Music Creators' Rights under EU Law

D2.2

WP2, T2.2 + T2.3 + T2.4

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28 February 2025

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Post scriptum

A significantly revised and expanded version of this Study is forthcoming as an open-access book entitled *Online Music and the Quest for Fairness - The Evolution of Creators' Rights in the EU Data Economy* (Edward Elgar Publishing 2027).

2 June 2026

G.M.

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Abstract

This Study examines the multifaceted landscape of music creators' rights within the EU's legislative framework, emphasising the ongoing efforts towards copyright harmonisation and their effects in achieving a higher degree of fairness in the EU digital music market. In doing so, it provides a comprehensive analysis of the evolving challenges facing music creators in the EU based on the topics and goals spelt out in Tasks 2, 3 and 4 of Fair MusE's Work Package 2 (T2.2, T2.3 and T2.4).

Following the subject matter of T2.2, Part I consists of a thorough, yet concise, investigation of the state of composers', performers' and record producers' rights under EU law, considering their scope as it emerges in EU case law (Chapter 2). The analysis extends to issues such as the trade-off between music rightholders' protection and the scope of users' rights and freedoms, as contemplated under EU law provisions enabling transformative uses and computational analysis, including text-and-data mining techniques and AI (Chapter 3). The Study draws on the desk and empirical research carried out by UCP, TARTU and CEU on the national transpositions, implications and practical repercussions of the principle of fair and transparent remuneration embodied in Directive 2019/790 (Chapter 4) in 10 EU Member States (Austria, Belgium, Denmark, Estonia, France, Germany, Greece, Italy, Portugal and Spain). To do so, The Study relies on the analysis of music licensing trends and the contractual practices that reflect the implementation of EU-wide rights of composers and performers to access data on profits that all online music platforms derive from their different types of music exploitations.

Part II develops T2.3, focusing specifically on the national implementations of Article 17 of Directive 2019/790 in the above-mentioned 10 EU countries. Veering away from a principle of 'platform neutrality' and the safe harbour provision embodied in Article 14 of Directive 2000/31, Article 17 requires EU Member States to establish a new (or, at least, much clearer) copyright liability regime for social media companies (so-called Online Content-Sharing Service Providers or 'OCSSPs') communicating user-uploaded works - which consist of sound recordings and underlying musical compositions - to the public. The Study carefully (and critically) reviews the genesis of this provision, with a special emphasis on the slightly different and broader scope of the 2016 Commission's proposal. In doing so, it presents the main controversies this provision raised, especially as regards the conflict between digital copyright enforcement and the protection of conflicting fundamental rights, such as users' freedom of expression and tech companies' business freedom. The Study also explains the way the Court of Justice of the European Union reviewed these concerns (Chapter 5). While offering a comparative analysis of the most interesting and problematic national transpositions (if compared to the EU law model), the Study identifies the industry's response to the new liability regime and the music licensing structures fostered by Article 17 of the DSM Directive. To this end, Chapter 6 explores important disputes that have emerged in different jurisdictions and clarifies how music rightholders are exercising their rights (collectively or individually) and organising their data in a way that supports their claims vis-a-vis the social media industry.

On the grounds of T2.4, Part III provides an analysis of the national implementations of Directive 2014/26 and of the scenarios that have emerged in the aftermath of this major regulatory intervention in the field of collective management of rights in musical works. Chapter 7 aims to assess whether EU copyright rules have succeeded in reducing transaction costs and making remuneration of

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various categories of rightholders in the music industry value chains smoother and proportionate to their commercially valuable exploitations. To this end, this chapter dissects the roles and responsibilities of Collective Management Organisations (CMOs) and Independent Management Entities (IMEs) in Europe, tracing their historical evolutions, as well as the 2014 CRM Directive's attempt to enhance transparency and accountability of CMOs. This chapter critically observes that, having established a principle of rightholders' freedom to choose how to license their works, the Directive 2014/26 spurred repertoire fragmentation in the multi-territorial licensing of composers' and publishers' rights. This has entailed a significant increase in the number of licences each music service or platform now needs to obtain with a broad variety of old and new CMOs, publishers' licensing hubs and IMEs to clear rights in the global music repertoire. As regards IMEs, uncertainties surrounding the obligations which these businesses must comply with in Europe add yet another level of uncertainty to the music licensing industry, especially in Member States such as Italy and Spain, which showed hostility to the emergence of this new type of music licensors.

Relatedly, Chapter 8 shows how the fragmentation of music repertoires has made the alignment of music publishing and recording rights even more complex than it used to be. The ensuing fragmentation of repertories and of the related rights management information shows that the digital exploitation of recorded music needs a robust and interoperable data management and music repertoire infrastructure. Without this infrastructure it is (and will continue to be) impossible to remunerate all rightholders in a granular and transparent way. Such a music data-sharing model encompassing both recording and publishing rights remains missing, despite the attempts that organisations such as IFPI and CISAC have made in the past. This chapter reviews the attempts that have been made in the direction of greater and deeper data integration and shows that the failure of the most important initiative (*i.e.* the Global Repertoire Database) was caused by issues concerning ownership and control over databases and standards. The chapter eventually analyses the role of national laws in the 10 above-mentioned EU countries to assess the effectiveness of several transparency obligations established for CMOs and online music exploiters to assess whether individual rightholders and small- and medium-size music publishers and record labels can understand how valuable their works are in digital markets. As found in this final part of the Study, the need for transparency in this sector remains of crucial importance and presupposes greater integration of music repertoires data, metadata and online users' reports to facilitate a more accurate and equitable distribution of revenues.

The Conclusion (Chapter 9) summarises the key findings of the Study and presents policy recommendations that will inform the preparation of Fair MusE's 'White Paper' on promoting fairness in Europe's music ecosystems (Year 3). This chapter also serves as an Executive Summary of the Study, concluding with a section on unresolved issues where EU regulatory interventions may be necessary or appropriate soon.

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Annex II - List of EU CMOs and IMEs

Annex III - Desk Research National Summaries

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List of Abbreviations

'ADR'	Alternative Dispute Resolution
'AEPO-ARTIS'	Association of European Performers' Organisations
'AG'	Advocate General
'AGCM'	Autorità Garante della Concorrenza e del Mercato (Italian Competition Authority)
'AGCOM'	Autorità per le Garanzie nelle Comunicazioni (Italian Communications Authority)
'AI'	Artificial Intelligence
'ALAI'	Association Littéraire et Artistique Internationale (International Literary and Artistic Association)
'ALDE'	Group of the Alliance of Liberals and Democrats for Europe
'ARESA GmbH'	Anglo-American Rights European Service Agency
'ASCAP'	American Society of Composers, Authors and Publishers
'BMAT'	Barcelona Music and Audio Technologies
'BMG'	Bertelsmann Music Group (Germany)
'BTAP'	Beijing Treaty on Audiovisual Performances
'BVMI'	Bundesverband Musikindustrie (German member of IFPI)
'BWARM'	Bulk Work and Recordings Metadata
'CDM'	Claim Detail Message
'CDPA'	Copyright, Designs and Patents Act
'CEL'	Belgian Code of Economic Law
'CELAS'	Centralised European Licensing and Administrative Service
'CISAC'	International Confederation of Societies of Authors and Composers
'CJEU'	Court of Justice of the European Union
'CMO'	Collective Management Organisation

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'CNMC'	Comisión Nacional de los Mercados y la Competencia (Spanish Competition Authority)
'CPI'	Code de la Propriété Intellectuelle (French Intellectual Property Code)
'CRM'	Collective Rights Management
'CRRC'	Código do Direito de Autor e dos Direitos Conexos (Portuguese Copyright and Related Rights Code)
'CTEA'	Sonny Bono Copyright Term Extension Act
'CULT'	European Parliament's Committee on Culture and Education
'D-DEX'	Digital Data Exchange
'DEAL'	Direct European Administration and Licensing
'DMA'	Digital Markets Act
'DMCA'	1998 US Digital Millennium Copyright Act
'DPMA'	Deutsches Patent- und Markenamt (German Patent and Trademark Office)
'DRM'	Digital Rights Management
'DSA'	Digital Services Act
'DSM'	Digital Single Market
'DSP'	Digital Service Provider
'EBSI'	European Blockchain Services Infrastructure
'ECL'	Extended Collective Licence
'ECR'	European Conservatives and Reformists Group
'EEA'	European Economic Area
'EC'	European Community
'EPP'	Group of the European People's Party
'EU'	European Union
'EUIPO'	European Union Intellectual Property Office
'EuroFIA'	European branch of the International Federation of Actors
'FIM'	International Federation of Musicians

