Valerie Withofs, *Contractsoverdracht* (Recht en Onderneming 47, die Keure 2015) 367–70.

[650] See ibid 211–17, 469–505.

[651] Lucas-Schloetter, 'The Remuneration of Authors and Performers in Copyright Contract Law' (n 26) 267; Ramalho and Lopez-Tarruella, 'Implementation of the Directive 2011/77/EU' (n 45) 19.

[652] Art 25e(6) Dutch Copyright Act *jo* Art 2b Dutch Neighbouring Rights Act; Visser, 'Pippi Langkous en het nieuwe auteurscontractenrecht' (n 277) 1295; Houben and Visser, 'De Beëindiging van Muziekexploitatieovereenkomsten' (n 500) 142–43.

[653] See Chapter 4, Section 4.5.

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not release the corporate partner from the constraints of the law. Therefore, musicians should be able to reclaim their rights from secondary contracting parties that do not engage in fair exploitation, either via their initial corporate partner, or, preferably, through direct action against the secondary contracting party/parties. This is especially true where the musicians' consent was not required or was obtained in advance. In such a case, moreover, the initial corporate partner and the third party involved should remain jointly and severally liable for the fulfilment of the initial corporate partners' obligations under the initial contract, as is the case under German law.[654]

The relative effect of contracts also extends to the content of exploitation activities. While in the case of contract transfer, the initial corporate partner's obligations shift to the transferee, musicians can in principle not exert any influence vis-à-vis sub-licensees, except on the basis of moral rights protection, rules mandating good faith and/or the general prohibition on the abuse of law.[655] Given the restrictive application of these general principles, as well as the fact that these general rules are not tailored to the creative sector, this role is likely to be relegated to the background. Further obligations vis-à-vis third parties may excessively limit parties' freedom of contract. Moreover, it would not make sense to subject secondary contracting parties to stricter regulation than musicians' primary corporate partners. Much greater importance is attached to applicable obligations in terms of remuneration, which are discussed in the next subsection.

5.4.3 *Remuneration*

5.4.3.1 Fair Remuneration

In terms of remuneration, a distinction may be made between revenues arising from the secondary transaction (in case a transfer of rights is effectuated) and those arising from the exploitation activities of the third party or parties.

If a corporate partner transfers the exclusive rights of musicians to a third party, the musician cannot claim any rights on (part of) the net gains of the initial corporate partner through the sales transaction. The contract adjustment mechanism that was partially harmonised through the DSM Directive also applies to corporate partners' successors in title (so transferees, not sub-licensees) and could be invoked in such a context. However, it would be difficult to claim the existence of a manifest disproportion in the sense of this mechanism.

An option to strengthen musicians' position would be to find inspiration in the existing resale right for artworks. Subsequent to this unwaivable right, which is harmonised at the EU level, artists have a right to a percentage of the price of

[654] Art 34(4) German Copyright Act.
[655] See Withofs, *Contractsoverdracht* (n 649) 211–17, 367–70, 469–505.

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public resales of their artwork following the initial sale.[656] Member States are free to operationalise the resale right through collective management, or to maintain its individual enforcement.[657] The resale right seeks to ensure that artists 'share in the economic success of their original works of art', thus contributing to a fairer balance between the interests of stakeholders.[658] The link with this book's objective of securing fair remuneration for all stakeholders in the streaming age is clear. A resale right for music could allow musicians to claim part of the profit made by their initial corporate partner through the sales transaction. This is not prohibited at the international or EU level. As to authors, Article 14*ter*(1) Berne Convention not only posits an inalienable 'right to an interest in resales' on the part of both the author of original 'works of art', but also for 'manuscripts of writers and composers', expressly acknowledging the possibility of extending the resale right to compositions. While the international framework concerning the protection of (fixations of) performances does not contain an equivalent provision, the minimum harmonising nature of the applicable EU norm implies that a resale right for performers could be envisaged. Such a right could be limited to transactions that exceed a certain monetary threshold and/or that take place after a certain minimum period following the initial transaction.[659] The specifics could be the subject of sector-specific dialogues. For the purpose of transparency and in order to allow effective monitoring, the operationalisation of such a right would greatly benefit from the establishment of an active reporting obligation for corporate partners as to relevant transactions, as well as a passive reporting obligation upon a musician's express request.[660]

However, it is difficult to say whether the establishment of a resale right for music would actually lead to increased income for musicians, given the possibility that this would result in a diminished initial transfer fee.[661] In order to establish whether or not this would be the case, further empirical research is needed.

[656] Art 1 Resale Right Directive; Thomas Dreier and P Bernt Hugenholtz (eds), *Concise European Copyright Law* (2nd edn, Kluwer Law International 2016) 491–510; Jane Ginsburg, 'Copyright' in *The Oxford Handbook of Intellectual Property Law* (Oxford Handbooks, Oxford University Press 2018) 509; Justine Pila and Paul Torremans, *European Intellectual Property Law* (2nd edn, Oxford University Press 2019) 304–05; Jens Gaster, 'The Resale Right Directive' in Irini Stamatoudi and Paul Torremans (eds), *EU Copyright Law. A Commentary* (Elgar Commentaries, Edward Elgar 2021) 255–78.

[657] Commission, 'The Implementation and Effect of the Resale Right Directive' (Report) COM (2011) 878 Final (14 December 2011) 8. See (1) in Belgium: Arts XI.173–178 *jo.* XV.110 Belgian CEL; (2) in France: Arts L122-8 and R122-2–R122-12 French IP Code; (3) in Germany: Art 26 German Copyright Act; (4) in the Netherlands: Arts 43–43g Dutch Copyright Act; and (5) in the United Kingdom: the Artist's Resale Right Regulations 2006 (SI 2016/346).

[658] Rec 3 Resale Right Directive.

[659] Cf Arts 1(3), 3 Resale Right Directive.

[660] Cf Art 9 *jo* Rec 30 Resale Right Directive.

[661] Cf Kretschmer and others, 'The Relationship between Copyright and Contract Law' (n 260) 79; Ruth Towse, *A Textbook of Cultural Economics* (2nd edn, Cambridge University Press 2019) 419–20.

