

Remuneration of authors and performers for the use of their works and the fixations of their performances

EXECUTIVE SUMMARY EN

A study prepared for the European Commission
DG Communications Networks, Content & Technology by:



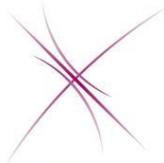
Europe Economics



IVR

This study was carried out for the European Commission by

Europe Economics and Lucie Guibault, Olivia Salamanca and Stef van Gompel of the University of Amsterdam



Europe Economics



Internal identification

Contract number: MARKT/2013/080/D

SMART 2015/0093

DISCLAIMER

By the European Commission, Directorate-General of Communications Networks, Content & Technology.

The information and views set out in this publication are those of the author(s) and do not necessarily reflect the official opinion of the Commission. The Commission does not guarantee the accuracy of the data included in this study. Neither the Commission nor any person acting on the Commission's behalf may be held responsible for the use which may be made of the information contained therein.

ISBN 978-92-79-47536-8

DOI:10.2759/421474

© European Union, 2015. All rights reserved. Certain parts are licensed under conditions to the EU.

Reproduction is authorised provided the source is acknowledged.

Contents

- Executive Summary1
- The current legal framework1
- Understanding payment flows3
- Analytical approach.....4
- Statistical analysis.....5
- Key findings.....6
- Policy recommendations.....7

Executive Summary

Europe Economics and the Institute for Information Law at the University of Amsterdam were commissioned by DG Internal Market to undertake a study of the remuneration of authors and performers (or the “creators”) for the use of their works and the fixations of their performances.

The overarching objectives of this study are to analyse the current situation regarding the level of remuneration paid to authors and performers in the music and audio-visual (AV) sectors in order to compare the existing national systems of remuneration for authors and performers and identify the relative advantages and disadvantages of those systems for them. We also aim to assess the need to harmonise mechanisms affecting the remuneration of authors and performers, and to identify which ones are the best suited to achieve this. Their potential impact on distribution models and on the functioning of the Internal Market is also examined.

In doing this we focus specifically on:

- Music:
 - Authors — lyricists, composers, songwriters (lyricist and composer).
 - Performers — featured artists, session musicians.
- AV:
 - Authors — principal directors, screenwriters, composers of music for film or television.
 - Performers — TV actors, film actors.

The current legal framework

To conduct our legal analysis, we approached correspondents, a mix of scholars and practising lawyers, in each of the ten countries under study.¹ These countries were chosen to reflect differences in regulatory approaches and existing regional idiosyncrasies. The questionnaire we prepared for our correspondents focused on legal framework of each country from both a contract law (lex generalis) and copyright law (lex specialis) perspective. It also focused on the actual contractual practice in their country and whether this practice was

¹ We thank our correspondents for their contributions to the study: Prof. Maurizio Borghi (UK Bournemouth University); Dr. Till Kreutzer (Germany, iRights.Law, Berlin); Dr. Brad Spitz (France, YS Avocats, Paris); Ms. Deborah de Angelis (Italy, DDA Studio Legale, Rome); Prof. Pedro Letai (Spain, Instituto de Empresa, Madrid); Dr. Tomasz Targosz (Poland, Truple Konarski Podrecki & Partners Law Firm, Kraków); Dr. Rita Matulionyte (Lithuania, Law Institute of Lithuania, Vilnius); Ms. Maria Fredenslund (Denmark, RettighedsAlliancen, Copenhagen); Dr. Aniko Grad-Gyenge (Hungary ProArt Alliance for Copyright, Budapest); Prof. Daniel Gervais (US, Vanderbilt University Law School, Nashville).

aligned or not with the law. Further, the law and contractual practice in the United States was also examined, for the purpose of a comparative analysis.

Copyright and related rights have been fairly well harmonised in European law. All ten Member States considered in this study grant authors an exclusive, transferable right of reproduction, a right of communication to the public, including the right of making available, and a distribution right in conformity with the Information Society Directive (Directive 2001/29/EC). Some differences can be observed in the national implementation of the EU *acquis*, particularly with respect to the existence or the exercise of the rights conferred on authors and performers under the Rental and Lending Rights Directive (Directive 2006/115/EC), the Satellite and Cable Directive (Directive 1993/83/EEC), as well as with respect to certain performers' rights under the Information Society Directive. Variations in legislation have occurred primarily as a result of the options left in the *acquis* for the implementation of European norms by the Member States but some differences are the result of conscious decisions on the part of the national legislator to go beyond the minimum harmonisation in the *acquis*. Further, we provided some insight into the nature and implications of exclusive rights versus the so-called remuneration rights. In addition to these differences in implementation, we also analysed the different interpretations given in the Member States to particular uses (e.g. webcasting) that may fall in a different category of rights, or cover more than a single right, depending on the Member State.