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'FIPC'	Fair Internet for Performers Campaign
'GDPR'	General Data Protection Regulation
'GenAI'	Generative AI
'GPAI'	General-Purpose AI
'GRD'	Global Repertoire Database
'GRD WG'	Global Database Repertoire Working Group
'ICA'	Italian Copyright Act
'ICE'	International Copyright Enterprise
'IGAC'	Inspecção Geral das Atividades Culturais (General Inspection of Cultural Activities in Portugal)
'IFPI'	International Federation of the Phonographic Industry
'IMPEL'	Independent Music Publishers European Licensing
'IME'	Independent Management Entity
'IMPALA'	Independent Music Companies Association (originally: Independent Music Publishers and Labels Association)
'IPD'	International Performers Database
'IPN'	International Performer Number
'IPRED'	Intellectual Property Rights Enforcement Directive
'IPTV'	Internet Protocol Television
'ISAN'	International Standard Audiovisual Number
'ISBN'	International Standard Book Number
'ISRC'	International Standard Recording Code
'ISWC'	International Standard Musical Work Code
'JURI'	European Parliament's Committee on Legal Affairs
'LCC'	Linked Content Coalition
'LLM'	Large Language Model
'MCPS'	Mechanical Copyright Protection Society
'MERLIN'	Music and Entertainment Rights Licensing Independent Network
'MI3P'	Music Industry Integrated Identifiers Project

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'MLC'	Mechanical Licensing Collective
'MMA'	Music Modernization Act
'NFT'	Non-Fungible Token
'OCSSP'	Online Content-Sharing Service Provider
'ONB'	Belgian National Orchestra
'ORDE'	Open Rights Data Exchange
'ORDF'	Open Rights Data Framework
'PAECOL'	Pan-European Central Online Licensing
'P2P'	Peer-to-Peer
'PEDL'	Pan-European Digital Licensing
'PEL'	Pan-European Licensing Initiative for Latin American Repertoire
'PPI'	Phonographic Performance (Ireland)
'RAAP'	Recorded Artists Actors Performers
'RAM'	Random Access Memory
'RIAA'	Recording Industry Association of America
'RRAs'	Reciprocal Representation Agreements
'SCAPR'	Societies' Council for the Collective Management of Performers' Rights
'SESAC'	Society of European Stage Authors and Composers
'SOCAN'	Society of Composers, Authors and Music Publishers of Canada
'SPF Economie'	Service de contrôle des sociétés de gestion du droit d'auteur et des droits voisins (Belgian Control Service for collecting societies for copyright and related rights)
'TDM'	Text-and-Data Mining
'TFEU'	Treaty on the Functioning of the European Union
'TEOSTO'	Säveltäjäin Tekijänoikeustoimisto Teosto (Finnish CMO)
'TRLPI'	Texto refundido de la Ley de Propiedad Intelectual (revised text of the Spanish Intellectual Property Law)
'TRIPS Agreement'	Agreement on Trade-Related Aspects of Intellectual Property Rights

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'UGC'	User-Generated Content
'UrhDaG'	Urheberrechts-Diensteanbieter-Gesetz (German Act on the Copyright Liability of Online Content-Sharing Service Providers)
'UK'	United Kingdom
'UMPG'	Universal Music Publishing Group
'US'	United States
'USC'	United States Code
'VLOP'	Very Large Online Platform
'VRDB'	Virtual Recording Database
'VUT'	Verband unabhängiger Musikunternehmer*innen (German Association of Independent Musicians and Music Companies)
'WCT'	WIPO Copyright Treaty
'WID'	Works Information Database
'WIPO'	World Intellectual Property Organization
'WPPT'	WIPO Performances and Phonograms Treaty
'WTO'	World Trade Organization

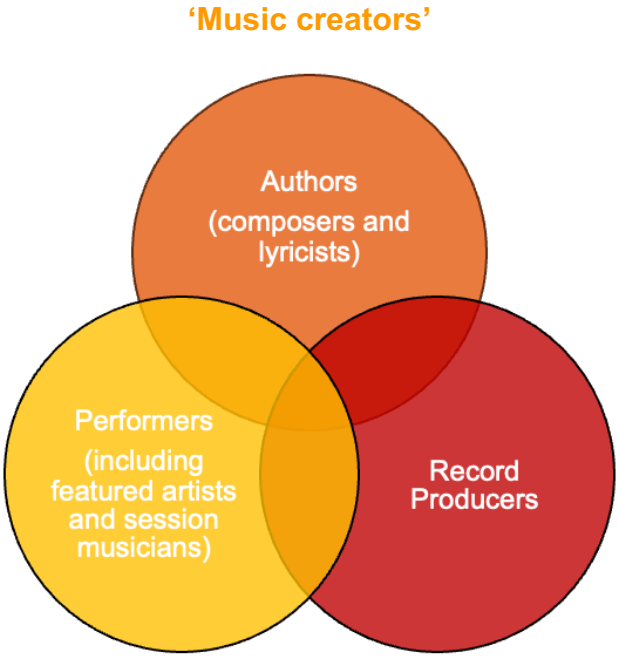
Note: for a list of CMOs and IMEs with their designations and meaning, please refer to Annex II - List of EU CMOs and IMEs.

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1. Introduction

1.1. 'Music creators': who are they in this Study?

In a fast-changing and increasingly broad music ecosystem where the evolution of computing and communication technologies are constantly changing the production and dissemination processes, the terminology used to describe those who 'create' music has significant implications for copyright law, economic growth in digital markets and cultural policies. This Study adopts a broad definition of "music creators" that encompasses both persons and enterprises who are involved in the composition, performance and recording of musical works. All these individuals and companies rely on their intellectual and creative output to make a living and to run businesses with an expectation to be fairly remunerated for the exploitation of their works. From a law and policy perspective, this notion includes composers, lyricists, performers (such as featured performing artists and session musicians) and record producers. As detailed in this Study, these are, historically and legally, 'music creators' who progressively emerged and obtained recognition under international, European and national copyright laws as *original* rightholders owning intellectual property rights in musical compositions, music performances and sound recordings. The codification of these rights under copyright inherently reflect the emergence, in a row, of two distinct sectors and layers of the music industry, whose distinction is still of paramount relevance from a legal and economic perspective: *(i)* the authors' and music publishers' rights (better known as 'publishing rights', despite the non-inclusion of publishers among copyright's original rightholders); and *(ii)* the record producers' rights (known in the industry as 'recording' or 'master' rights, which incorporate and absorb the exclusive rights of music performers in their fixations, which producers acquire contractually at the time of a sound recording production).



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Despite their formal eligibility for copyright protection, given the very low and aseptic threshold established by the concept of 'originality' in European Union ('EU') copyright law, this Study does not specifically address the condition, under the law and in digital markets, of so-called "content creators". This is a term popularised by the exponential rise of social media platforms to describe creative users who produce and share materials primarily to engage audiences within platform ecosystems. As explored elsewhere, the use of the "content creator" rhetoric in public discourse has often diluted the traditional notion of "authorship", undermining the perception and exercise of economic and moral rights historically associated with authors and other professional creators.[1] This Study reclaims the notions of "authorship" and "authors' rights" according to their original purpose and uses the term "music creators" to broadly refer to all original music copyright holders under the relevant legislation. Moreover, the Study purposely restricts this notion to individual rightholders - namely: composers and performers - in the analysis of those EU law provisions focusing *specifically* on the contractual relationships between these rightholders and their traditional contractual counterparts *within* the music industry (*i.e.,* music publishers and record producers). As discussed in the Study, the adoption and national transposition of the DSM Directive and the codification of the authors' and performers' right to fair remuneration in their exploitation contracts was a turning point under EU law in the protection of the bargaining power and of the income of the most vulnerable parties. Even in the music ecosystem, the expectation of fairness in the treatment of individual creators is closely linked to the EU's constitutional goal to preserve and promote cultural and linguistic diversity.

Another preliminary disclaimer concerns the exclusion of the debate on the legal treatment of *purely* artificial intelligence ('AI')-generated or 'authorless' works from the scope of this Study.[2] While philosophical and legal debates on AI-driven creativity remain important, and are duly considered in a chapter on copyright exceptions, text and data mining and artificial intelligence (see Chapter 3 below), discussions about the copyrightability of AI-generated musical works and recordings are *not* at the core of this work and of the Fair MusE project, as a whole. Certainly, the launch of large-scale 'GenAI' technologies such as OpenAI's ChatGPT made the analysis of what should be eligible for protection under copyright law more pressing and relevant. Yet, the huge attention paid to this

[1] See Giuseppe Mazziotti, '"Authors", not "content creators"' (2024) 19 Journal of Intellectual Property Law & Practice 465.