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In addition to the secondary transaction itself, secondary transferees' or sub-licensees' exploitation activities also garner revenues – at a rate that has been increasing significantly over the past few years.[662] The economic value of the exploitation activities carried out by DSPs under the sub-licences thus acquired from musicians' primary corporate partners is not to be underestimated. The same rings true as to their follow-on impact on the contractual relationship between musicians and their corporate partners.

On the one hand, substantive discussions concerning the activities of DSPs and their interplay with the CCIs have largely revolved around the issue of the so-called value gap. This relates to protected content that is shared on social media and online content-sharing service providers (OCSSPs) and for which the media industries seek to obtain remuneration. It refers to the significant difference that is said to exist between the economic value extracted from creative content by DSPs through exploitation, and the remuneration ultimately accruing to rightsholders.[663] The value gap issue ties in with the second dimension of the balance between copyright and other fundamental rights: the balance between rightsholders and users as well as exploiters of protected content.[664] As this book centres around the third dimension – the balance between interests within the music value chain itself – an in-depth analysis of the value gap issue is eschewed here. Instead, the analysis focuses on whether the revenues collected by secondary exploiters are subject to the protective framework for primary music contracts. Generally speaking, requirements applicable in terms of fair remuneration are not enforceable against third parties with whom musicians do not have a contractual bond, such as transferees and sublicensees.[665] Two types of exceptions apply. First, under German law, if the requisite consent of the musician(s) to the transaction was not required or was obtained in advance, the initial corporate partner and the third party involved remain jointly and severally liable for the fulfilment of the initial corporate partners' obligations under the initial contract with the musician.[666] This leads to an indirect application of the requirement of fair remuneration. Second, under Belgian law, in case the primary publishing contract is rescinded,[667] secondary (transfer or licence) contracts remain unaffected, but authors (not performers) have a direct remuneration claim vis-à-vis

[662] See Chapter 2, Section 2.3.

[663] On this topic from the perspective of the CCIs, see Paul Kempton and Massimo Travostino (eds), *Finding the Value in the Gap* (IAEL Yearbook, 2018).

[664] See Chapter 3, Section 3.2.1.

[665] Lucas-Schloetter, 'The Remuneration of Authors and Performers in Copyright Contract Law' (n 26) 258. Cf Mark Anderson, 'Assignments and Royalties Don't Mix' (2009) 4 JIPLP 283, 284–88. Under UK law, see *Barker v Stickney* [1919] 1 *KB* 121; John Adams, 'The Passing of the Burden of Royalty Payments' (2007) 4 IPQ 403; Arnold, *Performers' Rights* (n 370) 277–79.

[666] Art 34(4) *jo* 79(2a) German Copyright Act; Schricker, *Urheberrecht. Kommentar* (n 58) 736–51; Markellou, *Le Contrat d'Exploitation d'Auteur* (n 17) 232.

[667] For more detail on the termination of the contracts under review and the consequences thereof, see Chapter 6.

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the third party.[668] This rule provides an opening, albeit rather limited, to an indirect application of the requirement of fair remuneration to secondary relationships in the field of copyright *sensu stricto*.

Moreover, the scope of some of the other specific rules on remuneration has been expressly extended to secondary relationships. The right to additional remuneration for emerging methods of exploitation under German and Dutch law may be directly enforced against third parties to which corporate partners have transferred (not licensed) musicians' rights.[669]

The significant economic value of secondary relationships should be coupled with additional regulatory action to ensure reciprocity in the form of a fair distribution of revenues. While an express extension of the principle of fair remuneration to such secondary relationships would be excessive, an argument may be made in favour of the application of a contract adjustment mechanism to all third-party corporate partners when an actionable disproportionality in revenue distribution arises, subject to applicable rules pertaining to prescriptive periods.[670]

As noted above, the harmonised contract adjustment mechanism also applies to transferees.[671] The German and Dutch provisions have a broader scope and allow artists to assert their rights on the basis of the contract adjustment mechanism against both transferees and sub-licensees.[672] In the Netherlands, such a direct claim is unwaivable, but subject to the conditions that the required objectionable disproportion arises subsequent to the grant of rights to the third party and that the third party acquires the exploitation revenues relating to the content.[673] In Germany, the direct claim is subject to the condition that the disproportion at issue results from proceeds or benefits enjoyed by that party.[674] This claim may not be waived in advance.[675] These jurisdictions may serve as a source of inspiration, not only in view of fairness considerations, but also given the reference to 'all the subsequent relevant revenues derived from the exploitation' in the disproportionality assessment under Article 20 DSM Directive. Indeed, 'all' revenues may be said to also include revenues accrued by third parties.[676]

[668] Markellou, *Le Contrat d'Exploitation d'Auteur* (n 17) 232–34.
[669] Arts 32c(2), 79b(2) German Copyright Act; Art 25c(6) Dutch Copyright Act *jo* Art 2b Dutch Neighbouring Rights Act; Visser and others, *ACR: Auteurscontractenrecht* (n 44) 141–42.
[670] Cf Paramythiotis, 'Fairness in Copyright Contract Law' (n 219) 88–89.
[671] Art 20(1) *jo* Rec 78 DSM Directive; Shapiro, 'Remuneration Provisions in the DSM Copyright Directive and the Audiovisual Industry in the EU' (n 38) 783.
[672] Under French law, see also French Supreme Court 16 July 1998, docket number 96-10.123 <https://bit.ly/3Dn8Dfk>; Hugenholtz and Guibault, 'Auteurscontractenrecht' (n 58) 58–59.
[673] Arts 25d(2) *jo* 25h(1) Dutch Copyright Act *jo* Art 2b Dutch Neighbouring Rights Act; van Gompel and others, 'Evaluatie Wet Auteurscontractenrecht: Eindrapport' (n 102) 38; Visser, 'Dutch Copyright Contract Law' (n 137) 32–33.
[674] Arts 32a(2) *jo* 79(2a) German Copyright Act. See Reber, 'The "Further Fair Participation" Provision in Art 32 a (2) German Copyright Act' (n 339) 382–85.
[675] Arts 32a(3) *jo* 79(2a) German Copyright Act.
[676] Paramythiotis, 'Fairness in Copyright Contract Law' (n 219) 89.