On the basis of the answers provided by the correspondents in the ten jurisdictions, it appears that the general provisions of contract law play a very limited role in granting support to authors and performers in the negotiation of exploitation agreements and the determination of the level of remuneration. General contract law may affect the way a contract is interpreted or executed, but in general it does not influence the outcome of the negotiation on the transfer of rights or on the remuneration to be paid. But because authors and performers are traditionally seen as the weaker party to contractual negotiations, some Member States, like France, Germany and Spain have implemented in their copyright legislation a number of imperative rules on the formation, execution and interpretation of authors' and performers' contracts. Between these solutions and contractual freedom many variations exist in the laws of the Member States.

Furthermore, authors and performers often organise themselves into unions (wherever permitted) or freelance associations. Many of these unions and associations negotiate model exploitation contracts with representatives of the industry. Nevertheless, trade unions and associations of authors and performers have not been set up in all Member States. Where they have, the type and the extent of collective action vary, both as regards the unions' and associations' role in the negotiation and in the enforcement of contracts.

Collective rights management organisations (CRMOs) also play a role in establishing the level of remuneration received by authors and performers, although the importance of this role differs by right holder, sector and Member State. Contrary to other exploiters, CRMOs are often not bound by the general or specific rules on authors' and performers' contracts found in the legislation of a

number of Member States, on the ground that CRMOs are deemed to operate in the interest of their members, e.g. authors, performers or other rights owners.

Even though several mechanisms offered by contract or copyright law provide support to authors and performers, some show a more direct impact on the level of remuneration paid to authors and performers than others. The principal legal elements we have identified in this respect are:

- the structure of the rights conferred by the law (i.e. the ownership and the nature of the rights – exclusive or remuneration rights);
- the existence of statutory provisions to protect authors and performers as weaker parties to a contract; and
- the use of collective bargaining and role of trade unions and associations.

Understanding payment flows

Supply chains and payment flows in the music and audio-visual industries involve a number of players and vary both across different types of authors and performers and across Member States. Their analysis provided two important insights for the determination of authors' and performers' remuneration. First, in most cases, the level of remuneration that authors and performers earn is dependent upon the contract negotiated with the publisher/producer in exchange for a transfer of their exclusive rights. Second, the complexity of supply chains and the associated payment flows can make it difficult for authors and performers (as well as others operating in the industry) to fully understand the source of and rights associated with the remuneration they receive.

Music industry

The supply chain in the music industry is particularly complex with distinctions between offline and online distribution of music, different repertoires and authors and performers.

In the offline supply chain publishers plays a central role for authors such as songwriters, who assign their rights to them. CRMOs collect royalties for several types of uses of works and distribute them between the relevant right holders. Business models in the online domain however have altered the traditional dynamic between authors, publishers and CRMOs. The role of the CRMO in the online supply of musical works is more prominent than in the offline model; with important differences between the licensing of Continental and Anglo-American repertoires. CRMOs are increasingly involved in the collection and distribution of royalties associated with the making available rights.

The record label (as a producer of phonograms) plays the central role in the supply chain for performers in the music industry both in the online and offline environment. In most cases, featured artists and session musicians transfer virtually all their rights to phonogram producers when signing a record agreement, with the exception of the right to equitable remuneration for the broadcasting and the communication to the public of commercial sound recordings, pursuant to article 8 of the Rental and Lending Rights Directive. The

contracts signed by featured artists and session musicians with phonogram producers may include either a buy-out of rights with a one-off payment, an entitlement to royalties or a combination of both. The role of the CRMOs is more restricted, mainly to the collection of monies for the communication to the public and broadcasting rights.

Audio-visual industry

For authors and performers, the central player is the producer who acts as a focal point both in the film and the TV industries. The role of CRMOs is much more limited than in the music industry and it varies across the Member States.

In the vast majority of cases, the producer is (by law or by contract) the initial owner of the rights of authors and performers in the audio-visual work. Depending on the contractual agreement between the producer and the authors and performers, upfront payments in the form of salary or lump-sum payment are made as a form of compensation for their work in the production. In addition to receiving advanced payments for the actual work accomplished during the production time, arrangements for the payment of royalties flowing from the exploitation of the audio-visual works vary considerably in relation to both the determination of the level and the administration of the payment of the remuneration (either through the producer or through a CRMO). Contractual practices regarding the determination of the level of remuneration differ significantly between countries.