[2] Several scholars reflected on the notion of 'machine-generated' works and, in particular, the distinction between 'machine-assisted' and 'machine-created' works to evaluate their abstract copyrightability: see, for instance, Ryan Abbott, 'Artificial intelligence, big data and intellectual property: protecting computer-generated works in the United Kingdom' in Aplin T (ed), *Research handbook on intellectual property and digital technologies* (Edward Elgar 2017), 322, 323, arguing that the degree of machines' independence in creating a work is inversely proportional to the level of human contribution; and Jane Ginsburg and Luke Ali Budiardjo 'Authors and machines' (2019) 34(2) Berkeley Technology Law Journal, 343, 402, who coined the term 'authorless works' to describe creations where a machine can fully replace a human author by conceiving and executing the work without being designed or trained to accomplish specific tasks. In doing so, Ginsburg and Budiardjo, 402, recommended extreme caution in the assessment of machine independence and properly ''authorless'' works (''Any apparent 'creativity' in a machine's output is directly attributable either to the code written by the programmers who designed and trained the machine, or to the instructions provided by the users who operate the machine. No machine itself is a source of creativity [...]''). See also Enrico Bonadio, Nicola Lucchi and Giuseppe Mazziotti, 'Will Technology-Aided Creativity Force Us to Rethink Copyright's Fundamentals? Highlights from the Platform Economy and Artificial Intelligence' (2022) 53 IIC 1174, for whom the involvement of humans in creative processes might gradually fade away to the stage of authorless works so long as technology gets more sophisticated (as in the case of the GenAI).

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specific subject has contributed to a sort of 'mass distraction' of policy makers, practitioners and legal scholars from the everyday life and hardship of legacy authors and performers who keep using new technologies under their control, supervision and responsibility - ultimately serving their own creative, human and, therefore, copyrightable endeavours. Therefore, by aiming to explore whether copyright law can effectively safeguard the sustainability of 'human creations', this Study does not exclude from this notion the works where the human intellect's element is tangible or predominant, despite the assistance provided by new technologies.[3] This work assumes that, without adequate protections for this intellectual and creative labor, the financial sustainability of professional creators would be jeopardised, threatening the survival and advancement of cultural innovation and diversity. This human-centric focus also acknowledges that the advent of AI and other digital technologies has compounded the challenges faced by authors and performers, such as the erosion of effective copyright protections, inequitable remuneration practices, and the increasing dominance of the platform-based attention markets built by social media companies.

In terms of scope, this Study is limited to the music industry and does not extend to the audiovisual sector and other sectors where the use of musical works and records can be prominent (for instance: the videogames industry), reflecting the specific scope of the Fair MusE project. By concentrating on the rights and challenges of professional music creators, this Study aims to contribute to the development of EU copyright law in a manner that enhances fairness and ensures that music creators can thrive in the evolving digital and platform-dominated landscape. Safeguarding the rights of these creators is essential not only for their individual livelihoods but also for the broader cultural and economic health of the European music industry.

Finally, given the broad context in which this Study was undertaken, and the interaction of an interdisciplinary group of researchers with a multi-stakeholder community built for the Fair MusE project, it is fair to acknowledge that the above-mentioned inclusion of record producers within the definition of "music creators" raised important concerns from representatives of composers and performers at the European level. Specifically, questions have been posed about the clarity, consistency, and implications of the Fair MusE project's use of the term "creators", emphasising the necessity of relying on this concept with precision so as to ensure that the project's findings and recommendations are not misinterpreted or perceived as overlooking the nuanced roles and interactions among different rightholders in the music value chain.[4]

These observations underscore the importance of clarifying Fair MusE's approach to the term "creators" in light of its different work packages and tasks, where researchers explore the music industry and its underlying businesses from a variety of perspectives and where this notion can vary

[3] See Abbott (n 2) 2 ("... computers may function as simple tools that assist human authors [...], much the way that a pen [...] can help someone to write").

[4] As put by Marc du Moulin, Secretary General of the European Composers and Songwriters Alliance (ECSA) in an email sent to Fair MusE on 16 December 2024: "In our view, assessing fairness in the music sector - an objective that we fully support - must be based on a clear and consistent definition of the different music copyright holders and stakeholders, and how they interact with each other in the music value chain. If such an important term is so often used by the Fair MusE project without any definition nor consistent understanding on what it covers, it would give a wrong impression and lead to some unfortunate misunderstandings about the project's findings and recommendations. As a result, we suggest that you provide a definition and use the term in a consistent way. If not, I would suggest at least a disclaimer explaining the Fair MusE approach related to the use of the term."

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slightly depending on the purpose of each task. This is not an inconsistency but, rather, a broadened perspective reflecting the complexity of a music value chain where independent artists can simultaneously act as composers, publishers of their own music, main performing artists and producers of their records

1.2. Music copyright law: legal concepts

Music is not only a prominent performing art that has accompanied humanity through thousands of years of history and civilisation. It is also a crucial aspect of our daily lives, having become even more pervasive with the rise of personalised digital media, such as social networks and streaming services. As one of the most significant forms of human creativity, music is granted robust protection under copyright law, which has continually evolved to adapt to technological advancements. Regardless of how copyright law emerged or of the varying legal traditions that have shaped this field since its first modern codifications, one of its primary goals has been to place authors and other rightholders involved in music creation in a position to receive compensation for the exploitation of their work.

The music industry itself is a complex and multifaceted domain operating at the intersection of law, creativity, and business. To understand why a performing art like music attracts such substantial and well-established legal protection, it is essential to understand the fundamentals of the music ecosystem, the publishing and recorded music markets, as well as the legislative instruments that govern this field, broadly. This purpose requires exceptional clarity in depicting this ecosystem, as a whole, and the defining concepts that have emerged and consolidated in international copyright agreements and EU directives, namely: (i) 'musical work', (ii) 'performance', and (iii) 'sound recording' (or 'phonogram'). These three types of copyright's subject matters respectively relate to three categories of music rightholders: authors/composers, performers, and record producers — all of which follow the above-mentioned notion of 'creators' and, unlike music publishers, find direct recognition under EU copyright law as *original* rightholders.

Interestingly, in the music industry, the terminology for creators' rights differs from that used in law. For example, reproduction rights are referred to as 'mechanical' rights; rights concerning communication to the public or broadcasting fall under the broad category of 'performing' rights; and the making of derivative works, where a musical composition and a sound recording are combined to create new works, is covered by 'synchronisation' rights. In legal terms, this falls under categories such as 'adaptation', 'alteration', or other modifications.

Furthermore, the fair remuneration of rightholders presupposes content and rightholder identification related to the subject-matter of their copyright whenever music is used or otherwise exploited online. This data, including the rights related to copyright's subject matters and copyright's owners, is catalogued within different data infrastructures, each controlled by a distinct organisation or community of stakeholders. Annex I - Music Data and Metadata contains a succinct overview of the data and metadata used in the publishing and recording branches of the music industry.

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1.2.1. 'Musical work'

Firstly, it is important to clarify that "music" as a performing art and "musical work" in law are two very different concepts, and this distinction arises from the inherent characteristics of music as an art form.[5] The concept of copyright has primarily been developed to protect more static forms of expression, such as texts and visual artworks. This framework presents challenges when applied to music, which is inherently abstract, extemporaneous, and ephemeral.[6] Therefore, the distinction between a musical work - as conceived and detailed on paper or another tangible medium by a composer, and remaining an *abstract* creation - and its concrete performance fixed and incorporated into a sound recording is crucial.

Article 2(1) of the Berne Convention for the Protection of Literary and Artistic Works (Paris Text 1971),[7] a foundational instrument to modern copyright law, explicitly classifies "musical compositions with or without words" as literary and artistic works, granting them copyright protection. In copyright law, a 'musical work' refers to an original composition or arrangement of music that is eligible for copyright protection. Historically, this concept has been inextricably tied to its written notation, a perspective rooted in the early frameworks of copyright. These frameworks, established initially to protect static, written forms of intellectual property, such as books and manuscripts, were extended to music on the assumption that only notated compositions could be reliably recognised and attributed as original works. Early European copyright statutes, for example, offered composers legal protections specifically tied to their musical texts. The 1710 British Statute of Anne—the first Act to directly protect the rights of authors—did not originally cover music until 1777, when Johann Christian Bach successfully argued in the *Bach v. Longman* case that his musical scores should be recognised as "writings" under the Act.[8] The legal definition of a musical work remained centred on the notated score, effectively making the visual, fixed representation the primary embodiment of the composition. This focus on notation thus limited copyright protections to what could be captured and visually documented, reinforcing a view of musical works as static texts rather than dynamic, multifaceted creations.[9]

1.2.2. 'Performance'

Unlike a work of visual art that can be immediately apprehended by the eyes of the viewer, music as a living art form requires its performance by skilled musicians - namely: performers - to be appreciated by the listener.[10] The performance, as a separately protected layer under copyright law, essentially renders the abstract musical composition into an acoustically perceptible form. In this sense, the musical composition functions as a script for the performing artist, providing instructions on which notes and lyrics to perform. As broadly shown in the domain of Western classical music,

[5] Andreas Rahmatian, 'The Musical Work in Copyright Law' (2024) 73(1) GRUR International 18, 20.
[6] ibid 18-33.
[7] Berne Convention for the Protection of Literary and Artistic Works (adopted 9 September 1886, as revised at Paris 24 July 1971) 828 UNTS 221.
[8] *Bach v. Longman* [1777] 2 Cowp 623; the two composers were Johann Christian Bach and Karl Friedrich Abel. For further details, see Anna Barron, 'Copyright Law's Musical Work' (2006) 15 Social & Legal Studies 101, 112-118.
[9] Giuseppe Mazziotti, 'Music Improvisation and Copyright' in Enrico Bonadio and Nicola Lucchi (eds), *Non-conventional copyright: do new and atypical works deserve protection?* (Edward Elgar 2018).
[10] Rahmatian (n 5) 22.