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It would be even more beneficial to the musician if the right to claim additional remuneration from a third-party transferee were not to exclude the possibility of claiming such remuneration from the initial corporate partner, subject to an internal regress mechanism between the initial corporate partner and the grantee.[677] However, this possibility is expressly excluded under German law: once a claim against the third party is possible, any claim vis-à-vis the initial corporate partner on that basis disappears.[678] Despite largely being modelled on its German counterpart, the corresponding provision under Dutch law does not expressly treat this hypothesis and appears to accommodate both sides of the argument.[679] In practice, contractual arrangements on this issue are likely.[680]

5.4.3.2 Transparency

Transparency is an inherent aspect of fair remuneration. However, the wealth of intermediaries in the streaming age leads to a multiplicity of contracts between primary and secondary corporate partners that is difficult, if not impossible to disentangle. While ALS data management companies and dedicated DSP artist dashboards that provide access to data analytics[681] may fulfil an important role, musicians are often unable to obtain credible data on digital use and streaming of their music in the long term.[682] By way of example, since August 2023, 'Spotify for Artists' only shows detailed streaming data for 'the past 2 years plus the year to date'.[683]

Transparency should apply throughout the entire music value chain. Given the ever-increasing economic role of DSPs, secondary relationships should not be overlooked.[684] This subsection reviews the reporting obligations that apply to secondary relationships.

[677] Cf Reber, 'The "Further Fair Participation" Provision in Art 32 a (2) German Copyright Act' (n 339) 385.

[678] Arts 32a(2) *jo* 79(2a), 32c(2), 79b(2) German Copyright Act.

[679] Arts 25d(2), 25c(6) Dutch Copyright Act *jo* Art 2b Dutch Neighbouring Rights Act.

[680] Visser, 'Pippi Langkous en het nieuwe auteurscontractenrecht' (n 277) 1295.

[681] See eg Amazon Music for Artists <https://artists.amazonmusic.com>, Apple Music for Artists <https://artists.apple.com>, Deezer Backstage <https://backstage.deezer.com>, Spotify for Artists <https://artists.spotify.com>, etc.

[682] See eg Giblin and Doctorow, *Chokepoint Capitalism* (n 305) 160. See eg the dispute between Dutch artist Mr Probz, his label (Left Lane Recordings), and Sony Music Entertainment, see District Court Amsterdam 10 September 2020, ECLI:NL:RBAMS:2020:4618 and, most recently at the time of writing, District Court Amsterdam 9 August 2023, ECLI:NL:RBAMS:2023:5087. See also [2021] AR 40–2.

[683] <https://support.spotify.com/us/artists/article/data-retention>.

[684] Cf Hilty and Moscon, 'Part D – Copyright Contract Law (Article 10 and Articles 14–16 COM (2016) 593 Final)' (n 243) 75; Aisling Quinn, 'Are Online Music Platforms Undermining the Principles of Copyright Law?' (2018) 13 JIPLP 49, 59–60; European Copyright Society, 'Comment' (n 54) 133, 143; William Deresiewicz, *The Death of the Artist. How Creators Are Struggling to Survive in the Age of Billionaires and Big Tech* (Henry Holt 2020) 318; Racine,

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The reporting obligation that was harmonised by Article 19 DSM Directive also applies to third parties to which musicians' initial corporate partners have transferred their rights.[685] This proviso is also included in the UK draft mechanism.[686] Consequently, such transferees have to actively inform musicians. Whether the initial corporate partner's duty to inform lapses in such a case, is not specified at the EU level. The German regime expressly treats this hypothesis.[687] In case of a further transfer (or sub-licence), the musician also has the right to demand information and accountability from the third party/parties at issue.[688] The further transfer of rights therefore does not relieve the initial corporate partner of their obligation to provide relevant information upon request. No equivalent appears to be included under Belgian, Dutch or French copyright contract law.

The harmonised reporting obligation under EU law also applies to sub-licensees,[689] albeit only in a limited way. Instead of an active duty to inform, sub-licensees are only obliged to provide information upon request, if the initial corporate partner does not hold the necessary information.[690]

The procedure consists of several stages. First, the initial corporate partner must fulfil their own reporting obligation. Contrary to what is the case for further transfers, therefore, it is clear that a sub-licence does not exempt the initial corporate partner from the fulfilment of their reporting obligation. Second, the musician must analyse the information transferred and assess whether this information allows them to determine the economic value of their music, or whether additional information is required.[691] Third, the musician must request additional information from the initial corporate partner. In case they themselves hold additional information, such information must then be provided and, again, assessed by the musician. If only their sub-licensee(s) hold(s) the additional relevant information, the initial corporate partner must provide information on their identity.[692] Relevant sub-licensees may – and will often – be DSPs, but may also be sister companies to the initial corporate

'L'Auteur et l'Acte de Création' (n 329) 110; van Gompel and others, 'Evaluatie Wet Auteurscontractenrecht: Eindrapport' (n 102) 31.

[685] See Art 19(1) DSM Directive, which refers to initial corporate partners as well as 'their successors in title'.

[686] Draft Arts 93D(3), 191N(3) UK CDPA. Cf Art 5 UK Voluntary Code of Good Practice on Transparency in Music Streaming (31 January 2024) <https://bit.ly/4bbBx32>.

[687] Amended Art 32e(1) *jo* 79(2a) German Copyright Act.

[688] Third-party grantees fall within the scope of this right to information if they essentially economically determine the exploitation of the content at issue or if their revenues or profits lead to a disproportion in the sense of the German contract adjustment mechanism. The right of information only applies if the initial contracting partner fails to fulfil their reporting obligation within three months following the due date, or if the information that was provided falls short, see amended Art 32e(1) *jo* 79(2a) German Copyright Act.

[689] Including sub-licences granted subsequent to the application of Art 17 DSM Directive, see Art 17(8) DSM Directive.

[690] Art 19(2) DSM Directive. See critically Visser, 'Dutch Copyright Contract Law' (n 137) 29–30.

