Directive 2019/790 on Copyright in the Digital Single Market

Authors' Group first recommendations on the transposition of Articles 18 to 23

In contrast to the Information Society Directive (2001/29/EU) general approach, Directive 2019/790 on Copyright in the Digital Single Market includes market regulation elements aiming to achieve "Fair remuneration in exploitation contracts of authors and performers" (Title IV, Chapter 3, Articles 18 to 23).

Articles 18 to 23 set out a new harmonized framework for the contractual relationship between authors and their contractual counterparts which stems from the **explicit acknowledgement by the EU legislator of the systemic weak bargaining power of authors negotiating their individual contracts**

Our organisations representing authors in the audiovisual, music and book sectors have welcomed this essential and historical step forward to bring fairer terms to all authors in the European Union. **Yet the impact of these provisions very much depends on a thorough and faithful implementation process in national legislation, consistent with the spirit of the Directive**. If properly implemented, those provisions can greatly contribute to a harmonised digital single market for creators and provide new opportunities for transnational mobility of authors.

Particular attention must be brought to the fact that the new set of rights is inter-connected: the transparency obligation, cornerstone of the Chapter, is indispensable to the implementation of a right to proportionate remuneration based on the actual exploitation and commercial success of the work, as well as to allow for the effective use of the contract adjustment mechanism, the revocation right and the dispute resolution procedure.

In order to bring legal security to rightholders throughout the value chain as well as a level-playing field between all European authors in exercising these new rights, we very much welcome the reference to collective bargaining and collective mechanisms as essential tools to effectively implement these provisions in practice.

Here are the key elements implementation should include to bring about concrete progress in EU authors' situation:

1. Acknowledgement of the authors' systemic weak bargaining power when negotiating contracts

- National legislations should introduce wording which similarly acknowledges the systemic weak bargaining power of an author negotiating his/her contract, as the basis for the introduction of the rights set out in Articles 18 to 22. In addition, Member States should consider the fact that those contracts are very often of long duration and for the full term of copyright (70 years after the death of the author(s)).

- In that spirit, Article 23 by which "*Member States shall ensure that any contractual provision that prevents compliance with Articles 19, 20 and 21 shall be unenforceable in relation to authors and performers*" should be extended to all provisions (including Articles 18 and 22) aiming at securing fair remuneration of authors in contracts. Such an extension would enable authors to fully benefit from all the provisions adopted by the EU co-legislators and aimed at achieving a fair remuneration in exploitation contracts of authors and performers.

2. Principle of appropriate and proportionate remuneration (Article 18)

- The right to "*appropriate and proportionate remuneration*" constitutes authors' **entitlement to a share of the income generated by the ongoing use of their work**. It should therefore be clearly established on the basis not only of "potential" but most importantly **of "actual" economic value of the rights licensed or transferred**.

- While important flexibility is left to Member States in its implementation, implementing article 18 does entail **assessing whether current practices** are compatible with the new legal framework and the subsequent **introduction of new mechanisms where necessary**.

- A **clear definition of the exceptional cases where lump-sum payments** can be deemed constituting proportionate remuneration should be provided: **only where there is no prospect of a work earning any other income in the future**. If it has the possibility to earn income in the future, proportionate remuneration based on actual exploitation of the work must apply.

- Ample flexibility on the mechanisms to implement proportionate remuneration is already provided by article 18. **Bundling of several use entitlements into one single payment can therefore only be considered acceptable when coupled with additional remuneration based on agreed thresholds** (e.g. minimum guarantee upfront payment) through regular monitoring of the economic performance of the work.

- Various existing models allow calculation of actual value of exploitation rights and related payments overtime:

  - joint remuneration rules
  - collective bargaining
  - voluntary collective rights management
  - statutory remuneration mechanisms

3. Transparency obligation (Article19)

- Article 19 is the cornerstone of the EU legislator's approach to fair and proportionate remuneration in authors' contracts: transparency on the exploitation of their works and

revenues generated is a **pre-requisite for the valuation of the rights transferred/licensed**.