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for instance, given the possibility of varying interpretations of a notated musical piece and the remarkable freedom left to the performer by a composer normally leads to very different performances of the same composition.

As far as the performing artists are concerned, copyright law does not discriminate between different types of performers. However, the music industry does distinguish performers in light of their role in a recording production, with significant repercussions, that will also be explored in depth in this Study. A first category is that of 'featured' performers, who are those who are credited as artists featuring on stage or in a sound recording.[11] These performers are normally (but not always) remunerated through recurring payments, named 'royalties, based on a given percentage of a record's revenues. The featured performer can, but does not necessarily, also be the composer of the musical composition, a role usually referred to in popular music as 'singer-songwriter'. The second category of performers consists of 'session musicians' or 'non-featured performers ' who, as the term suggests, back up the featured performer during the recording of their performance (see §1.1.3). This is the case, for instance, of background vocalists or instrumentalists who only get hired by a label for a specific recording production.[12] Therefore, they are not a permanent member of the band or ensemble that signs the recording contract.

1.2.3. 'Phonogram' or 'sound recording'

As captivating as a live musical performance may be, the performance is quintessentially ephemeral without its manifestation in tangible, recorded form. This is where a third layer - the 'phonogram', 'sound recording' or 'master '- comes into play. Sound recordings function as a medium that permanently captures and immortalises a certain rendering of a musical work. As defined by Article 3(b) of the Rome Convention, a phonogram constitutes the 'exclusively aural fixation of sounds of a performance or of other sounds'. From a cultural and artistic perspective, sound recordings enable the widespread distribution of music to a mass audience. From an economic perspective, recordings help maximise the commercial exploitation of a given music performance by making it accessible indefinitely and well beyond the physical space and the moment a performing act occurs. The same way as for performances, recordings of the same musical composition are potentially endless, with each fixation of sounds being protected separately. The autonomy of each recording matters, legally and artistically, if one considers the practice of re-recordings, remixes, and covers in pop music and, even more so, the function of records in genres such as classical music and jazz, where every 'take' provides a different rendering of a given piece of (abstract) music.

1.2.4. Simultaneity of musical composition, performance and sound recording

While two of the three above-mentioned layers of creation and music production - the fixation of a performance and the related recording - logically occur simultaneously, the first one, the musical

[11] CLIP, 'What is a main artist?' (*CLIP*, 13 August 2024) <https://goclip.org/en/music/recording/what-is-a-main-artist#:~:text=The%20main%20artist%2C%20sometimes%20also,a%20band%2C%20or%20an%20orchestra>.
Unless stated otherwise, all URLs cited in this Study are available as of 21.02.2025.
[12] CLIP, 'What is a session musician and a non-features artist?' (*CLIP*, 13 August 2024) <https://goclip.org/en/music/recording/what-is-a-session-musician-and-non-featured-artist?collection=recording-roles>.

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composition, usually precedes them. However, this is not always the case because a musical composition can be created, performed and recorded at the very same time. This can happen when a composition is improvised during a live performance recorded by a sound engineer on behalf of a record label, as in the famous example of pianist Keith Jarrett's 'Köln Concert', recorded (rather unexpectedly) and released by label ECM in 1975.[13] In this context, the sound recording serves as the fixation of both a musical composition that had not been previously written down and its simultaneous performance,[14] with the improviser holding rights in both the composition and the performance.[15]

Outside of music genres like jazz and rap, where improvisation is an inherent part of the creative process, the simultaneity of composition, performance and sound recording has become the norm even in other genres, like contemporary pop and hip-hop, where music production, from an artistic and technical point of view, does not require pre-written notated pieces. Digital music technologies and sophisticated recording equipment have gradually reduced the need for written music scores. In many cases, these tools replace even instrumental or vocal performers, in a way that the final sound recording embodies all the legally distinct concepts and elements and blurs the lines between them. The lyrics of a song or a track can be an exception to this trend, and be composed in advance of the recording, so that the literary part of the work can proceed (and influence) the musical rendering.

1.3. Music ecosystem, the industry's value chain and the digital transition

The rapid expansion of social media, streaming services, and the growing influence of their algorithms and data structures raises concerns about whether today's digital economy can support the cultural and creative industries - particularly the music ecosystem.[16] The digital revolution has enabled content production and simplified content dissemination on an unprecedented scale. Advancements in technology have fostered innovation and diversity in terms of music production techniques and creative processes so that the creativity of composers, performers, and record labels has reached remarkably new artistic and technical results, magnified by social media and an increasing reliance on AI. On this front, the power and dominance of a few very large online platforms ('VLOPs'),[17] also in conjunction with the Covid-19 pandemic, and the forced lockdowns and shutdown of performing arts venues around Europe, made them even more indispensable to connect artists with their audiences. As a result, these online platforms and services hold immense power in controlling access to vast volumes of music that can transcend territorial boundaries.

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[13] Keith Jarrett, 'The Köln Concert', ECM (1975) <https://ecmrecords.com/product/the-koln-concert-keith-jarrett/>.

[14] Warren Shaw, 'Copyrighting Improvised Music' (1982) 32 Copyright Law Symposium 109, 111.

[15] Giuseppe Mazziotti, 'Music Improvisation and Copyright' (n 9).

[16] Giuseppe Mazziotti and Heritiana Ranaivoson, 'Can Online Music Platforms Be Fair? An Interdisciplinary Research Manifesto' (2024) 55(1) IIC 249, 250.

[17] Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC (Digital Services Act, DSA) [2022] OJ L277/1, Art. 33.

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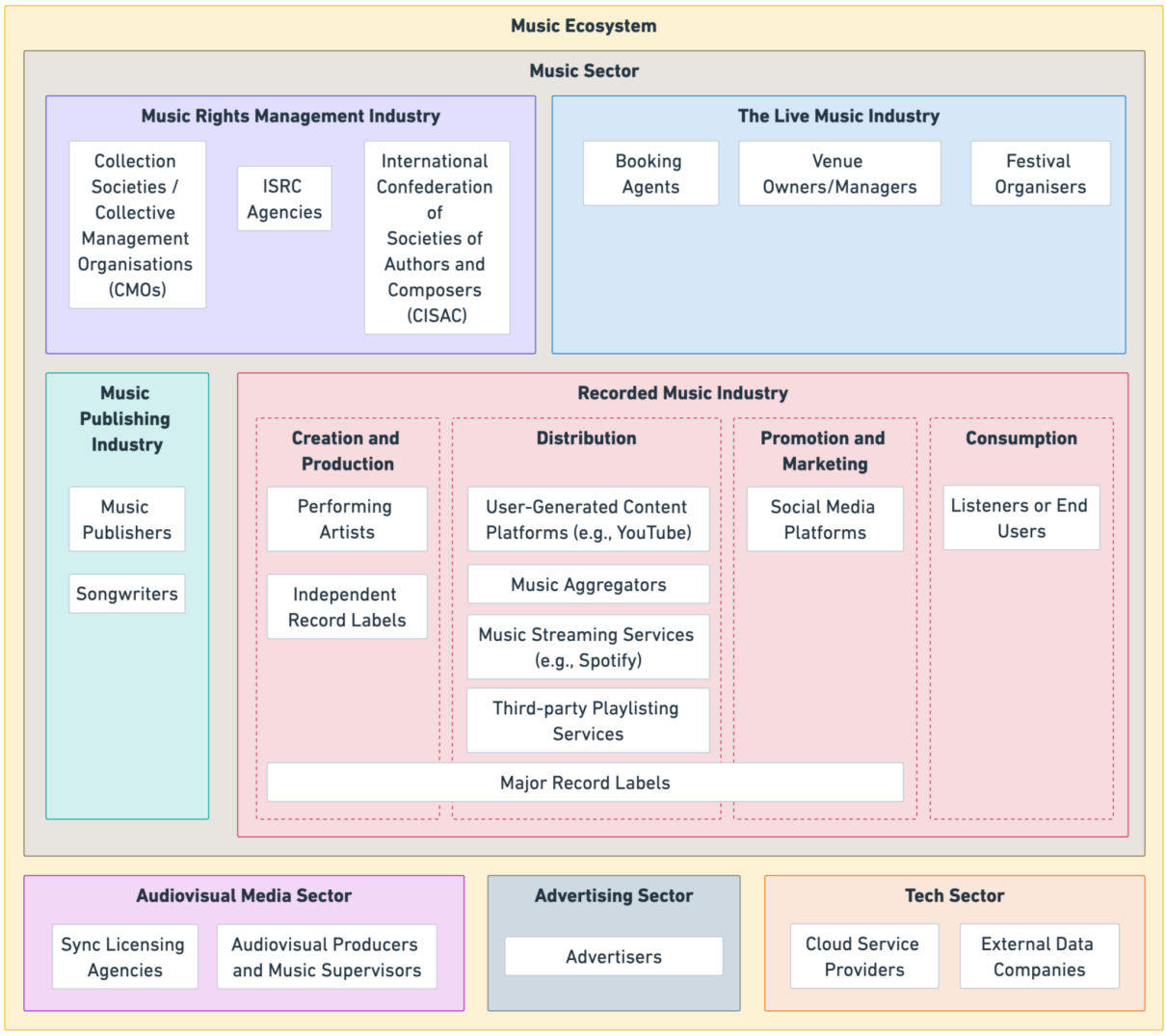
The advent of the internet catalysed a profound transformation in the music industry over the past two decades. Previously common mechanisms of music consumption through physical formats such as vinyl records and CDs have been undermined as content is now predominantly disseminated and accessed in the digital space.[18] The sale of physical audio media was eventually replaced with file-sharing software where recorded music was accessible without intermediaries. Purchasing and downloading music on online music stores, pioneered by Apple with iTunes in 2001,[19] were soon displaced with the emergence of streaming services such as Spotify and social media platforms like YouTube. This marked an important shift from music ownership to music access and transformed the digital music distribution system. The digital transition has made the music sector, its ecosystem and its overall economic value chain even more complex and articulated than it used to be until the late 1990s. This transition and the emergence of new, powerful communication and data processing technologies, and their large-scale adoption, has significantly increased the number and types of stakeholders to be considered from a policy and legislative perspective.