[691] Rec 76 DSM Directive.

[692] Art 19(2) DSM Directive.

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partner. The multi-step approach condoned by Article 19 DSM Directive thus indirectly allows the initial corporate partner to take measures to retain certain time-sensitive information.[693] Further, as to the actual request for additional information vis-à-vis the sub-licensee, Member States may require musicians to go (directly or indirectly) through their initial corporate partner.[694] In such a case, the artist should be entitled to request information directly from the sub-licensee.[695] National regulatory approaches vary. The formulation of the Dutch provision suggests that the artist may choose to request information from either the initial corporate partner or the sub-licensee.[696] The Belgian provision goes in the same direction, but adds that a collective agreement may limit artists' choice.[697] Conversely, the new German rule provides that the sub-licensee must only provide information to artists if the musicians' initial corporate partner does not comply with their obligation to inform within three months of the due date, or if the information does not provide sufficient information about the exploitation by the third party/parties and/or the relevant revenues and profits.[698] Finally, the French regime leaves the procedure for information provision by third parties up to collective bargaining.[699]

A sub-licensee that is (finally) confronted with a request for additional information must provide it. The cooperation of unwilling sub-licensees may be secured in several different ways. A first clear incentive for sub-licensees to this end exists if the non-rendering of accounts is sanctioned by contract termination that also affects contracts further down the licensing chain.[700] Indeed, if the sub-licensee does not comply, the composer may claim termination of the initial contract, which would lead to the destruction of the chain of rights – to the disadvantage of the sub-licensee.[701] On the other hand, subsequent to the implementation of the DSM Directive, German law grants artists an injunction right if a third party systematically refuses to provide relevant information – similar to the right granted in the context of primary contractual relationships.[702] Remedies under national tort law may also apply.

If the sub-licensee cooperates, no real qualitative or quantitative benchmark appears to apply to the additional information they provide. Nor is the sub-licensee subject to any deadline to take action. It may be questioned whether many

[693] Aguilar, 'The New Copyright Directive: Part 1, Articles 18 and 19' (n 549).
[694] Art 19(2) DSM Directive; Fair Internet Coalition, 'Joint Guidelines' (n 54) 13.
[695] Parliament, 'Report on the Proposal for a Directive of the European Parliament, A8–0245/2018 (n 205) 68.
[696] Art 25ca(2) Dutch Copyright Act *jo* Art 2b Dutch Neighbouring Rights Act.
[697] Arts XI.167/2(5), XI.205/2(5) Belgian CEL.
[698] Amended Art 32e(1) *jo* 79(2a) German Copyright Act.
[699] Arts L 131-5-1(II), L 212-3-1(II) French IP Code.
[700] For publishing contracts under French law, see above, Section 5.3.3.2.2.
[701] Cf Bently and others, 'Strengthening the Position' (n 199) 59. Under Belgian law, as noted above (Section 5.4.3.1), the termination of the primary publishing contract has no impact on the validity of secondary contracts. Instead, authors have a direct remuneration claim vis-à-vis the third party.
[702] Art 36d German Copyright Act.

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musicians will invoke this right to request information in view of both the burdensome set of steps and the lack of qualitative guarantees in terms of prospective return.[703] A more elegant and effective solution could have been to extend the reporting obligation not only to third-party transferees, but also to sub-licensees, as was done for exclusive licensees under the draft UK mechanism.[704] Moreover, if the information received from the initial corporate partner(s) falls short, a direct claim for musicians vis-à-vis both their initial corporate partner(s) and the relevant sub-licensee(s) would be beneficial.

5.5 RESIDUAL REMUNERATION RIGHT FOR STREAMING

Above, focus lay on exclusive rights. However, exclusivity does not in itself equal (fair) scope, exploitation and/or remuneration. The pitfalls of contractual negotiations and the ensuing risks of unfairness remain. To avoid these pitfalls, the legislator can set in motion a shift away from exclusivity and towards remuneration – from property rule to liability rule.[705] A potential avenue presents itself in the form of an unwaivable, collectively managed remuneration right for the online use of protected music.[706] Such a right would focus on the digital sphere. It would be akin to the statutory mechanism for the rental right and has been gaining significant traction in recent years.[707]

Proponents of 'equitable remuneration' (ER) for streaming argue in favour of the combination of an exclusive right and a remuneration right for online exploitation. The initial exclusive right of musicians would still be transferable or susceptible to licensing to a corporate partner.[708] That corporate partner would then still be able to

[703] Cf Commission, SWD(2016) 301 final (n 4) 178.

[704] Draft Arts 93D(3), 191N(3) UK CDPA.

[705] Jens Schovsbo, 'The Necessity to Collectivize Copyright – and Dangers Thereof' in Jan Rosén (ed), *Individualism and Collectiveness in Intellectual Property Law* (ATRIP Intellectual Property, Edward Elgar 2012) 169, 177. Regarding the pitfalls of such an approach, see ibid 179–82.

[706] Daniel Johansson, 'Revenue Distribution from Music Streaming – A Quantitative Analysis of Swedish Artists on Spotify' (2023) 24–29; 'Information Session on the Music Streaming Market – SCCR 43 Day 4 Afternoon' (16 March 2023) <https://webcast.wipo.int/video/SCCR_43_2023-03-16_PM_118736>.

[707] Cf Art 5(1) Rental and Lending Directive; David Stopps, 'How to Make a Living from Music, Second Edition' (Creative Industries, WIPO 2014) 33–34; Europe Economics and others, 'Remuneration of Authors and Performers' (n 188) 23, 27; Tomori, 'Need and Options for Regulatory Intervention' (n 632) 400; Silke von Lewinski, 'A Model that May Indeed Help' in Silke von Lewinski (ed), *Remuneration for the Use of Works. Exclusivity vs Other Approaches* (De Gruyter 2017) 255–58; Xalabarder, 'The Principle of Appropriate and Proportionate Remuneration' (n 203) 29–31; DCMS Committee, 'Economics of Music Streaming (n 280) 34–43; Sylvie Nérisson, 'The Rental and Lending Rights Directive' in Irini Stamatoudi and Paul Torremans (eds), *EU Copyright Law. A Commentary* (Elgar Commentaries, Edward Elgar 2021) 135–36; Paramythiotis, 'Fairness in Copyright Contract Law' (n 219) 95.