Producers, as the key right holders of a completed film or TV programme, are in charge of the granting of licences for the use of film products to the distributors and aggregators. CRMOs play a role in granting licences and distributing the royalties collected from the cable retransmission right.

Finally, we observed that often there is legal uncertainty arising from the lack of specification of rights covered by the presumption of transfer from the creator to the producer.

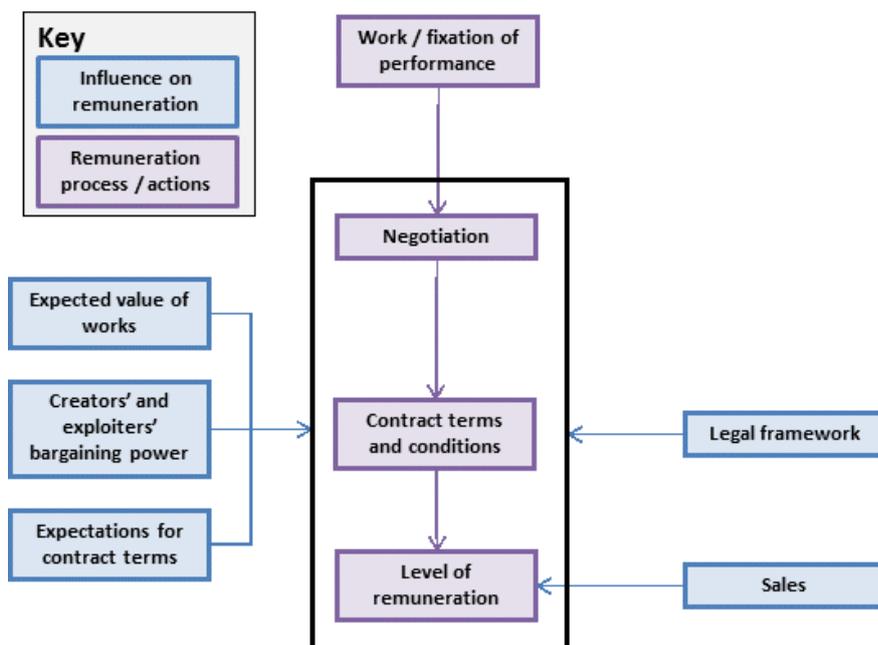
Analytical approach

There is a range of additional factors that may affect the level of remuneration of authors and performers. Together, these factors form a theoretical framework against which the data gathered through the legal review and survey of performers and authors were examined.

The theoretical framework was designed to be general in nature to encompass all types of authors and performers across both industries and from any Member State. Therefore, it has been simplified. This section presents an overview of the process by which the level of remuneration received by authors and performers is determined and identifies the key influences on their remuneration, such as

expectations for the value of the work, bargaining power, the contractual expectations or norms, and the legal framework in place.²

Figure 1: High-level process of securing remuneration



Source: Europe Economics.

We analysed and qualified the expected impact each of these factors on the level of remuneration that authors and performers achieve in their contracts.

Statistical analysis

During the study we gathered primary data on the remuneration, contract terms, and characteristics of creators in order to put the theory to work. To facilitate the gathering of these data we developed an online survey in consultation with DG Internal Market. The survey was uploaded onto the EU Survey platform and was distributed to authors and performers in the ten Member States³ via those CRMOs and unions that offered to assist us with our research. We translated the questionnaire into the native language of the countries chosen for the study.

However, we had several concerns with the outcome of the data collection, such as the data was not representative of all authors and performers in the countries covered by this study, there was a significant scope for bias in the responses and we observed missing values and a lack of internal consistency in a number of responses. The statistical analysis of the survey data did not yield many clear

² It should be noted that the legal framework will have a bearing on the nature of these influences. In terms of the role of the legal framework specifically/directly we consider: rules on the form of payment; collective bargaining; exclusive/non-exclusive nature of rights; waivable/non-waivable character of non-exclusive rights; and rules on transfers of rights (e.g. specification of modes of exploitation, limit on transfer of rights of future works, future modes of exploitation).