As shown in the graph below, from an economic point of view the industry can be divided in several sub-sectors, including the music rights management, live music, music publishing and recording industries, in addition to sectors where live and recorded music play a remarkable role (audiovisual, advertising and tech sectors).

[18] Ulrich Dolata, 'The Digital Transformation of the Music Industry, The Second Decade: From Downloading to Streaming' (2022) SOI Discussion Papers 2020-04 Research Contributions to Organisational Sociology and Innovation Studies, University of Stuttgart, Institute for Social Sciences, Department of Organisational Sociology and Innovation Studies 5, 5-6.
[19] Mazziotti and Ranaivoson (n 16) 253.

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Music Ecosystem: Parties Involved within each Sector



Source: Fair MusE, © Valdy Wiratama, Heritiana Ranaivoson, Adelaida Afilipoaie and Anders Henten, 2024 <https://fairmuse.eu/wp-content/uploads/2024/10/D3.1_slideset_forsubmission_HQ.pdf>.

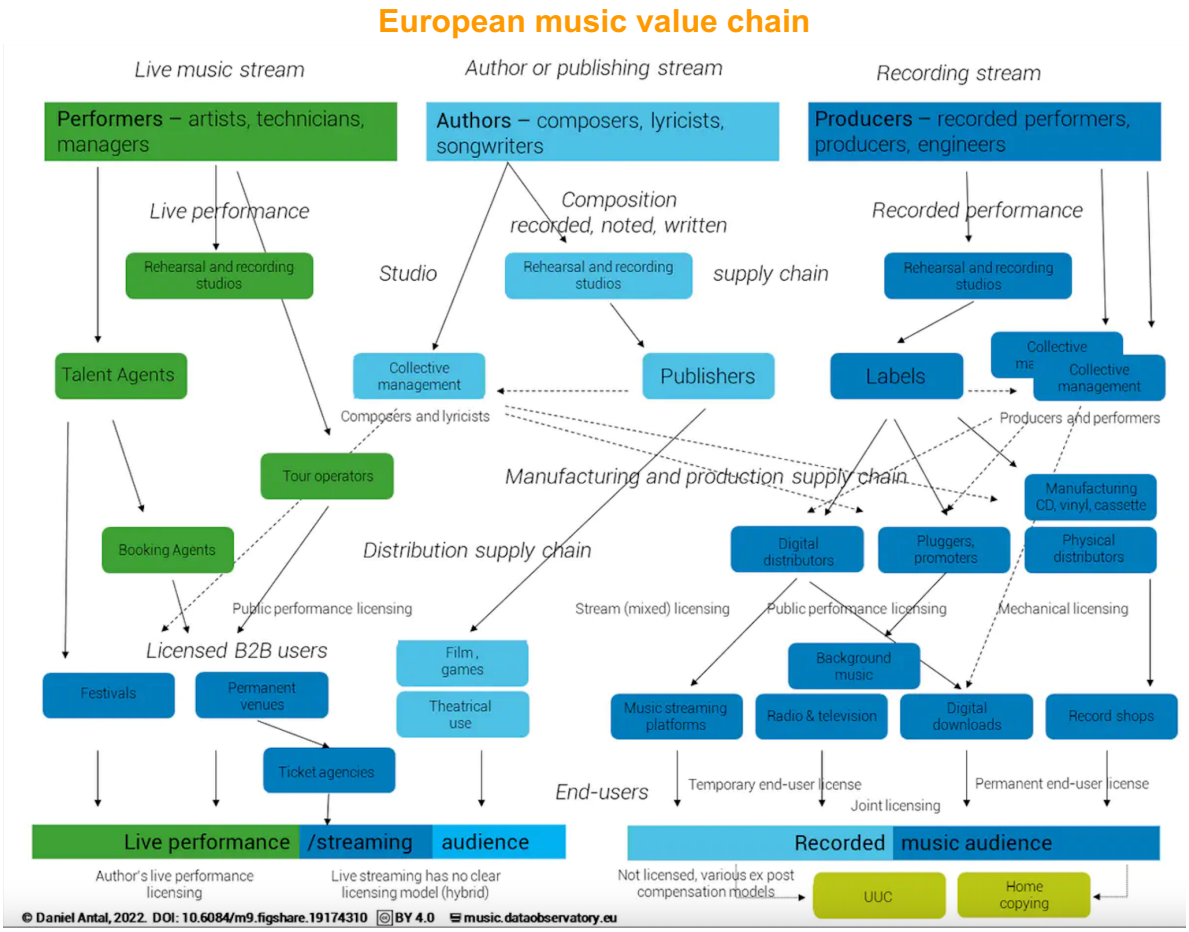
Music digitisation and the 'platformisation' of online content distribution has significantly changed the music industry's value chain. As highlighted by the analysis conducted by the Open Music Observatory, the European music sector involves a diverse network of freelancers, microenterprises, and some small-to-medium and large enterprises, all contributing to the creation of musical projects.[20] To create a comprehensive data platform and online analytical tools for the whole music sector, the Observatory relies on a widely accepted "three revenue stream model"[21] which

[20] Daniel Antal, 'Open Music Observatory' (Open Music Observatory) <https://music.dataobservatory.eu/authors/admin/>.

[21] See, for the European Union, Andra Leurdijk and others, *Trends in European Internet Distribution of Audiovisual Content* (Publications Office of the European Union 2012); Andra Leurdijk and Ottilie Nieuwenhuis, *The Future of Digital Content Distribution* (Publications Office of the European Union 2012); Andra Leurdijk, Ottilie Nieuwenhuis and Martjin Poel, 'The Music Industry' in Jean Paul Simon, Esteve Sanz and Giuditta de Prato (eds), *Digital Media Worlds* (Palgrave Macmillan 2014).

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distinguishes among the (i) live music stream, (ii) author or publishing stream, and (iii) the recording stream. The mapping effort and the graph below are useful to shed light on the scope and specific purposes of this Study, and highlight distinct streams of the music industry so as to assess the challenges and opportunities entailed by an exponential growth of the streaming and social media economy.



Source: Open Music Observatory, © Daniel Antal, 2022
<https://music.dataobservatory.eu/post/2022-02-15-music-value-chain/>.

The Study analyses the historic and normative evolution of the EU copyright law system with a view to addressing three main sources of problems that EU law targeted and sought to resolve with a special emphasis on the expansion of the authors' and recording streams of the industry: *(i)* the opaqueness of individual creators' remuneration in their contractual relationships with music publishers, record producers and their sub-licensees; *(ii)* the value gap and the transfer of economic value between different industries instigated by the broadly uncompensated nature of music exploitations on copyright-neutral - or "copyright-irresponsible", for more than a decade - user-generated content (UGC) services; and *(iii)* the increasing fragmentation in the collective rights management of musical works' repertoires, which has made it harder to remunerate independent, small or niche music repertoires whose use is more difficult to report in digital music licensing's models and data infrastructures.