[708] Xalabarder, 'The Principle of Appropriate and Proportionate Remuneration' (n 203) 25.

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exploit this exclusive right, such as through the grant of (sub-)licences.[709] In other words, the corporate partner would still acquire an exclusive right in addition to their own exclusive neighbouring right, and would thus be able to maintain control in terms of exploitation.[710] Upon the grant of the musician's exclusive rights to the corporate partner, the musician(s) would retain an unwaivable, 'residual'[711] right to equitable remuneration, which would only kick in upon exploitation by the corporate partner, such as through the grant of (sub-)licences to a DSP.[712] Upon exploiting music in the context of such a secondary contractual relationship, the latter would then be liable to pay a fee to a CMO, which would distribute the ensuing revenues to musicians.[713] The amount due would be calculated on the basis of the level of exploitation of the DSP.[714] This would remove musicians' remuneration from the value chain that includes the corporate partner(s) and, by doing so, contribute to a fair return to musicians.[715] Only through (mandatory) collective management, it is argued, the playing field may be levelled in a way that fairness may be achieved in terms of remuneration.[716] Simultaneously, by allowing corporate partners to maintain control through exclusivity, positive effects may be expected in terms of efficiency.[717] The associated decrease in transaction costs would be beneficial to all stakeholders.[718]

Further theoretical support for the concept of ER arises from the substantive similarities between radio and music streaming, especially non-interactive discovery

[709] ibid 26, 37, 40, 43–44, 47.

[710] Europe Economics and others, 'Remuneration of Authors and Performers' (n 188) 154; Castle and Feijóo, 'Study on the Artists in the Digital Music Marketplace' (n 307) 6.

[711] 'Residual' refers to the fact that the remuneration right remains part of the musician's assets following the grant of rights to a corporate partner.

[712] Europe Economics and others, 'Remuneration of Authors and Performers' (n 188) 155; Raquel Xalabarder, 'Appropriate and Proportionate Remuneration' (European Copyright Society Conference – Copyright Challenges during the Pandemic (and Beyond), online, 21 May 2021); P Bernt Hugenholtz, 'Remuneration Rights and National Treatment' in Susy Frankel and others (eds), *Improving Intellectual Property* (Edward Elgar 2023) 347.

[713] Dusollier, 'An Effective and Comprehensive Contractual Protection of Creators and Performers' (n 89); Xalabarder, 'The Principle of Appropriate and Proportionate Remuneration' (n 203) 27; Castle and Feijóo, 'Study on the Artists in the Digital Music Marketplace' (n 307) 6; DCMS Committee, 'Economics of Music Streaming (n 280) 34–35.

[714] Dusollier and others, 'Contractual Arrangements Applicable to Creators' (n 17) 75.

[715] Europe Economics and others, 'Remuneration of Authors and Performers' (n 188) 119; Cooke, *Dissecting the Digital Dollar* (n 301) 96.

[716] Sylvie Nérisson, 'Collective Management and Exclusive Rights: Friends or Foes?' in Paul Torremans (ed), *Research Handbook on Copyright Law* (Research Handbooks in Intellectual Property, 2nd edn, Edward Elgar 2017) 441; von Lewinski, 'A Model that May Indeed Help' (n 707) 256–58; Malevanny, *Online Music Distribution* (n 109) 334–39, 375; European Copyright Society, 'Comment' (n 54) 142; Irina Eidsvold-Tøien, 'Remunerating Authors and Performers: Are Statutory Compensation Provisions Sufficient?' in Jens Schovsbo (ed), *The Exploitation of Intellectual Property Rights: In Search of the Right Balance* (ATRIP Intellectual Property, Edward Elgar 2023) 207–12.

[717] Cf Dusollier and others, 'Contractual Arrangements Applicable to Creators' (n 17) 75.

[718] Xalabarder, 'The Remuneration of Authors and Performers' (n 52) 142.

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and recommendation mechanisms.[719] While much streaming activity has a strong likeness to radio play – and Spotify even has a feature that is expressly labelled as 'radio' – the current legal status and its ensuing administration differs widely. For radio, a 50/50 division between composition and phonogram is the norm, while the division for streaming is close to a 20/80 split.[720] As for the division of revenues between musicians and their corporate partners, again a 50/50 division for radio may be contrasted with a significantly lower proportionate return for musicians for music streaming.[721] This difference in legal and practical treatment between streaming and radio is difficult to justify, especially for non-interactive streaming.

However, the idea of ER for streaming is not at all free from criticism.[722] First, from the perspective of corporate partners, a certain mistrust towards changing the status quo may be forgiven.[723] Indeed, their fear that a redistribution of the pie may work to their commercial disadvantage may be justified. From the perspective of musicians, the shift away from exclusivity may lead to a certain loss of control regarding the exploitation of their music – and thus decreased agency.[724] However, situations where such loss of control would be the most palpable may be overcome through the application of moral rights protection. Moreover, the reality of exclusive rights is their transfer.[725] For many musicians, the idea of control is already illusory; the establishment of a statutory remuneration mechanism would not lead to any real 'loss' of control in practice.[726]

A counterargument that bears more weight is that, if effective collective bargaining mechanisms are in place and/or all record companies start paying royalties to heritage artists with unrecouped balances,[727] fair remuneration may be secured via these routes, in turn rendering ER for streaming unnecessary.[728]

[719] Cf Giblin and Doctorow, *Chokepoint Capitalism* (n 305) 218.

[720] See Chapter 2, Section 2.4.4.

[721] Castle and Feijóo, 'Study on the Artists in the Digital Music Marketplace' (n 307) 7; DCMS Committee, 'Economics of Music Streaming' (n 280) 34–40.

[722] See eg Will Page, 'Equitable Remuneration: Policy Options and Their Unintended Consequences' (2023). See however AEPO-ARTIS, 'The Music Industry Is Not Just a Label-Economy' (7 April 2023) <www.aepo-artis.org/the-music-industry-is-not-just-a-label-economy/>.

