

EU Copyright Directive 2019

Articles of Concern to Brand Owners

**A Report by the
Copyright Policy of INTA Subcommittee
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and the
International & Legislative Subcommittee
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Introduction

The INTA Copyright Committee analyzed the most controversial provisions of the European Union (EU) Copyright Directive in the course of 2020. As it is aimed to be implemented into legislation of the EU Members States by June 2021, now is the good time to publish this report.

The implementation process itself is not without controversy, in particular in Germany, but in several other EU states as well. For brand owners that may be affected, it will be interesting to watch what will happen in terms of full implementation, due in June 2021.

Authored by members of the Copyright Policy of INTA Subcommittee and the International and Legislative Subcommittee of INTA's Copyright Committee, the following analysis is only of the articles of the Directive identified as most controversial for a number of brand owners and INTA member organizations. Click on the links below for the specific articles.

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Articles 3 and 4: Text and Data Mining Exception

By Bilyana Angelova - Dimitrov, Petrov & Co. Law Firm, Sofia, Bulgaria

Background/Overview

Text and Data Mining (TDM) generally refers to computer-based analysis of large bodies of data to gain information and insights into the content being mined. This has become a prominent tool for processing and analysing data in scientific and research fields, and can generate significant value to the user in various commercial fields. DSMCD defines TDM as “any automated analytical technique aimed at analysing text and data in digital form in order to generate information which includes but is not limited to patterns, trends and correlations”, and provides two new exceptions for its use with respect to copyrighted works.

Wording of Article 3 - Text and Data Mining for the Purposes of Scientific Research

- Member States shall provide for an exception to the rights provided for in Article 5(a) and Article 7(1) of Directive 96/9/EC, Article 2 of Directive 2001/29/EC, and Article 15(1) of this Directive for reproductions and extractions made by research organisations and cultural heritage institutions in order to carry out, for the purposes of scientific research, text and data mining of works or other subject matter to which they have lawful access.
- Copies of works or other subject matter made in compliance with paragraph 1 shall be stored with an appropriate level of security and may be retained for the purposes of scientific research, including for the verification of research results.
- Right holders shall be allowed to apply measures to ensure the security and integrity of the networks and databases where the works or other subject matter are hosted. Such measures shall not go beyond what is necessary to achieve that objective.
- Member States shall encourage right holders, research organisations and cultural heritage institutions to define commonly agreed best practices concerning the application of the obligation and of the measures referred to in paragraphs 2 and 3 respectively.

Wording of Article 4 - Exception or Limitation for Text and Data Mining

- Member States shall provide for an exception or limitation to the rights provided for in Article 5(a) and Article 7(1) of Directive 96/9/EC, Article 2 of Directive 2001/29/EC, Article 4(1)(a) and (b) of Directive 2009/24/EC and Article 15(1) of this Directive for reproductions and extractions of lawfully accessible works and other subject matter for the purposes of text and data mining.
- Reproductions and extractions made pursuant to paragraph 1 may be retained for as long as is necessary for the purposes of text and data mining.
- The exception or limitation provided for in paragraph 1 shall apply on condition that the use of works and other subject matter referred to in that paragraph has not been expressly reserved by their right holders in an appropriate manner, such as machine-readable means in the case of content made publicly available online.
- This Article shall not affect the application of Article 3 of this Directive.

General Objectives of the TDM Exceptions

Member States are required to introduce mandatory exceptions to copyright and neighbouring rights in their national legislation for the purpose of facilitating TDM without permission from right holders. The objective is to support innovation across the EU and guarantee the legality of use of TDM technologies in the fields of research, innovation, education and preservation of cultural heritage.

Beneficiaries and Purposes of the TDM Exceptions

Article 3 of the DSMCD is for the benefit of research and cultural heritage organisations which undertake TDM on works containing third party copyright or related rights (First exception). A broad interpretation is given to 'research organisations', as the persons 'attached thereto', such as scientists and public-private partnerships, can rely on the First exception as well. However, organisations controlled by commercial undertakings are excluded from the notion.

Examples of research organizations are universities, other higher education institutions and their libraries, research institutes and hospitals that carry out research (e.g. KU Leuven in Belgium, Max Planck Society in Germany, etc.).

Examples of cultural heritage organizations are publicly accessible libraries and museums, archives and film or audio heritage institutions (e.g. International Council on Monuments and Sites (ICOMOS), Hungarian National Film Archive, etc.).

Article 4 of the DSMCD is for the benefit of any organisation or individual who undertakes TDM on works containing third party copyright or related rights (Second exception). TDM is a primary need in the Big Data and Artificial Intelligence fields and is an established practice in various areas, including medicine (e.g. in detection of side effects), finance (e.g. in securities markets forecasts) and sales and marketing (e.g. in analysing consumers' preferences).

A condition to both exceptions is the 'lawful access' to the content subject to TDM, which is also to be interpreted broadly. The notion of 'lawful access' covers mechanisms such as those based on an open access policy, contractual arrangements, subscriptions or other lawful means of access, as well as accessing content that is freely available online.

One of the main differences between the two exceptions are the purposes they serve: the First exception only applies for scientific research purposes, whereas the Second exception applies for all purposes.