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1.4. Evolution of EU copyright law: key developments for the music industry

With the increasing cross-border digital consumption of music through streaming platforms and online services, the music industry has been in constant adaptation.[22] Such a digital revolution has spurred the European Commission's intervention in proposing key directives that shape today's legal framework and regulate the music industry. Yet, one should not forget that the EU harmonisation of copyright laws started in the late 1980s, when European policy makers did not have in mind a unified European copyright system. Rather, the goal of early copyright law was just to resolve specific conflicts highlighted by the Court of Justice of the European Union ('CJEU') rulings when it examined cross-border trade distortions caused by diverging national rules affecting the distribution and rental of physical copyright goods.[23]

As thoroughly discussed in Fair MusE's D2.1 - 'Origins, goals and effects of EU law and policy in the online music sector', all copyright directives from the early 1990s aimed at supporting cultural creation and music professionals by seeking to grant a high level of copyright protection to creative works.[24] In examining the EU legislative instruments on copyright which have emerged since the 1990s, Fair MusE researchers demonstrated how 'fairness' in music copyrights manifests in several dimensions, two of which being: 1) the strengthening of the protection of intellectual property rights in the EU, especially in copyright and related rights; and 2) the increasing importance of fairly remunerating rightholders to protect Europe's cultural sector.[25] Those two dimensions form the focus of Part I of this Study. In particular, this analysis shows that the pursuit of 'fairness' has gained crucial importance in the European music sector. Fairness, as framed in the European Parliament's discourse, is inextricably linked to cultural diversity and both of these concepts in tandem guide EU policy objectives in the governance of the creative industries, including the music sector.[26] D2.1 illustrates that the growth of EU-wide discussions on copyright regulation can be paired with the integration of cultural and creative EU policy concerns in the field of music copyright law.

[22] European Commission, 'Music Moves Europe' <https://culture.ec.europa.eu/cultural-and-creative-sectors/music/music-moves-europe>.
[23] This intent was made evident in the publication of the 1989 Green Paper on Copyright and the Challenge of Technology, which emphasised sector-specific interventions in areas such as software, databases, and resale rights. The Commission explicitly avoided proposing general, horizontal provisions for copyright, focusing instead on resolving disparities that undermined the internal market.
[24] Antonios Vlassis and others, 'Origins, goals and effects of EU law and policy in the online music sector' (2024) Fair MusE's Draft Deliverable D2.1, Work Package 2 Task 2.1, available at <https://fairmuse.eu/fairmuse-resources/>.
[25] ibid 90.
[26] Vlassis and others (n 24) 85.

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Evolution of EU Directives on Copyright and Related Rights

Year	Directive
1991	Directive 91/250/EEC on the legal protection of computer programs
1992	Directive 92/100/EEC on rental right and lending right and on certain rights related to copyright in the field of intellectual property
1993	Directive 93/83/EEC on cable retransmission and satellite communications
1993	Directive 93/98/EEC on harmonising the term of protection of copyright and certain related rights
1996	Directive 96/9/EC on the legal protection of databases
2001	Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society
2001	Directive 2001/84/EC on the resale right for the benefit of the author of an original work of art
2006	Directive 2006/115/EC on rental right and lending right and on certain rights related to copyright in the field of intellectual property, which amends Council Directive 92/100/EEC
2006	Directive 2006/116/EC on the term of protection of copyright and certain related rights
2009	Directive 2009/24/EC on the legal protection of computer programs
2011	Directive 2011/77/EU on the term of protection of copyright and certain related rights
2012	Directive 2012/28/EU on certain permitted uses of orphan works
2014	Directive 2014/26/EU on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market
2019	Directive 2019/789 laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions of television and radio programmes, and amending Council Directive 93/83/EEC
2019	Directive 2019/790 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC

Among all EU copyright directives, a few of them embodied key developments for the European music industry, as it stands today. These are, in a chronological order: Directive 92/100/EC

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(hereinafter 'Rental, Lending and Neighbouring Rights Directive');[27] Directive 2001/29/EC (hereafter the 'InfoSoc Directive'),[28] Directive 2011/77/EU (hereafter the 'Term Extension Directive')[29]; Directive 2014/26/EU (hereinafter the 'CRM Directive'),[30] and Directive 2019/790/EU (hereinafter the 'DSM Directive').[31]

- The 'Rental, Lending and Neighbouring Rights Directive' was the first EU legislative instrument to address the domain of authors' rights and neighbouring rights comprehensively. This directive introduced a horizontal approach to copyright law in European intellectual property, granting rights to all participants in the creative chain rather than focusing on specific categories of works, as seen in earlier measures like Directive 91/250/EEC on computer programs.[32] The 1992 Directive provided the initial framework for regulating lending and rental activities, ensuring authors, performers, and producers were compensated for the use of their works while promoting public access. The Directive was later codified and replaced by the Rental and Lending Rights Directive (2006/115/EC), which refined and modernised its provisions.[33] Although commonly referred to as the "Rental and Lending Rights Directive", only Chapter I of this Directive regulates rental and lending rights. Chapter II, titled "Rights Related to Copyright" and discussed below, addresses other copyright related rights, including those concerning fixation, reproduction and broadcasting.

- The InfoSoc Directive was introduced to modernise copyright rules in response to the proliferation of digital technologies in the new millennium and ensure that authors, performers, and record producers could maintain control over their works in the digital environment within the EU. Most notably, the InfoSoc Directive provides a genuinely horizontal legal framework containing key harmonisation provisions addressing the most important and valuable economic rights in the music sector: reproduction (also known as 'mechanical') rights; communication to the public (also known as 'performing') rights, and distribution rights. Whilst maintaining robust protections for all music rightholders, the InfoSoc

[27] Council Directive 92/100/EC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (Rental, Lending and Neighbouring Rights Directive) [1992] OJ L 346/61.

[28] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (InfoSoc Directive) [2001] OJ L167/10.

[29] Directive 2011/77/EU of the European Parliament and of the Council of 27 September 2011 amending Directive 2006/116/EC on the term of protection of copyright and certain related rights (Term Extension Directive) [2011] OJ L 265/1.

[30] Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market (CRM Directive) [2014] OJ L84/72.

[31] 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 (DSM Directive) [2019] OJ L130/ 92.

[32] Council Directive 91/250/EEC on the legal protection of computer programs (Software Directive) [1991] OJ L122/42.
Sylvie Nérisson, 'The Rental and Lending Rights Directive' in Irini Stamatoudi and Paul Torremans (eds), *EU Copyright Law - A Commentary* (2nd edn, Edward Elgar 2021).

[33] Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (Rental and Lending Rights Directive) [2006] OJ L376/28.

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Directive introduced narrowly defined exceptions and limitations to these rights, creating an 'anti-circumvention' framework for the protection of technological protection measures and right-management information rightholders implement when exercising their rights.

- The Term Extension Directive[34] introduced music industry-specific provisions aimed at supporting the music publishing and recording sectors by clarifying the term of protection for musical compositions with words co-authored by a lyricist and a composer for a single musical composition and extending the term of protection of sound recordings. On the first front, Directive 2011/77 set out a single term of protection expiring 70 years after the death of the last surviving author, irrespective of whether the author of the lyrics or the composer of the musical composition can be designated as 'co-authors' under national laws.[35] On the second front, the 2011 directive extended the term of protection granted to fixations of performances incorporated into phonograms from 50 to 70 years from the date of the first publication or the first communication to the public, whichever is earlier. In doing so, this measure introduced a mandatory, non-waivable right to equitable compensation for performers who have transferred or assigned their exclusive rights to phonogram producers in exchange for a lump-sum payment (so-called 'session musicians'). As we will see, this remuneration right, which consists of 20% of the additional revenues generated by the term extension, was a turning point in the development of performers' databases on the grounds of which their collective organisations can claim and allocate these specific revenues.

- The CRM Directive introduced EU-wide legal requirements to harmonise and enhance the previous level of accountability, rightholders' freedom, transparency and efficiency in the management of copyright and related rights by Collective Management Organisations ('CMOs'). Moreover, this directive aimed at regulating the multi-territorial licensing by CMOs of authors' and publishers' rights in musical works for online cross-border exploitations in the EU. One of its key objectives was to create an obligation for CMOs to have greater transparency regarding the collection, management, and distribution of revenues and to build more robust data infrastructures for the identification of their repertoires and of the related rightholders to the benefit of their members, other CMOs and their licensees. Annex II - List of EU CMOs and IMEs provides information on the CMOs and IMEsactive in the music sector within the ten Member States under Fair MusE's analysis (Austria, Belgium, Denmark, Estonia, France, Germany, Greece, Italy, Spain and Portugal).

- The DSM Directive complements the aforementioned directives by introducing new rules aimed at promoting a more balanced contractual relationship between rights holders and online exploiters. Two of this directive's provisions are exceptionally relevant for this Study, considering the implications of their genesis and implementation for the publishing and recording sectors of the music industry: *(i)* Article 17, which replaces the pre-existing liability safe harbour exemptions under the Directive 2000/31/EC (E-Commerce Directive)[36] to ensure that online content-sharing service providers ('OCSSPs') make their best efforts to

[34] Term Extension Directive (2011), Art. 1(1), introducing a new para 7 in Art.1 of the original Term Directive (1993).
[35] ibid Art. 1(1).
[36] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market [2000] OJ L178/1.