[723] Cf DCMS Committee, 'Economics of Music Streaming' (n 280) 36–39. See also Giblin and Doctorow, *Chokepoint Capitalism* (n 305) 216.

[724] Schovsbo, 'The Necessity to Collectivize Copyright' (n 705) 180–81; Commission, 'Report on the Responses to the Public Consultation on the Review of the EU Copyright Rules' (n 375) 80, 82; Commission, SWD(2016) 301 final (n 4) 30; Raad voor de Intellectuele Eigendom, 'Advies' (n 64) 77.

[725] Raad voor de Intellectuele Eigendom, 'Advies' (n 64) 77.

[726] Cf Thomas Dreier, 'Exclusive Rights' in Silke von Lewinski (ed), *Remuneration for the Use of Works. Exclusivity vs Other Approaches* (De Gruyter 2017) 15–16; AEPO-ARTIS, 'Performers' Rights in International and European Legislation: Situation and Elements for Improvement' (n 238) 9.

[727] See above, Section 5.3.2.2.2.

[728] Cf Commission, 'Report on the Responses to the Public Consultation on the Review of the EU Copyright Rules' (n 375) 80; Commission, SWD(2016) 301 final (n 4) 30; Brigitte Lindner, 'The Role of Collective Administration in New Business Models in the Audiovisual Sector' in Silke

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However, the former primarily applies to countries with a strong collective bargaining tradition. Regardless, this may provide an alternative solution for risk-averse musicians who prefer an immediate (lump sum) return for their musical contributions.[729]

In addition, it has been argued that the redistributive effects of ER would only benefit a minority of musicians, not only because the revenue proportion accorded to (successful) featured artists would diminish, but also in view of the prospective lower flat fee for non-featured artists that this risks entailing in the long run.[730] However, a redistribution of revenues inevitably results in some stakeholders being worse off than before. While it is logical for prospective 'losers' to object to such a redistribution, we must adopt a holistic perspective and move towards a model that is as fair as possible for as many stakeholders as possible. Given the current lack of remuneration for many musicians, regulatory action is required, even if this risks leaving certain artists worse off than before.

Finally, from the perspective of users, the establishment of yet another copyright levy is likely to be a cause for concern, since a risk of increased transaction costs and double payment arises.[731] However, from a conceptual standpoint, the legal object of the potential fee payable on the basis of ER for streaming differs from the payment associated with the exploitation of an exclusive right. Nevertheless, care must be taken to avoid ER for streaming that would lead to an undue increase of total costs for music use. The removal of performers' contributions from the value chain through the establishment of ER for streaming would in itself require a downward adjustment of the fee charged by corporate partners. Indeed, the contrary could give rise to a potential abuse of dominant position through excessive pricing, as the fee charged would then not (or no longer) correspond to the economic value of the exploitation right granted.[732]

Several other practical obstacles to the implementation of ER for streaming arise, in particular as to the appropriate methods of calculation, collection and distribution.[733] As regards all three aspects, streamlining is desirable. Indeed, if ER is established in each country separately, with a vastly different set of conditions and procedures, this would lead to an increase in legal uncertainty and ensuing

von Lewinski (ed), *Remuneration for the Use of Works. Exclusivity vs Other Approaches* (De Gruyter 2017) 423–24.

[729] Europe Economics and others, 'Remuneration of Authors and Performers' (n 188) 155–56.

[730] Hesmondhalgh and others, 'Music Creators' Earnings in the Digital Era' (n 311) 97.

[731] Cf William F Patry, *How to Fix Copyright* (Oxford University Press 2011) 486; Commission, 'Report on the Responses to the Public Consultation on the Review of the EU Copyright Rules' (n 375) 82; Commission, SWD(2016) 301 final (n 4) 31; Giblin and Doctorow, *Chokepoint Capitalism* (n 305) 216.

[732] Cf above, Section 5.3.2.2.2.

[733] 'The Ten Things People Get Wrong about Streaming – Part Two' (n 306). Cf Sari Depreeuw, 'Mandatory Collective Management of Copyright: When the Road to Deadlock Is Paved with Good Intentions' (*Kluwer Copyright Blog*, 9 February 2022) <https://bit.ly/33emVmo>.

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transaction costs, as well as a decrease in transparency.[734] The (at first) purely national nature of an ER system for streaming would lead to significant difficulties in ensuring cross-border licences.[735] Further, the most logical administration method for ER for streaming would be to have recourse to mandatory collective management. If this route is chosen, care must be taken to complete the web of reciprocity agreements between CMOs and further optimise the collective management process.[736] Moreover, due care is required for the interests of performers that are not (yet) a member of a CMO, as well as those who wish to distribute their music under an open licence.[737]

Finally, in countries with a strong collective bargaining tradition and/or a well-performing system of voluntary collective management for exclusive rights, effective recourse to such collective mechanisms should not be hindered. National legislators should have the possibility to opt for collective bargaining or voluntary collective management for digital exploitation instead of mandatory collective management through a residual remuneration right. As to the former, a legislative prerequisite should be that such collectively bargained arrangements can be made generally binding.

In order to establish ER for streaming, legislative intervention is necessary, since such a right cannot be created solely through bottom-up industry-led change. The international and EU regulatory levels neither expressly mandate nor prohibit the establishment of a statutory right to ER for streaming at the national level.[738]

Given the minimum harmonising nature of the DSM Directive, in principle nothing prevents Member States from setting up such a statutory remuneration mechanism.[739] The effective implementation of Article 18 DSM Directive requires

[734] Cf Commission, 'The Online Distribution of Audiovisual Works in the European Union: Opportunities and Challenges towards a Digital Single Market' (Green Paper) COM(2011) 427 final (13 July 2011) 16–17.

[735] Cf Commission, 'Report on the Responses to the Public Consultation on the Review of the EU Copyright Rules' (n 375) 82; Commission, SWD(2016) 301 final (n 4) 31.

[736] Europe Economics and others, 'Remuneration of Authors and Performers' (n 188) 155–56; 'The Ten Things People Get Wrong about Streaming – Part Two' (n 306).