It is an open question whether compensation is due to right holders under the Second exception. It is clear that any potential harm caused to right holders through an exception limited to entities carrying out scientific research would be minimal, so no compensation for right holders needs to be provided for. However, Recital 17 of the DSMCD allows for possible different interpretations by Member States regarding compensation in case the TDM is not related to scientific research. Therefore, this issue might be interpreted differently by Member States when transposing the DSMCD.

Scope (works or other subject matters and acts covered by the TDM exceptions)

TDM exceptions permit acts of reproduction or extraction for the purpose of TDM. Unlike the Second exception, however, the First exception does not refer to reproductions or alterations of computer programs under the Software Directive.

TDM exceptions do not include the right of communication to the public. In case that the results of TDM contain copyrighted subject matter of the original works, their communication to the public could eventually be made under the general exceptions.

There is room for Member States to adopt a broader scope of TDM exceptions according to Article 25 of the DSMCD, as long as they are compatible with the exceptions and limitations provided for in Directive 96/9/EC and InfoSoc Directive 2001/29/EC.

Restrictions on TDM Exceptions

Unlike the First exception, the Second exception can be overridden by contractual agreements or a unilateral declaration, and in the case of publicly available online content – by the use of machine-readable means. The latter may include metadata and terms and conditions of a website or a service.

Regarding the First exception, right holders may apply proportionate measures to ensure the security and integrity of the networks and databases where their works or other subject matter are hosted, for example through IP address validation or user authentication. Such measures should be proportionate to the risks involved. They should not exceed what is necessary to pursue the objective of ensuring the security and integrity of the system and should not undermine the effective application of the exception. Technological protection measures shall not be used to prevent TDM under both TDM exceptions.

Issues to be Considered by Member States when Transposing the DSMCD

There are certain issues which should be carefully considered by Member States when implementing the DSMCD into the national legislation.

Regarding the First exception, such issues are the following:

- Whether to provide specific conditions for the storage of content used for TDM, in particular to define “an appropriate level of security” for retaining copies, and whether to appoint trusted bodies for the purpose of storing the copies;
- Whether to provide specific measures which right holders may apply in order to ensure the security and integrity of the networks and databases containing the original works, considered proportionate to the risks involved; and
- Whether and how to facilitate the definition of best practices concerning the application of the measures referred to in points (1) and (2), respectively.

Regarding the Second exception, an important issue to consider is the question whether and how Member States should determine the necessary duration of the period of retention of reproductions and extractions for the purposes of TDM.

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Article 12: Optional Extended Collective Licensing (ECL) Exception

By James Whymark, FACEBOOK, London, UK

Background/Overview

Article 12 of the EU CD represents the aims of the Commission to better harmonise the collective licensing of copyright works in line with the Directive on collective management of copyright and related rights (2014/26/EU).

Article 12 in particular is targeted at providing flexible licensing schemes for digital content which permit collective management organisations (CMOs) to conclude licences on behalf of a sector of right holders, irrespective of whether all right holders within that sector have expressly authorized the CMO to do so. This is known as collective licensing with extended effect.

The intent behind collective licensing with extended effect is to allow CMOs to provide licences which cover all right holders in a particular sector. This allows licensees to be more confident that when they enter into an arrangement with a CMO, they obtain broad rights across the sector represented.

The Mechanics of Article 12

Article 12 allows Member States to provide for certain CMOs to “extend” their remit or representation to right holders who have not explicitly authorized the CMO to represent their rights. However, in order to take advantage of this extended effect, a number of factors must be present:

- Firstly, a CMO must have been established and be in compliance with the terms of the collective management Directive (2014/26/EU). This means that there will be a number of existing CMOs that may not fall within these criteria.
- Secondly, even if a CMO falls within the collective management Directive, a Member State can only apply the power of extended effect where there is a “well-defined area of use”, where obtaining individual authorisations from right holders is “typically onerous and impractical”, and where they can ensure that the “legitimate interests” of right holders are safeguarded.
- Further, Member States can only utilise this framework providing that in each case:
 - The CMO is “sufficiently representative” of relevant right holders in the Member State;
 - All right holders are guaranteed equal treatment under the “extension”;
 - All right holders can “easily and effectively” opt out; and
 - “appropriate publicity measures” are taken so that right holders are informed by a CMO or Member State of the extended effect in their sector.

Open Questions

Collective licensing with extended effect is found in a number of Member State national laws. However, the proposed system under the EUCD has raised a number of open questions that will need to be addressed as Member States implement a harmonized standard. In particular:

- **What constitutes a “well defined area of use”?** There is no clear definition in the Directive itself or any accompanying materials that would determine what is a “well defined area of use”. It may be the case that this will not be an issue where there are existing established CMOs that already represent a clearly defined sector of right holders. However, it remains unclear whether the area of use should be defined in relation to the type of work (i.e. sound recordings etc), specific uses of works (i.e. texts for research purposes etc) or by industry or technology. The recitals provide some guidance by stating that “Member States should determine the requirements to be satisfied for those organisations to be considered sufficiently representative, taking into account the category of rights managed by the organisation, the ability of the organisation to manage the rights effectively, the creative sector in which it operates, and whether the organisation covers a significant number of right holders in the relevant type of works or other subject matter who have given a mandate allowing the licensing of the relevant type of use, in accordance with Directive 2014/26/EU.”
- **What is considered “typically onerous and impractical”?** The recitals to the Directive give some guidance on what should be considered “typically onerous and impractical”. Extended collective licensing may be appropriate where it “makes the required licensing transaction, namely one involving a licence that covers all right holders concerned, unlikely to occur due to the nature of the use or of the types of works or other subject matter concerned. Such mechanisms should be based on objective, transparent and non-discriminatory criteria as regards the treatment of right holders, including right holders who are not members of the collective management organisation.”
- **What mechanisms should be available to allow right holders to opt out?** Whilst the Directive specifies that an easy and effective mechanism should be provided for right holders to opt out of the extended effect, what this means in practice is unclear. In particular, how and when this information should be communicated by right holders and how, in turn, should this information be conveyed to potential licensees.

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Article 17: DSMCD

By Dr. Julian Waiblinger, NORDEMANN, Berlin, Germany

Background

Article 17 was established to address concerns about liability for certain online service providers to bridge what has been called the “Value Gap.” The term Value Gap describes “the growing mismatch between the value that user upload services, such as YouTube, extract from music and the revenue returned to the music community – those who are creating and investing in music” (IFPI).

Article 17

- Clarifies that an Online Content-Sharing Service Provider (OCSSP) performs an act of communication to the public (CTTP), which is an exclusive right of the right holders;
- Establishes a framework of liability for OCSSPs and a mechanism for OCSSPs to secure licenses or authorization for their activity;
- Provides for conditions in which OCSSPs can obtain a new “safe harbor” from liability in addition to the safe harbors already established in the E-Commerce Directive.

Overview

Article 17 addresses the question of liability of certain online content-sharing service providers for the gap between the value that such services (such as YouTube) generate from uploaded works, and the revenue returned to creatives (authors and performers) and right holders. Before Article 17 entered into force, it was uncertain under what conditions online content-sharing service providers – such as YouTube – could be held liable for copyright infringements committed by their users. Clarification from the CJEU is currently being sought on this issue. In his opinion in the Joined Cases C-682/18 (YouTube) and C-683/18 (Uploaded) of 16 July 2020, the Advocate General advised the CJEU to rule that, under the InfoSoc Directive (Directive 2001/29/EC), platforms like YouTube and Uploaded are not liable for making available copyright infringing content uploaded by their users. The CJEU decision is eagerly awaited. It must be noted, though, that Article 17 is not applicable to the afore-mentioned cases (the provision was not in force yet). The CJEU will only decide the case on the basis of the legal regime in place prior to the enactment of the DSMCD.

Summary of the key Provisions of Article 17

Scope of Application

Article 17 introduces a new liability regime for certain OCSSPs. OCSSPs are providers, the main or one of the main purposes of which is to store and give the public access to a large amount of copyright-protected content uploaded by its users, which it organizes and promotes for profit-making purposes.

The following services do not fall under Article 17:

- Not-for-profit online encyclopaedias;
- Not-for-profit educational and scientific repositories;
- Open source software-developing and-sharing platforms;
- Providers of electronic communications services as defined in Directive (EU) 2018/1972;
- Online marketplaces;
- Business-to-business cloud services and cloud services that allow users to upload content for their own use (cyberlockers).

Direct liability of OCSSPs for Uploads of their Users

- OCSSPs perform acts of communication to the public when they give the public access to copyright protected content uploaded by its users. Accordingly, OCSSPs can be held directly liable for copyright infringements.
- OCSSPs have to obtain an authorization (e.g., by way of a license agreement) from the right holders in order to communicate to the public copyright protected content.
- The authorization obtained by the OCSSP also covers the acts carried out by the users (unless they act on a commercial basis or generate significant revenues).

New Safe Harbor

- OCSSPs enjoy a new safe harbor privilege according to which they are not liable – under the following requirements:
 - If they made best efforts to obtain authorization; the DSMCD confirms that full contractual freedom remains available and that no one should be obliged to give an authorization or to conclude licensing agreements;
 - If they made best efforts to make specific works unavailable when properly notified by right holders;
 - If they acted quickly upon receiving a proper take down notice from the right holders. In addition, it must show efforts to prevent future uploads of specific works. This may require an OCSSP to permanently remove specific works from its platform. This so called “stay down” obligation already existed in some Member States and now sparked a debate about the proportionality of “upload filters”.
- Article 17 provides for a “lighter” liability for smaller platforms/start-ups (available less than 3 years with an annual revenue under 10 million Euros); so far, they only have to comply with the 1st and 3rd safe harbor conditions. The threshold for moving up in category is more than 5 million monthly unique visitors calculated based on the last calendar year.

General Monitoring and Reporting Obligations

- Additionally, the DSMCD states that the application of Article 17 shall not lead to any general monitoring obligation. This will be a crucial point in the implementation process and differentiation between proportionate filtered technology and general monitoring obligation.
- A reporting mechanism is intended to help manage the relationship between OCSSPs and right holders. OCSSPs have to provide right holders with information on their practices, upon request. If a licensing agreement exists between the two, OCSSP must provide information on use of content covered by the agreement.