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obtain authorisation from rightholders when hosting their works; and *(ii)* Article 18, which codifies a principle of appropriate and proportionate remuneration for authors and performers, thereby addressing the so-called "value-gap" underlying Article 17's new copyright liability regime for social media. Both provisions address, from different angles, the persisting issue of broadly unequal profit allocation between individual creators, their contractual counterparts, and online exploiters.[37]

1.5. Individual or collective exploitation

The exploitation of music creators' rights operates within a complex legal and institutional framework shaped by EU directives as well as national regulations and music business practices. Creators' rights can be exercised either individually or collectively:

- ➢ Individual management empowers rightholders with greater control but often struggles with inefficiencies in complex licensing scenarios.
- ➢ Collective management, on the other hand, promotes accessibility and fairness at the cost of individual freedom. This dual approach reflects a suitable, if not indispensable, compromise between the autonomy of creators and the collective administration of rights aimed at enhancing efficiency, reducing transaction costs and broadening content accessibility.

Generally, the choice between these two alternatives in rights management is limited to the domain of exclusive rights, where it essentially depends on the context and volume of music exploitation.

In the recorded music market, exclusive rights of record producers and, by necessity, those of the performers are managed individually. In the case of small- and medium-size independent labels, rights are normally managed through specialised agencies acting as rights aggregators. However, this does not transform the rights' aggregation into proper collective management, as we will see below. In this market, performers always transfer their rights to record labels at the time of a sound recording production and they do so either in exchange for a recurring payment based on a percentage of the revenues from a record (*i.e.*, royalty) or through a lump-sum, whose amount can also reflect the level of remuneration agreed upon in collective agreements.

In the music publishing market, to the contrary, the exclusive rights of the composers and music publishers are mostly exploited through the intermediation of CMOs. As illustrated in Chapter 7 and 8 of this Study, EU policy and legislative initiatives aimed to harmonise copyright's collective management in an intricate digital ecosystem where the effective exploitation of rights in musical compositions hinges on accurate music data and metadata. In the streaming and social media economies - in particular - music repertoire databases and other data infrastructures are essential for identifying rightholders, tracking the use of works, and ensuring transparent allocation of payouts.

[37] "Value gap" is an expression used to describe uncompensated (or very poorly compensated) uses of copyright works which creates a sharp disparity in rightholders remuneration compared to the high licensing fees online platforms receive.

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Completely different is the situation of remuneration rights, which apply to cases where certain uses of a musical composition, performance or recording are covered either by a copyright exception or by a statutory licensing scheme. The main reason why these rights are managed collectively is that they complement exclusive rights by seeking to protect composers' and performers' right to receive 'fair' remuneration for the exploitation of their works. So, in these cases, rightholders' freedom of choice is significantly compressed because the statutory provisions that grant a remuneration right simultaneously mandates a collective form of exploitation to make the process of negotiation, collection and allocation of the rights revenues as smooth and transparent as possible.

1.6. Outline of this Study

With the adoption of the main copyright directives outlined above, the EU copyright landscape looks nearly all-encompassing in providing the music sector with a broad array of both exclusive and remuneration rights. Yet, as this Study emphasises, there are rights - such as the right to control derivative works and moral rights - that are still not harmonised at the EU level and play a significant role in today's digital music industry.

Part I of this Study provides an overview of the most relevant music creators' rights, which constitute the pillars of the EU's ongoing copyright harmonisation efforts. This Part essentially explores the current copyright and related rights reality for creators in the EU legislative framework. Chapter 2 analyses exclusive and remuneration rights provided to music creators and harmonised at the EU level, with a special emphasis on the evolution of the concepts of 'reproduction' and 'communication to the public rights', which are arguably copyright's broadest and most important economic prerogatives. This chapter includes an analysis of other relevant rights that remain unharmonised in Europe, namely, the rights in derivative works and moral rights to attribution and integrity of creative works. Chapter 3 explores how copyright exceptions - including private copying and text-and-data mining ('TDM') - seeks to foster a 'fair balance' of interests in the protection of copyright and of conflicting interests such as technological innovation and freedom of expression. For the same reasons, this chapter discusses the conflict between creators' rights and AI, critically reviewing the copyright-related provisions recently introduced in the EU AI Act.[38] Chapter 4 focuses on the EU law provisions from the DSM Directive (Articles 18-23) that codify the right of authors and performers to receive fair remuneration for the use of their works and the copyright contract law measures that are expected to foster this goal. To this end, this chapter draws on the origin, purpose and scope of these provisions and how the ten Member States under Fair MusE's analysis incorporated them under their laws. For a summary of the desk research findings on these ten countries, please refer to Annex III - Desk Research National Summaries.

Part II of this Study critically analyses Article 17 of the DSM Directive and investigates its implications for music creators in Europe's digital economy. Chapter 5 specifically discusses the genesis of Article 17 by recalling how the exponential rise of a few social media platforms created the 'value gap' that this provision targeted and sought to reduce. The chapter briefly illustrates how the EU Parliament

[38] Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonised rules on artificial intelligence and amending Regulations (EC) No 300/2008, (EU) No 167/2013, (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1139 and (EU) 2019/2144 and Directives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828 ('EU AI Act') [2024] OJ L2024/1689.

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and the Council amended the very controversial Article 13 of the Commission's proposal to seek a fair balance between the rights and interests of music creators and those of other stakeholders, including social media platforms and their users. Chapter 6 then explores the national transpositions of Article 17 across the ten Member States covered by the Fair MusE project. It highlights whether, and to what extent, national laws deviated from the EU law model in implementing this provision. In particular, the chapter highlights the impact of this new law on digital music licensing and, in particular, the music repertoire data exchanges between the music and the social media industries.

Part III focuses on Europe's digital markets for recorded music, placing special emphasis on the exploitation of musical compositions and sound recordings via streaming service and social media. Chapter 7 is specifically targeted at the evolution of the role and intermediation of CMOs handling rights in musical compositions and, to a smaller extent, the remuneration rights granted to record producers and performers in Europe. On the one hand, this chapter provides a critical analysis of the European Commission's long-term policy choice that led to the shift from "blanket" licensing of the global music repertoire in one single territory to repertoire-specific licensing of single music repertoires in a EU-wide on multi-territorial basis. On the other hand, this chapter selects and analyses critical aspects of the 2014 CRM Directive that exacerbated inequalities between different music repertoires and between large and small rightholders and CMOs. Finally, Chapter 8 explains how the above-mentioned regulatory measures and the ensuing market-driven developments have dramatically increased the fragmentation of music repertoires and "polarised" their licensing structures in Europe. This situation is currently limiting the interoperability between the data infrastructures built and managed, at the different levels of creators' rights ownership, respectively, by the international networks of CMOs, record producers and performers' organisations. The chapter argues that this situation poses an even greater barrier to a transparent and nuanced identification of rightholders because of the very different degrees of "data collaboration" shown by streaming service providers and social media companies. Without such transparency and music repertoire's data accuracy, fair remuneration as a result of more balanced licensing conditions is and will remain only on paper.

The Conclusion (Chapter 9) summarises the key findings of the Study and presents preliminary policy recommendations that will inform the preparation of Fair MusE's 'White Paper' on promoting fairness in Europe's music ecosystems (Year 3). This chapter also serves as an Executive Summary of the Study, concluding with a section on areas and unresolved issues where EU regulatory interventions may be necessary or appropriate in the near future.

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Part I

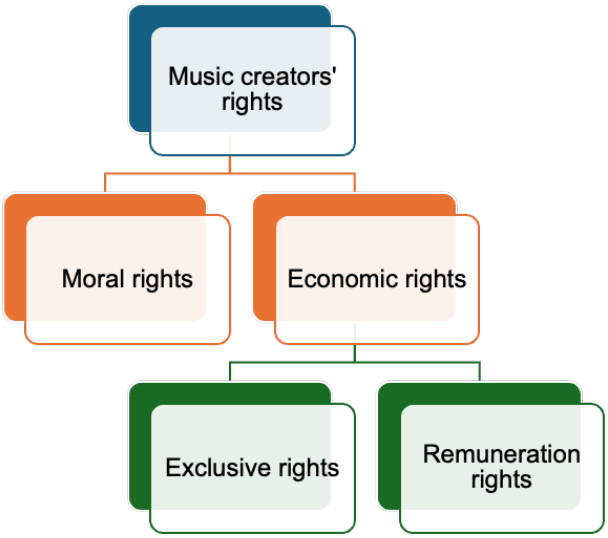
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2. Exclusive rights v remuneration rights

2.1. Introduction to music creators' rights

Copyright protection plays a central role in the music industry by safeguarding the rights of composers and lyricists, performers and record producers. As stressed in the Introduction, all of them can be considered 'music creators' according to a broad definition encompassing all original rightholders in the music industry. Music publishers shall also be included in the picture, as main contractual counterparts of composers and members of CMOs. However, unlike record producers, publishers are not original rightholders because copyright law does not contemplate them directly.