[737] Bently and others, 'Strengthening the Position' (n 199) 51–52; 'The Ten Things People Get Wrong about Streaming – Part Two' (n 306).

[738] Cf Shapiro, 'Remuneration Provisions in the DSM Copyright Directive and the Audiovisual Industry in the EU' (n 38) 780; Xalabarder, 'The Principle of Appropriate and Proportionate Remuneration' (n 203) 28. For detail, see Christophe Geiger and Oleksandr Bulayenko, 'Creating Statutory Remuneration Rights in Copyright Law: What Policy Options under the International Legal Framework?' in Henning Grosse Ruse-Khan and Axel Metzger (eds), *Intellectual Property Ordering beyond Borders* (1st edn, Cambridge University Press 2022).

[739] Paloma López, 'The Making Available Right for Performers in Spain: A Statutory Remuneration Right Managed by Performers' Collecting Societies' in Silke von Lewinski (ed), *Remuneration for the Use of Works. Exclusivity vs Other Approaches* (De Gruyter 2017); DCMS Committee, 'Economics of Music Streaming' (n 280) 41; Frank Gotzen, 'L'approche belge de la rémunération directe des auteurs et des artistes dans les cas de transmissions par plateformes numériques' [2023] RIDA 52, 63, 65–66.

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a substantive implementation that goes beyond simply pasting the principle of appropriate and proportionate remuneration into national law.[740] This includes the possibility of establishing a collectively managed remuneration right.[741] The express reference in the DSM Directive to the Member States' freedom to implement the principle of fair remuneration using 'different mechanisms' (Article 18), which 'could include collective bargaining and other mechanisms' (Recital 73), supports this position. Further, Recital 61 DSM Directive, one of the recitals accompanying Article 17, expressly notes the need to secure 'appropriate' remuneration for the use of protected content. Moreover, in the summer of 2022, European Commissioner for Internal Market Thierry Breton expressly confirmed that Member States may establish an unwaivable remuneration right when implementing the DSM Directive.[742]

While idealistic at present, a cross-border solution in tune with the global nature of the internet would be the preferred final solution. However, a global musician ER mechanism is unlikely to materialise in practice. Given the choice of the EU legislator not to require the implementation of ER in the DSM Directive, the best chances for performer ER at present reside at the national regulatory level.

The German legislator established a form of ER through the German OCSSP Act, the separate act implementing Article 17 DSM Directive.[743] The German legislator has granted artists, including both composing and performing musicians, an unwaivable right to 'appropriate' remuneration, payable by the OCSSP to the artist through collective management only.[744] This right arises for any communication to the public of the content at issue that is contractually authorised through the Article 17 licensing mechanism, provided that the artist has granted the right of communication to the public to a third party. The residual right to OCSSP remuneration does not apply if the third party having been granted the rights at issue is a CMO or a party active as a *Digitalvertrieb* – the latter being roughly translatable to a

[740] See also Xalabarder, 'The Principle of Appropriate and Proportionate Remuneration' (n 203) 19; Xalabarder, 'Appropriate and Proportionate Remuneration' (n 712).

[741] See Gotzen, 'L'approche belge de la rémunération directe des auteurs et des artistes dans les cas de transmissions par plateformes numériques' (n 739) 71–85.

[742] Answer given by Mr Breton on behalf of the European Commission, 20 July 2022, E-001255/2022 <https://bit.ly/3CvfQei>. See also more recently Answer given by Mr Breton on behalf of the European Commission, 5 March 2024, E-000066/2024(ASW) <https://shorturl.at/fgrLP>. Cf the position of the European Parliament: 'European Parliament Resolution of 20 October 2021 on the Situation of Artists and the Cultural Recovery in the EU' (2020/2261(INI)) P9_TA (2021)0430 <https://bit.ly/3rVE78s>; Parliament, 'Report on the Proposal for a Directive of the European Parliament, A8–0245/2018 (n 205) 67; Aguilar, 'We Want Artists' (n 551) 161, 163; Xalabarder, 'The Principle of Appropriate and Proportionate Remuneration' (n 203) 11–12.

[743] See above, Section 5.4.3.1.

[744] Artur-Axel Wandtke and Saskia Ostendorff, *Urheberrecht* (De Gruyter Studium, 8th edn, De Gruyter 2021) 402–03; Matthias Leistner, 'The Implementation of Art 17 DSM Directive in Germany – A Primer with Some Comparative Remarks' (2022) 71 GRUR International 909, 913–14; Silke von Lewinski, 'The Implementation of the Digital Single Market Directive of 2019 in Germany' [2022] RIDA 57, 86.

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'digital distributor'.[745] Truly DIY musicians therefore appear not to be covered by this collectively managed right to remuneration, allowing them instead to secure 'appropriate' remuneration through contractual means – in other words: through the exploitation of their exclusive rights.

In 2022, the Belgian legislator went even further and established ER for online exploitation by both OCSSPs and streaming services.[746] The relevant provisions establish that, if an author or performing artist has transferred their right of communication to the public in the context of the exploitation of their work and/or performance by an OCSSP and/or a streaming service, they retain an unwaivable, collectively managed right to remuneration in return for such exploitation.[747] This initiative was the subject of vehement discussion in the Belgian Parliament.[748] Several actions for annulment were filed with the Belgian Constitutional Court.[749] These cases are pending at the time of writing.

The implementation of the DSM Directive in the Netherlands did not entail the establishment of a statutory remuneration right. However, recent legislative evolutions may lead to the establishment of ER in the context of video on demand.[750] In France, no musician or performer ER has been established at the time of writing. Finally, while the Brennan Bill in the United Kingdom did propose to establish performer ER for streaming, this proposal did not make it into hard law.[751]

All things considered, and acknowledging that further empirical evidence is needed, it is submitted that ER for streaming in an ideal form may beneficial. Removing the remuneration for digital exploitation from the music value chain and subjecting it to direct payment via collective management would, at least partially,

[745] On the role of digital distributors such as DistroKid and TuneCore, see Chapter 2, Section 2.3.4.