User Redress and User Generated Content Exception

- To mitigate concerns of users and to prevent wrongful takedowns of non-infringing content, Article 17 requires OCSSPs to establish an "effective and expeditious complaint and redress mechanism" for users in the event of disputes over the removal or blocking of uploaded content.
- Under Article 17, the liability framework must "not result in the prevention of the availability of works or other subject matter uploaded by users, which do not infringe copyright and related rights, including where such works or other subject matter are covered by an exception or limitation." Also, users will be able to benefit from certain exceptions and limitations like quotation, criticism, review, and parody. This essentially makes those previously optional exceptions of the InfoSoc Directive mandatory for user generated content.

Current Status of Transposition in EU Member States

As required under Article 17(10), the European Commission is currently in the process of stakeholder dialogues between OCSSPs and right holders to discuss best practices for cooperation. The Commission is expected to issue guidance on the application of Article 17, in particular regarding the safe harbor mechanisms pursuant to Article 17(4). According to the available information, the stakeholder dialogues have not been completed and no guidance has been issued by the Commission yet. Recently, the European Commission has launched a "targeted consultation" addressed to the participants to the stakeholder dialogue with the intention to finalize the Commission's guidance on the application of Article 17.

However, in light of the implementation period expiring on 7 June 2020, several Member States have initiated the process of implementing the DSMCD into the national laws. For instance, on 13 October 2020, the German Ministry of Justice and for Consumer Protection has published Draft Bill (based on a previous Discussion Draft) that proposes to implement Article 17 through a separate law, the so-called "Copyright Service Provider Act". Right holders as well as platform operators will follow closely the transposition process in the Member States and will eagerly await the expected guidance from the European Commission.

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Article 18: The Principle of Appropriate and Proportionate Remuneration

By Tobias Kempas, VINGE, Stockholm, Sweden

Introduction

Article 18 of the EUCD seeks to secure fair remuneration for authors and performers when their creations are used by commercial entities. The provisions can be perceived as controversial, or at least unconventional, as they interfere with the principle of freedom of contract.

Brand owners should observe the new rules, as certain signs or symbols can be protected by copyright. If, for example, a brand owner engages an artist to create a new logotype or figurative trademark, Article 18 may require that the brand owner pay “appropriate and proportionate remuneration” to the artist. Likewise, if a brand owner engages a designer to create a three-dimensional trademark, the designer may demand “appropriate and proportionate remuneration” where the design is protected by copyright.

Wording

Article 18 states the following:

- Member States shall ensure that where authors and performers license or transfer their exclusive rights for the exploitation of their works or other subject matter, they are entitled to receive appropriate and proportionate remuneration.
- In the implementation in national law of the principle set out in paragraph 1, Member States shall be free to use different mechanisms and take into account the principle of contractual freedom and a fair balance of rights and interests.

General Purpose

Article 18 rests on the notion that authors and performers are usually in a weaker contractual position when they grant a license or transfer their rights, including through their own companies, for the purposes of exploitation in return for remuneration. Article 18 thus aims to ensure that authors and performers may fully exploit the exclusive rights that are harmonized under EU law.

The author agrees that authors and performers should receive appropriate and proportionate remuneration and thus be able to economically benefit from their creative and/or artistic efforts. This view is consistent with the main purposes of intellectual property law. However, the considerable legislative discretion left to the Member States, combined with the vague wording of Article 18, leaves some important questions unanswered in respect of its scope and implementation.

Limited Harmonization

Article 18 leaves considerable discretion to the Member States to draft and determine the provisions of their respective national laws. Even though the preamble to the EUCD sets out some general guidelines that can be considered when incorporating the principle of appropriate and proportionate compensation (cf. Section 5 below), the preamble is not very

detailed and has no binding legal force. Furthermore, there is no explicit requirement that Article 18 be implemented by mandatory national provisions. It is thus likely that the Member States will implement Article 18 in different ways. This raises the risk that appropriate and proportionate remuneration may be assessed and calculated differently in different Member States. Accordingly, to understand if (and how) the notion of “appropriate and proportionate remuneration” applies to a specific transaction, it will be necessary to check both the agreement and the relevant national law.

Example: A performing artist transfers their rights to a recorded version of a music composition to a music publishing company. The publishing company proposes a transfer agreement stating that the artist shall waive their rights under Article 18. Such a waiver may be enforceable in some Member States, but not in others. Hence, the governing law clause of the contract will determine whether the waiver applies.

To mitigate this issue, the author recommends that the Member States adhere to the guidelines set out in the preamble as much as possible. It is also recommended that the Member States refrain from making bespoke national laws for specific sectors. Rather, the national laws should be designed to provide a sufficient degree of flexibility, i.e. be adaptable to the different conditions that may apply in different sectors.

The Notion of “Appropriate and Proportionate Remuneration”

Member States are free to implement Article 18 through different existing or newly introduced mechanisms, which could include collective bargaining and other mechanisms, provided that such mechanisms are in conformity with applicable EU law.

According to the preamble, remuneration should be appropriate and proportionate in relation to the actual or potential economic value of the licensed or transferred rights, considering the author’s or performer’s contribution to the overall work or other subject matter and all other circumstances of the case, such as market practices or the actual exploitation of the work. A lump sum payment can constitute proportionate remuneration, but it should not be the rule.