- As per Article 23, this **right to information cannot be waived by contract**. It is also a minimum: "*Member States should have the option, in compliance with Union law, to*

  provide for further measures to ensure transparency for authors and performers" (rec. 76).

- The **minimum scope of the transparency obligation** is defined in Article 19 paragraph 1 and recital 75:

  - up-to-date accurate data,
  - to be received on a yearly basis,
  - as long as exploitation is ongoing,
  - comprehensive to include identification of all modes of exploitation,
  - and all relevant revenues worldwide including merchandising,
  - reporting should be comprehensible for individual recipient,
  - and fit for the purpose of an "*effective assessment of the rights in question*".

- All modes of exploitation and revenues should be **listed separately**. A work can perform differently on different modes of exploitation; the share of revenues must be assessed in detail in order to properly inform the use of the contract renegotiation mechanism.

- Contractual counterparts, who, with their successor in title, are responsible for the transparency obligation, should have the responsibility to **notify authors when exploitation of the work has ceased**, thereby suspending their transparency obligation. Where exploitation has ceased, revocation of rights under Article 23 should be granted when requested.

- In cases where the contractual counterpart does not hold the information necessary to fulfil the transparency obligation, that additional information shall be provided upon request to authors "or their representatives" by **sub-licensees** (i.e. users granted a license to exploit the work in a particular format) (Article 19 para. 2).

- To make this provision workable in practice, several elements have to be introduced or clarified:

  - Authors' contractual counterparts should exercise due diligence in collecting the data from sub-licensees necessary to fulfil their transparency obligation;
  - Authors' contractual counterparts should systematically provide information on the identity of sub-licensees;
  - Authors' representatives should include their duly mandated representative professional organisation;
  - Possible collective enforcement of the transparency obligation should be set out, with duly mandated representative organisations entitled to receive the data in

addition to the individual author (Recital 76 and 81 sets out that authors must be able to use the information "for the purpose of exercising their rights under this Directive")
- Confidentiality agreements cannot prevent the use of information in the scope of the transparency obligation by authors or their representatives (including representative organisations) in enforcing the right to remuneration, the contract adjustment mechanism, the right of revocation or in using the dispute resolution procedure, as set out in recital 81;
- Collective enforcement of the transparency obligation could be operated directly between authors' representative organisations and sub-licensees based on information on sub-licensees provided by authors' contractual counterparts.

- Recital 76 sets out the possibility for Member States to take a sector-specific approach to the transparency obligation implementation: "all relevant stakeholders should be involved when deciding on such sector-specific obligations" through collective bargaining.

  - Where possible, such sector-specific framework agreement should be **extended to rightholders not affiliated to the representative organisations involved in the negotiation** in order to bring legal security to all rightholders.

- Paragraph 3 introduces a possible exception to the transparency obligation "where the administrative burden resulting of the obligation […] would become disproportionate in the light of the revenues generated by the exploitation of the work", but only in "duly justified cases" and limiting the obligation to "the types and level of information that can reasonably be expected in such cases".

  - **It does NOT provide the possibility to exclude a category of works** (e.g. smaller budget) **or a category of companies** (e.g. based on size) **from the transparency obligation**: economic success comes to creative works of all shapes and sizes.
  - Paragraph 3 clearly sets out the revenues generated by said work to assess the exemption. Duly justified cases where the transparency obligation generates a disproportionate administrative burden on the contractual counterpart should therefore be assessed on a case-by-case basis.

- Paragraph 4 enables Member States to introduce an exception to the transparency obligation when the author/performer's contribution is "not significant, having regard to the overall work or performancee". This exception should only apply to limited, duly justified cases since the significance of a certain level of contribution *ab initio* might be assessed differently in time, taking into account the actual exploitation of a work.