[746] See Hendrik Vanhees, 'Twee Nieuwe Vergoedingsrechten Voor Auteurs En Uitvoerende Kunstenaars' [2022] IRDI 389; Frank Gotzen, 'The Belgian Approach to Direct Remuneration of Authors and Performers in the Case of Transmission via Digital Platforms' [2023] RIDA 163; Alain Strowel and Solène Festor de Suremain, 'The Belgian Implementation of the Rules on Copyright and Related Rights Contracts in the Digital Single Market Directive' in Simon Geiregat and Hendrik Vanhees (eds), *Copyright Contracts Tomorrow* (LeA 2023) 11–15.

[747] See Art XI.228/4 BCEL as to OCSSPs and Art XI.228/10 and XI.228/11 BCEL as to streaming services.

[748] See *Verslag van de Eerste Lezing, Wetsontwerp tot omzetting 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 Richtlijnen 96/9/EG en 2001/29/EG*, Parl St Kamer 21–22, nr 2608/3, 12, 22–34; *Verslag van de Tweede Lezing*, Parl St Kamer 2021–22, nr. 2608/6, 3–13.

[749] See cases with docket numbers 7922, 7924, 7926, 7927, retrieved via <www.const-court.be/nl/judgments/pending-cases>. See also Amélie Lacourt, Justine Radel-Cormann and Sophie Valais, 'Fair remuneration for creators in exploitation contracts' (European Audiovisual Observatory 2023) <https://shorturl.at/dwT68> 86–87.

[750] See draft Arts 45da, 45db Dutch Copyright Code <https://bit.ly/4407vot>.

[751] Art 1 Copyright (Rights and Remuneration of Musicians, Etc.) HC Bill (2021–22) 19, proposing a new Art 191GA UK CDPA.

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counter the existing opacity and thereby contribute to transparency and ensuing legal certainty.

An important precondition is a high-functioning system of collective management, with sustained attention to the transparency and governance of CMOs. Extensive legislative measures have already been introduced in this context.[752] Title II CRM Directive[753] was implemented into the national law of all four chosen EU jurisdictions, as well as the United Kingdom.[754] Among other things, this has led to a (maximum) cost percentage charged to members.[755] Further, there is a long line of case law regarding the application of the prohibition against abuse of a dominant position to the conduct of CMOs.[756] In addition, care must be taken to ensure that CMOs use technological advancements to render their operations leaner and more transparent, efficient and cost-effective. This may aid in bringing down the cost percentage. Furthermore, the current distribution of unallocated CMO revenue to successful members on a market-share basis deserves to be reconsidered.[757]

The appropriate formulation of a statutory right to equitable or 'fair' remuneration for performers is still open to debate. The corresponding provision of the Rental and Lending Directive may serve as a source of inspiration, as may the proposed formulation put forward by the European Parliament in the context of the DSM legislative process and the provisions of national law discussed above.[758] On this basis, the below proposal is made for a potential harmonising provision at the EU level. It outlines the essence of a right to ER while simultaneously leaving Member States the freedom to regulate its specifics, or to have recourse to collective bargaining:

Unwaivable right to fair remuneration

1. Where an author or a performer has transferred their exclusive right of making available in relation to their work or the fixation of their performance, they shall retain the right to obtain an equitable remuneration for the making available of their work or the fixation of this performance. National law shall determine from whom this remuneration may be claimed or collected.

[752] Daniel Gervais, 'General Report' in Jørgen Blomqvist (ed), *Copyright, to Be or Not to Be* (Ex Tuto 2019) 160–63.

[753] Arts 6–22 CRM Directive. The CRM Directive leads to minimum harmonisation, see Rec 9 CRM Directive. See also Recs 20–36 CRM Directive.

[754] See (1) in Belgium: Arts XI.246 through XI.283 Belgian CEL; (2) in France: Art L 321-1 through L 328-2 French IP Code; (3) in Germany: the German CMO Act; (4) in the Netherlands: the Dutch CMO Act; and (5) in the United Kingdom: the Collective Management of Copyright (EU Directive) Regulations 2016 (SI 2016/221).

[755] Art 22 CRM Directive *jo* Art 2(b)(vi) Annex CRM Directive. See eg Art XI.252(3) Belgian CEL.

[756] CMOs have eg been prevented from limiting musicians' exploitation choices (Case C-395/87 *BRT v SABAM II* [1974] ECLI:EU:C:1974:6) and have been forced to accept artists from abroad as CMO members (Case C-7/82 *GVL v Commission* [1983] ECLI:EU:C:1983:52).

[757] Aguilar, 'The Collective Management of Performers' Rights in the UK' (n 237) 26–41.

[758] See also Hilty and Moscon, 'Part F – Claims to Fair Compensation (Article 12 COM(2016) 593 Final)' (n 243) 96; Fair Internet Coalition, 'Joint Guidelines' (n 54) 8.

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2. This right to obtain an equitable remuneration for making available is non-transferable and cannot be waived by authors or performers.
3. The administration of this right to fair remuneration for the making available of works or fixations of performances shall be entrusted to collective management organisations. By way of derogation, Member States may provide that, for agreements subject to or based on collective bargaining agreements having been made generally binding, the relevant collective bargaining agreements are applicable, provided that the remuneration for the making available of works or fixated performances meets the requirements of Article 18 DSM Directive.

5.6 OUTRO

This brings an end to the analysis and evaluation of the relevant legal framework as applicable to the performance phase of the music contracts under review. This chapter focused on the obligations of primary and secondary corporate partners in terms of both exploitation and remuneration. Section 5.2 argued that shortcomings in terms of fair exploitation should be sanctioned by a high-performing, unwaivable rights revocation mechanism. However, fair exploitation risks remaining rather meaningless if it is not accompanied by fair remuneration, as contended in Section 5.3. Due account must be taken of the digital environment and parties' evolving position throughout the contract. This translates into the desirability of a right to additional remuneration for emerging digital uses, as well as a contract adjustment mechanism that counters disproportionately unfair remuneration arrangements in extreme situations. Due attention must also be accorded to secondary relationships in terms of both exploitation and remuneration, as discussed in Section 5.4. Finally, Section 5.5 brought to the fore the potential establishment of a residual remuneration right for digital exploitation at the EU level.

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