Example: A television production company agrees to pay a scriptwriter remuneration corresponding to the levels collectively agreed between the Swedish Media Industries Employer Association and the Swedish Union for Performing Arts and Film. Seeing that the compensation is based on a collective bargaining agreement, the remuneration will most likely be considered appropriate and proportionate and thus compliant with Article 18.

When assessing if certain remuneration is appropriate and fair, the conditions in conjunction with the conclusion of the agreement should be indicative. Hence, the assessment should be based on what is known when the agreement is entered into. Subsequent events are seemingly irrelevant. Such events may instead be considered according to the contract adjustment mechanism set out in Article 20.

Further, according to the preamble, nothing in the EUCD should be interpreted as preventing holders of exclusive rights from authorizing the use of their works or other subject matter for free, including through non-exclusive free licenses for the benefit of any user. However, in the author’s view, seeing that Article 18 seeks to prevent inappropriate and non-proportionate remuneration, it cannot be ruled out that Article 18 (as implemented) may in fact, depending on the circumstances, prohibit certain transfers and licenses without remuneration. Whether

such an agreement is compatible with Article 18 should be assessed in consideration of all circumstances of the individual case, such as the parties' respective bargaining positions and the reasons for the agreed non-compensation.

Scope

Which beneficiaries, works and other subject matters are covered?

Article 18 covers all categories of authors and performers. The provisions are not limited to certain types of works or performances. The only exception is computer programs. According to Article 23(2) of the EUCD, Member States shall provide that Articles 18 to 22 of the EUCD do not apply to authors of a computer program. Thus, authors of computer programs are not covered by Article 18.

Example (i): An independent consultant develops source code. His exclusive rights are transferred to a software company. Article 18 does not apply, because the term "computer program" includes source code according to EU copyright law.

Example (ii): An independent consultant develops and designs a graphical user interface. His exclusive rights are transferred to a software company. Article 18 applies, because the term "computer program" does not include graphical user interfaces according to EU copyright law.

Article 18 does not prevent Member States from offering, in their national laws, a right to appropriate and proportionate remuneration to creators of subject matters that are not harmonized by EU law. For instance, in some Member States (e.g. the Nordic countries and Germany), photographs that are not copyright protected are nonetheless protected by neighboring rights. It is conceivable that these Member States will include creators of such subject matter in the group of beneficiaries under Article 18, as implemented in their national laws. Arguably, such inclusion is also advocated by Article 26 of the EUCD, which states that the EUCD shall apply in respect of all works and other subject matters that are protected by national law in the field of copyright on or after 7 June 2021.

Article 18 does not seek to protect legal or natural persons who have acquired copyrights or neighboring rights from the first right holders (natural person). However, in the author's opinion, it is not equally obvious how Article 18 should be understood in respect of a person to whom an author's or performer's rights have been transferred by inheritance or will. Typically, in cases of right transfers by inheritance or will, the recipient or beneficiary is a natural person with a relatively close relation to the work or performance. The recipient may often have the same financial interests as the original right holder if he or she had been alive. That said, the wording of the EUCD (the articles and the preamble) seems to indicate that only the original authors and performers are covered by Article 18.

Which transfers and licenses are covered?

A literal interpretation of Article 18 indicates that the provisions include all transfer agreements and all license agreements. There are no restrictions on the counterparty's position, e.g. on the acquirer or licensee being a producer or other commercial entity. In addition, the scope of Article 18 is apparently not limited to agreements that have been individually negotiated.

On the other hand, in the author's opinion, Article 18 cannot reasonably be understood as covering all agreements under which authors or performers assign or license their exploitation

rights. Such an interpretation would cause great difficulties. For instance, if all agreements were to be included, remuneration rights would arise every time an author or performer granted a limited reproduction right to a consumer. This is obviously not intended. As explained by the preamble, Article 18 is not intended to include situations where the contractual counterparty acts as an “end user”. In addition, most likely certain employment contracts should be excluded from the scope of Article 18.

Example (i): An author grants a publishing license to a publishing house. Article 18 applies.

Example (ii): A performing artist transfers their rights to a recorded version of a music composition to a music publishing company. Article 18 applies.

Example (iii): An author or performer grants a limited reproduction right to a consumer. Article 18 does not apply.

It is also somewhat unclear whether the scope of Article 18 is restricted to situations where the rights have been transferred or granted in return for remuneration. The provision itself does not seem to exclude transfers and licenses without remuneration. On the other hand, the preamble seems to suggest that Article 18 comprises only agreements under which the rights are transferred or licensed in return for remuneration. In the author’s opinion, it is unfortunate that the EUCD does not give any further guidance in these respects.

Should the national legislation be mandatory or discretionary?

According to Article 23 of the EUCD, 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. Hence, obviously, there is no explicit requirement that Article 18 be implemented by mandatory national provisions. The issue of whether the national rules should be mandatory or discretionary will thus largely depend on the solutions sought in national law, with due regard to the general purpose of Article 18.