4. <u>Contract adjustment mechanism (Article 20)</u>

- Article 20 set out that "authors […] are entitled to claim additional, appropriate and fair remuneration […] when the remuneration originally agreed turns out to be

disproportionately low compared to all subsequent relevant revenues derived from the exploitation of the works."

- **"Disproportionately low" should be understood as "not proportional" and not in a more restrictive way**, as set out by certain translations of the Directive on Copyright in the Digital Single Market in various EU languages.

- The ability of authors to use this mechanism requires:

  - the scope of information on exploitation and revenues generated by the work obtained through the transparency obligation to be sufficiently detailed and comprehensive to allow for a fair assessment of the level of remuneration. (rec. 78),

  - a clear definition of the right to appropriate and proportionate remuneration based on the actual exploitation revenues of the work,
  - and a clearly restrictive definition of acceptable lump-sum payments.

- The contract adjustment mechanism applies on an individual basis "in the absence of an applicable collective bargaining agreement providing for a [comparable] mechanism comparable to that set out in this article".

- Authors can be represented in making the claim for additional remuneration by "duly mandated" representatives, who can act on behalf of "one or more" authors in processing the request for contract adjustment. Those representatives are entitled to protect the identity of the author in order to mitigate blacklisting risks.

- Duly mandated representatives should explicitly include professional organisations and guilds.

5. <u>Alternative dispute resolution procedure (Article 21)</u>

- Article 21 sets out that Member States must provide for "voluntary, alternative dispute resolution procedure" to handle disputes concerning the transparency obligation and the contract renegotiation mechanism. Article 23 and recital 81 add that this procedure is of a "mandatory nature, and parties should not be able to derogate from those provisions".

  - Sector-specific procedureS should therefore involve **professional organisations** of authors, performers and their contractual counterparts
  - And provide a **binding** arbitration.

- Member States are required in addition to "ensure that representative organisations of authors may initiate such procedures at the specific request of one or more authors": if a satisfactory dispute resolution procedure already exists at national level, its framework **must therefore be extended to collective actions by duly mandated representative organisations** including professional organisations and guilds.

6. Right of revocation (Article 22)

- Several EU Member States and certain third countries already grant to authors the possibility to claim back their rights in case their contractual counterparts are not properly exploiting their works. Such a right does not only benefit authors but also encourages fair competition and access to a wide diversity of cultural works.

- Article 22 provides that "Member States shall ensure that where an author or a performer has licensed or transferred his or her rights in a work or other protected subject matter on an exclusive basis, the author or performer may revoke in whole or in part the licence or the transfer of rights where there is a lack of exploitation of that work or other protected subject matter".

- The key concept of "lack of exploitation" has been translated into a more restrictive way in certain EU languages. However, in certain EU Member States, more ambitious concepts such as "continuous and permanent exploitation" or "exploitation according to common usages" are used. The implementation of the right of revocation should be in line with those laws where the concept of exploitation is more ambitious.

- **Member States should not automatically exclude works which "usually contain contributions of a plurality of authors or performers" and consider sector specificities.** Otherwise, this Article would be meaningless in practice for authors, since a wide majority of creative works are in fact works of joint authorship. We note in this respect that collective bargaining agreements can derogate from the application of the right of revocation (paragraph 5) and therefore take into account the specificities of each creative sector.

- **Member States should provide that a continuous lack of regular reporting** (non-compliance with Article 19) **proves a lack of exploitation in practice.** Otherwise, authors would not be able to demonstrate a lack of exploitation.

- While the right of revocation can only be exercised after a reasonable timeframe, it could be exercised at any given time after that timeframe, taking into account a present "lack of exploitation". It should also be possible to exercise this right if the work has never been exploited.

European Composer and Songwriter Alliance (ECSA)

European Writers' Council (EWC)

Federation of European Film Directors (FERA)

Federation of Screenwriters in Europe (FSE)