³ The Member States covered for the data gathering are Denmark, France, Germany, Hungary, Italy, Lithuania, Netherlands, Poland, Spain, and the United Kingdom.

patterns across different types of authors and performers and some of the patterns are to some extent counter-intuitive. While we would not necessarily expect the strength of the legal framework and collective bargaining to have identical impacts across different types of authors and performers, we would expect there to be greater consistency than is evident in the results of our analysis. This reinforces our concerns over the weakness in the data. A similar lack of consistent findings was apparent in our econometric analysis. It follows that we could not rely on the collected data when defining our policy recommendations.

Consequently, our recommendations are based on our findings in the legislation and contractual practices in the ten Member States, the conclusions drawn from the analysis of the payment flows in the music and the audio-visual sectors and on the analytical framework we have developed.

Key findings

The key findings of our analysis are:

- Transparency — there is a lack of transparency of the remuneration arrangements in the contracts of authors and performers in relation to the rights transferred. The payment flows in the music industry are particularly complex. Moreover, the differences in the national implementation of the cable retransmission right, the right of making available and the rental right pose noticeable cross-border transparency problems. The absence of information on which to base an estimate of likely earnings in different Member States undermines the ability of authors and performers to effectively exercise their freedom of movement across jurisdictions (non-tariff trade barrier) and has an adverse effect on the functioning of the Internal Market.
- Scope of transfer — certain groups of authors and performers, such as those new to the industry, are in a weaker bargaining position than others. Problems however arise if they get locked into long contracts with relatively unfavourable terms, in particular if they become successful. This issue is also pertinent with respect to the development of new modes of exploitation. To alleviate this problem, the laws of a number of Member States, in different ways, expressly regulate the transfer of rights relating to forms of exploitation that are unknown or unforeseeable at the time the copyright contract was concluded, as well as the transfer of rights relating to future works and performances.
- Role of trade unions and freelance associations — in some Member States collective action by trade unions and associations (and CRMOs that fulfil similar functions) play an important role, especially for authors and performers in the audio-visual sector. Besides providing support at the time of negotiating remuneration agreements (including both direct support and the assistance provided through the union's involvement in preparing and promoting model contracts), unions and associations can also be effective at the moment of enforcing agreements. Nevertheless, unions and associations

of authors and performers have not been set up in all Member States or, where they have, for all categories of authors and performers.

Policy recommendations

Based on these findings we have developed five overarching policy options for consideration. For some of the issues identified, an EU level approach may be necessary, for example where there is a specific Internal Market issue. For others, policy intervention at the national level may also be effective.

The policy options are as follows:

- Policy 1: Specify remuneration for individual modes of exploitation in the contracts of authors and performers.
- Policy 2: Improve the cross-border transparency of the national systems.
- Policy 3: Limit the scope for transferring rights for future works and performances and future modes of exploitation.
- Policy 4: Create a more conducive environment to support the role of trade unions, freelance associations and CRMOs when they fulfil similar functions.
- Policy 5: Facilitate the exercise of the right of making available. This policy option effectively represents a fall-back in the event that the other policies fail to protect authors and performers sufficiently and is broken down into three possibilities:
 - Voluntary collective management of the right of making available.
 - Unwaivable right to obtain equitable remuneration from the producer/publisher.
 - Unwaivable right to equitable remuneration administered by a CRMO.

A full impact assessment should be conducted on any policies considered to properly assess the costs and benefits of different options and the potential for unintended consequences that may distort the market. Based on our initial high-level review we recommend the following policies should be considered in more detail:

- Harmonised requirement for the specification of remuneration for individual modes of exploitation in the contracts of authors and performers — policy option one relating to the provision of written contracts with remuneration for individual rights broken down by mode of exploitation.
- Improve the cross-border transparency of the national systems — policy option two relating to the ability of authors and performers to understand whether or not they are likely to be better off by working in a different country.
- Harmonised limits on the scope for transferring rights for future works and performances and future modes of exploitation — policy option three relating to the ability of authors and performers to limit the scope of any rights transfer so as to prevent them being locked into less beneficial contracts for long periods.

With respect to options four and five we recommend conducting more detailed research to understand more fully the impact these options would have on the

remuneration of authors and performers. In each case it is important to consider the relevance of any policy proposal for the different types of authors and performers and the different industries. Furthermore, consideration must be given to countries where similar practices are already in place so that the design of the policy does not entail unnecessary and potentially costly changes.

European Commission

Remuneration of authors and performers for the use of their works and the fixations of their performances

Luxembourg, Publications Office of the European Union

2015 – 14 pages

ISBN 978-92-79-47536-8

DOI:10.2759/421474