In the author’s opinion, seeing that Article 18 aims to protect authors and performers by strengthening their contractual position, it is hardly imaginable that this purpose may be fully achieved by discretionary national legislation. In addition, even with due regard to the principle of freedom of contract, one may of course question whether it should be allowed to agree on a level of remuneration that is neither appropriate nor proportionate. These circumstances strongly suggest that the national provisions should be mandatory, although they should also allow for all relevant factors to be considered when assessing what is appropriate and proportionate (cf. Section 5 above).

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Article 19: Transparency Obligation

By Iulia Burbea, MILCEV BURBEA, Bucharest, Romania

Introduction

This provision will establish a transparency obligation for producers, publishers, labels and other similar parties. This is akin to an audit right for authors and performers. Art. 19 requires Member States to ensure that authors and performers can obtain:

- on a regular basis as long as exploitation is ongoing, at least once a year,
- taking into account the specificities of each sector;
- up to date, relevant and comprehensive information on the exploitation of their works and performances (including, where applicable; merchandising revenues);
- from those to whom they have licensed or transferred their rights or their successors in title in a comprehensible manner;
- notably as regards all modes of exploitation;
- all revenues generated and remuneration due.

Wording

- Member States shall ensure that authors and performers receive on a regular basis, at least once a year, and taking into account the specificities of each sector, up to date, relevant and comprehensive information on the exploitation of their works and performances from the parties to whom they have licensed or transferred their rights, or their successors in title, in particular as regards modes of exploitation, all revenues generated and remuneration due.
- Member States shall ensure that, where the rights referred to in paragraph 1 have subsequently been licensed, authors and performers or their representatives shall, at their request, receive from sub-licensees additional information, in the event that their first contractual counterpart does not hold all the information that would be necessary for the purposes of paragraph 1. Where that additional information is requested, the first contractual counterpart of authors and performers shall provide information on the identity of those sub-licensees. Member States may provide that any request to sub-licensees pursuant to the first subparagraph is made directly or indirectly through the contractual counterpart of the author or the performer.
- The obligation set out in paragraph 1 shall be proportionate and effective in ensuring a high level of transparency in every sector. Member States may provide that in duly justified cases where the administrative burden resulting from the obligation set out in paragraph 1 would become disproportionate in the light of the revenues generated by the exploitation of the work or performance, the obligation is limited to the types and level of information that can reasonably be expected in such cases.

- Member States may decide that the obligation set out in paragraph 1 of this Article does not apply when the contribution of the author or performer is not significant having regard to the overall work or performance, unless the author or performer demonstrates that he or she requires the information for the exercise of his or her rights under Article 20(1) and requests the information for that purpose.
- Member States may provide that, for agreements subject to or based on collective bargaining agreements, the transparency rules of the relevant collective bargaining agreement are applicable, on condition that those rules meet the criteria provided for in paragraphs 1 to 4.
- Where Article 18 of Directive 2014/26/EU is applicable, the obligation laid down in paragraph 1 of this Article shall not apply in respect of agreements concluded by entities defined in Article 3(a) and (b) of that Directive or by other entities subject to the national rules implementing that Directive.

Background/Purpose of the Provision

One of the aims of the Directive is to balance the rights of the authors and performers in the exploitation of their work. Traditionally, authors and performers have been considered as the weak part in licence contracts, a position which does not give them the means to renegotiate their licences revenues based on the actual manner of exploitation of their work.

In order to obtain such balance, the Directive lays down a transparency obligation where authors/performers will obtain regularly relevant and comprehensive information on the exploitation of their works and performances from the parties to whom they have licensed or transferred their rights, or their successors in title, in particular as regards modes of exploitation, all revenues generated and remuneration due.

Sharing of adequate and accurate information by contractual counterparts or their successors in title is important for the transparency and balance of rights, in order to achieve a fair remuneration of authors and performers. Also, the information should be up-to-date in order to allow access to recent data, relevant to the exploitation of the work or performance, and comprehensive in a way that it covers all sources of revenues relevant to the case.

Last but not least, the cases show that in practice, authors and performers negotiate their revenues based on a projection of exploitation of their work or based on the need to sign a contract in order to be broadcasted, needs which do not take into account how their work of art will be further received by the public and exploited by TVs/Radios/etc.

This provision will establish a transparency obligation for producers, publishers, labels and other similar parties. This is akin to an audit right for authors and performers.

Main Obligations

The main obligations laid down by the Directive with respect to the transparency obligation are the following:

“authors and performers will obtain on a regular basis as long as exploitation is ongoing, at least once a year, taking into account the specificities of each sector, up to date, relevant and comprehensive information on the exploitation of their works and performances (including, where applicable, merchandising revenues), from those to whom they have licensed or transferred their rights or their successors in title in a comprehensible manner, notably as

regards all modes of exploitation all revenues generated and remuneration due”

Therefore, Article 19 requires the licensor, sub-licensor, assignee or any other party receiving the right to exploit, as long as he is actively exploiting the said rights, to provide at least once a year information concerning:

- Mode of exploitation;
- Details concerning all revenues generated by the said exploitation;
- Due remuneration.

Article 19 (3) establishes that the above obligations shall be proportionate and effective in ensuring a high level in every sector.

Implications, Implementation and Main Issues

According to Article 23 of the DSMCD, 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. Hence, obviously, there is an explicit requirement that Article 19 be implemented by mandatory national provisions.

The wording of Article 19 is rather general, without clarifying the extent of the obligations and how the obligations should be fulfilled. Therefore, it is expected for Member States to implement efficiently the Directive in order to give effect to the obligation and ensure a proper compliance.

To ensure that this obligation is proportionate and effective, the Directive instructs that they take into account how the specificities of each sector plays a role. For certain industries there are often numerous authors and performers involved in the production of a single work. Depending on how this is implemented, the transparency obligation can place significant administrative burdens on producers and distributors that may outweigh the intended benefits.

The Directive allows Member States to limit through implementation the obligation set out in Article 19:

- In duly justified cases where the administrative burden resulting from the obligation would become disproportionate in the light of the revenues generated by the exploitation of the work or performance, Member States can limit the obligation to the types and level of information that can reasonably be expected in such cases.
- Furthermore, Member States may decide that the obligation does not apply when the contribution of the author or performer is not significant having regard to the overall work or performance, unless the author or performer demonstrates that he or she requires the information for the exercise of his or her rights under Article 20(1) and requests the information for that purpose.
- Also, Member States may provide that, for agreements subject to or based on collective bargaining agreements, the transparency rules of the relevant collective bargaining agreement are applicable, on condition that those rules meet the criteria provided for in paragraphs 1 to 4.

Main Issues Concerning Implementation

In view of the wording of the Article 19, several key-concepts are to be further defined by the Member States in their implementation process.

Among those concepts we mention:

- The extent of the information on the manner of exploitation: Are all data concerning the exploitation of the work of art to be given or only comprehensive relevant data? If so, what are to be considered relevant data?
- The concept of reasonably in the context of the limitation proposed by Article 19 (3).
- What are the parameters to consider when the contribution of the author or performer is not significant having regard to the overall work or performance?

Furthermore, the obligation imposed by Article 19 has implications on the manner in which the relevant comprehensive data will gathered, updated and further on transmitted to the author/performer upon request. We wonder if the provisions of GDPR can be a guideline with respect to the data portability provisions:

“The data subject shall have the right to receive the personal data concerning him or her, which he or she has provided to a controller, in a structured, commonly used and machine-readable format and have the right to transmit those data to another controller without hindrance from the controller to which the personal data have been provided”

Thus, a major implication of the implementation of the Directive concerns the technical/administrative means in which copyright exploiters (including here but not limited to licensees, sub-licensees, assignees etc.) will organize and manage the relevant data.

Another major problem which the case we cited in the beginning of our analysis has brought to our attention is the accuracy of the relevant and comprehensive data. Since exploiters are at liberty to organize the manner in which they will manage the relevant data, their obligation being only on the result – *i.e. to deliver at least once a year to the author/performer information on the mode of exploitation, all revenues generated by the said exploitation and due remuneration* and not on the manner in which the data is managed, we wonder if Member States should also ensure a mechanism of control of exploiters.

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Article 20: Contract Adjustment Mechanism

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Analysis of Article 20

Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC

Background

The contract adjustment mechanism provided in Art. 20 is a part of several author/creator-protective provisions introduced in Title IV, Chapter 3 of the DSMCD.

The contractual adjustment mechanism under Art. 20 is meant to address situations where the remuneration originally agreed under a licence or a transfer of rights clearly becomes disproportionately low compared to the relevant revenues derived from the subsequent exploitation of the work or fixation of the performance by the contractual counterpart of the author or performer. It introduces a so-called 'Best-Seller' right at a European level.

Creators are likely to invoke such right when they receive more information on the basis of the transparency obligation under Art. 19. The latter is meant to provide authors and performers with the information how much revenue is being generated by the exploitation of their work so that they can decide whether to seek additional remuneration pursuant to their Article 20. Member States have 24 months to implement the DSM Directive (including Article 20) into their national laws (until June 7, 2021) but Article 19 (transparency obligation) shall be applied from June 7, 2022.

Analysis

Art. 20 provides for a subjective right to claim additional, appropriate and fair remuneration. This right is meant to improve the capability of authors and performers to renegotiate contracts. However, if the parties do not agree on the adjustment of the remuneration, the creators can enforce this right by bringing a claim before a court or other competent authority.

Entitled to such right are authors (except for authors of computer programs, cf. Art. 23(2) of the Directive), performers as well as their representatives. According to Recital 78 of the Directive, representatives may exercise this right only if they are duly mandated in accordance with national law in compliance with EU law, i.e. representative organisations of authors and performers, including collective management organisations. Recital 78 of the Directive indicates that those representatives should protect the identity of the represented authors and performers. This is meant to shield authors from potential negative impact on authors' or performers' careers, including reputational damage or blacklisting, resulting from steps towards enforcement of the contract adjustment right.

Art. 20(2) provides that agreements concluded by collective management organisations and others to which the guarantees available under the Collective Rights Management Directive apply are exempt from contract adjustment right.

Authors and performers can benefit from the contract adjustment right not only when they enter into a contract personally but also when they act through their own companies (see recital 72).

The right is directed against authors' and performers' contractual counterparts or their successors in title. The right cannot be exercised against sub-licensees.

Member States are required to introduce a contract adjustment right at least for contracts on the exploitation of rights harmonised at Union level (see recital 78). Such rights are provided in the InfoSoc Directive, Rental Directive, Cable and Satellite Directive, and Resale Right Directive. Non-harmonised rights are not affected, such as the adaptation right, but there is nothing to prevent Member States to extend the contract adjustment right to contracts on adaptation as well.

Authors and performers can benefit from the contract adjustment right where the remuneration originally agreed under a licence or a transfer of rights clearly becomes disproportionately low compared to the relevant revenues derived from the subsequent exploitation of the work or fixation of the performance by the contractual counterpart of the author or performer. Recital 78 requires a broad interpretation of the term "relevant revenues" - all revenues relevant to the case in question, including, where applicable, merchandising revenues, should be taken into account for the assessment of whether the remuneration is disproportionately low. The assessment of the level of disproportionality should be performed on a case-by-case basis and take into account factors such as the contribution of the author or performer, the specificities and remuneration practices in the different content sectors, and whether the contract is based on a collective bargaining agreement. Moreover, the mechanism covers every payment, including lump sums and proportional payments.

Art. 20 and recital 78 suggest that authors and performers are entitled to claim additional remuneration only if the economic value of their rights was not properly estimated initially. If creators could foresee the actual economic value of their rights at the time of entering into a contract, they might not be able to benefit from the right.

The contract adjustment right will not apply if the contract is based on a collective bargaining agreement providing for a comparable adjustment mechanism. The mechanism provided in the collective agreement will prevail unless it is less favorable.

Finally, Art. 23(1) of the DSMCD provides that the contract adjustment right cannot be rendered unenforceable by virtue of a contractual provision.

Possible Implications for the Creative Industries

The implications could be substantial. There is a risk of unpredictability for publishers and producers. The publishers and producers should carefully regulate the remuneration that will be included in contracts at the beginning.

We could expect more collective bargaining agreements as a way to avoid the application of Article 20.

Since this right can be enforced against third parties to whom rights have subsequently been granted, it is important to agree on the allocation of risk between the original party and the party it subsequently grants rights to. Parties could negotiate some sort of indemnity against the risk that the remuneration they're paying will be judged to be disproportionately low in the future.

It is also possible that parties may be able to avoid this adjustment mechanism by choosing law and jurisdiction. They might agree on a non-EU law and arbitration/court. According to Recital 81, the choice of a non-EU law for intra-EU contracts should not deprive authors and performers of these rights. However, it's not clear whether a jurisdiction clause agreeing on a non-EU court could prevent this.

Questions

In a case of a sub-contract, Article 20 prescribes that the author may claim additional remuneration from “the party with whom they entered into a contract for the exploitation of their rights, or from the successors in title of such party“. Can author claim the remuneration in this case only from the sub-contractor or from both of the above parties (the party with whom they entered into a contract and sub-contractor)?

Article 20 describes remuneration that is disproportionate compared to “all subsequent relevant revenues derived from the exploitation of the works or performances.” How should the terms “relevant revenues” and “exploitation of works or performances” be defined in the Article 20?

Do the mechanisms apply to the work that was made under an employment contract or was commissioned? Are the mechanisms offered to authors and performers excluded in that case or not?

Contractual counterparties (in the agreements with creators) could, in addition, expect further re-negotiation costs of contract adjustment.

We will see how exactly this Article law will be implemented and enforced in the EU.

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Article 22: Right of Revocation

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Overview

As part of the moral rights of an author or performer, Article 22 requires Member States introducing a revocation right that can be exercised when an author or performer grants exclusive rights to a producer, publisher, label or similar party fully or party fails to exploit the work. The rationale for including this in the Directive is that authors and performers should be allowed to seek other avenues for exploiting their work if a significant amount of time has lapsed without or only with partial exploitation (use or lose it). Such revocation rights protect the authors interests and expectation that the works exclusively licensed are exploited in line with customary standards of the sectors concerned (“Use it or lose it”).

Such revocation right protects the creator’s interest and expectation that the copyrights exclusively granted are exploited along customary standards of the sector concerned.

Implementation

Member States will be able to adopt a variety of limitations to the revocation right:

- Related to specificities of various sectors and different types of works;
- Related to collective works concerning the relative importance of individual contributions and interests of all authors and performers effective by an individual revocation;
- Concerning the time frame in which the revocation mechanism is applicable, having in mind the proper notification to contracting parties concerned prior to revoking the license;
- Concerning the possibility of the author or performer to terminate the exclusivity only instead of revoking license all together.

Member States may decide to exclude sectors that rely on multiple performers or the licensing of underlying works (e.g., books or plays) for use in audio-visual works or similar works that may be prejudiced if one party is able to unilaterally revoke its rights from a project (Art. 22 III).

Art. 22 IV provides a mandatory safeguard in which the revocation right does not apply where lack of exploitation is "predominantly due to circumstances that the author or the performer can reasonably be expected to remedy". With respect to other safeguards, the Directive advises that Member States keep in mind that the legitimate interest of licensees (producers) should be respected and guarded from potential abuses. While few safeguards are expressly mentioned, the language is broad enough that protections can be implemented on a national level at the Member States’ discretion.

Additionally, Article 22 V states that Member States may permit collective bargaining agreements to contractually override the revocation mechanism.

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