This chapter delves into the complex and heterogeneous legal framework governing music creators' rights in Europe. The chapter highlights the interplay between international treaties, EU directives, and the Member States' law in those areas of copyright where the member states still retain freedom to legislate without (excessive) constraints posed by international and EU obligations. The chapter briefly examines the foundational role of international treaties in harmonising copyright laws within the EU. This analysis follows a chronological order, emphasising the historic dimension for EU music copyright law of the 1992 Rental, Lending and Neighbouring Rights Directive and the 2001 InfoSoc Directive. These are the legislative instruments which consolidate the exclusive rights that are unanimously considered essential for the economic sustainability of professional music creation. In terms of categories of rights, this chapter draws upon *(i)* the distinction between economic and moral rights, and *(ii)* the different purposes and sources of exclusive rights and remuneration rights. As regards moral (i.e. non-pecuniary) rights, despite their unharmonised character at the EU level, this chapter broadly emphasises their significance in protecting the personal and artistic connection between creators and their works.



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2.1.1. The international and EU legal frameworks

Copyright legislation within EU Member States derives from three main sources: international treaties, the EU *acquis*, and national laws. These interconnected layers of legal frameworks collectively shape the copyright landscape across the EU's music ecosystem.

At the international level, the 1886 Berne Convention for the Protection of Literary and Artistic Works (Berne Convention) and the 1961 Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (Rome Convention) laid the foundations for music copyright law across Europe. Namely, the Berne Convention introduced a set of minimum protection standards for the protection of authors of literary and artistic works. These standards include the term of protection, a definition of the main economic and moral rights, a principle of reciprocity regarding the protection of foreign authors, and important provisions on copyright exceptions and limitations.[39] As a complementary instrument to this agreement concerning authors' rights, being adopted at a time the recording and broadcasting industries reached a significant point of maturity and international consolidation, the Rome Convention expanded the boundaries of international copyright law to define, shape and harmonise the so-called rights related to copyright or 'neighbouring' rights of performers, phonogram producers and broadcasting organisations.

The main picture related to authors', performers' and record producers' rights is completed by agreements concluded in the 1990s. At that time, intellectual property law was greatly challenged by the emergence of digital technologies and globalisation of trade relations. The first is the 1994 Agreement on Trade-Related Aspects of Intellectual Property Rights ('TRIPS'). This agreement encompasses all the above-mentioned rights and merges intellectual property law with trade-related aspects, introducing enforcement and dispute resolution mechanisms which were entirely absent in the Berne Convention. Notably, its Article 9 incorporates the substantive copyright provisions of Articles 1-21 of the 1971 version of the Berne Convention, excluding only the protection of moral rights under Article 6-*bis*. In doing so, the TRIPS Agreement extends the obligations of the Berne Convention to all 166 members of the World Trade Organization ('WTO'), regardless of their membership to the Berne Union.[40] As a "Berne-plus" instrument, this agreement not only addresses some innovative breakthroughs of its time but also builds on the foundations laid by the Rome Convention by further strengthening the protection of neighbouring rights. The second and third agreements are the two 'Internet' treaties concluded in Geneva in December 1996. These treaties sought to adapt the scope of authors' rights and neighbouring rights, in light of the new technological environment that was emerging from the early 1990s. These are, respectively, the WIPO Copyright

[39] Noteworthy, between the third and the fourth revision of the Berne Convention, in 1952, 40 countries – including several developing countries and the United States ('US') – signed the Universal Copyright Convention. This treaty, joined also by the former Soviet Union in 1973, served as a more lenient alternative to the Berne Convention, thereby allowing the signatories to provide a basic level of reciprocal copyright protection without adhering to the more stringent requirements of the Berne Convention.

[40] As of 30 August 2024, there are 160 WTO members. See <https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm>.

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Treaty ('WCT'), a 'special agreement' under the Berne Convention,[41] and the WIPO Performances and Phonograms Treaty ('WPPT').[42]

With all EU Member States being signatories of the Berne, Rome, Marrakesh (TRIPS) and Geneva conventions, these international treaties provided a solid point of convergence for the further copyright harmonisation measures undertaken at the EU level.[43] As we will see, the EU copyright *acquis* builds upon and extends the protection established by these conventions. As emphasised in the Introduction, within the EU, a comprehensive copyright law framework has been established from the early 1990s onwards to uphold, define and redefine the subject matter, term of protection and enforcement of copyright for the purpose of removing disparities and obstacles to the circulation and exploitation of creative works within the so-called 'Single Market'. In doing so, EU lawmakers and the CJEU have made efforts to effectively balance the interests of creators with those of corporate and non-commercial users, other creators willing to use pre-existing works, and the public at large.

Despite their broad harmonisation at the international and EU level, the rights granted to composers, music performers and record producers are formally created and ultimately governed and enforced under national laws. This means that copyright is and remains genuinely territorial, in a way that these rights can be enforced only at national level. It is obvious that the inherently national character of copyright poses exceptional challenges to rightholders whenever their rights are infringed on a cross-border basis. The territorial nature of these rights, coupled with increasingly pervasive provisions being imposed at the EU level, has transformed the EU Member States' copyright law frameworks into regulatory 'hybrids.' On the one hand, most economic rights being granted at national level are a direct consequence of national implementations of EU copyright directives. On the other hand, certain rights and aspects of protection including moral rights, rights to authorise derivative works, remuneration rights as well as copyright exceptions are a result of international copyright harmonisation or national policies.

Finally, it should be considered that, in the EU constitutional order, creators' rights are fundamental rights. The status of these rights is recognised under Article 17(2) of the EU Charter of Fundamental Rights, according to which '[i]ntellectual property shall be protected'. Despite this acknowledgement - as we will see below - the constitutional standing of property rights in literary and artistic works has been broadly challenged in academic debates and even by the CJEU in some of its rulings on the conflict between copyright enforcement and other fundamental rights such as Internet users' freedom of expression and tech companies' rights to conduct business online. Despite the legal challenges posed by these potential conflicts, the explicit reference to intellectual property rights in the EU Charter and in the CJEU's case law, especially after the constitutionalisation of the Charter following the entry into force of the Treaty of Lisbon, provides a stronger foundation for the qualification of creators' rights as human rights. As emphasised in the literature, this constitutional

[41] See 1996 WIPO Copyright Treaty, Art. 8 (*Right of Communication to the Public*), available at <https://www.wipo.int/wipolex/en/text/295166>.

[42] See the 1996 WPPT, Art. 10 (*Right of Making Available of Fixed Performances*) and Art. 14 (*Right of Making Available of Phonograms*), dealing with the rights of two kinds of beneficiaries, *i.e.*, performers and record producers, that were initially harmonised through the 1961 Rome Convention. The text of the treaty is available at <https://www.wipo.int/wipolex/en/text/295578>.

[43] On the role of Berne and Rome Conventions in setting the minimum common ground for the EU's harmonisation effort, see Silke von Lewinski, 'Copyright in the European Communities: The Proposed Harmonization Measures' (1992) 18 Brooklyn Journal of International Law 703.

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standing in the EU legal framework ensures consistency with Article 27(2) of the 1948 Universal Declaration of Human Rights, which protects the *moral* and *material* interests of authors resulting from their scientific, literary, or artistic productions.[44] As this Study seeks to show, the constitutional value of authors' rights and related rights is essential for the empowerment of music creators and the protection of their artistic freedom and for the sustainability of their diverse cultural creations in a data-driven, tech-dominated economy.

2.1.2. Authorship and originality

Composers and lyricists are original copyright holders because of their authorship of original musical compositions. From an artistic perspective, musical works consist of sequences of sounds fixed on tangible media, being able to be performed according to instructions provided, in different styles, genres, grammar and modes of expressing musical thoughts, that have broadly evolved across centuries, cultures and communities of creators. One essential characteristic of musical compositions under copyright law is, as outlined in the Introduction, that they are abstract works which necessitate a performance or, when performances do not occur in front of a present audience, a medium of reproduction and public communication to be concretely enjoyed. As a general principle embodied in Article 5(2) of the Berne Convention, to facilitate the protection of authors' fundamental rights, this protection subsists for the mere operation of the law, independently of any formalities such as registration of these works. The above-mentioned requirement of 'originality' can be viewed as a synonym of 'authorship' especially in those legal systems, such as the continental-European legal systems, where this requirement has consistently identified the contribution made by an author.[45]

Interestingly, prior to 2009, the standard of originality in EU copyright law had been harmonised only from a sector-specific perspective: for computer programs,[46] photographs,[47] and databases.[48] Until then, the influence of different legal traditions and the position of national governments made EU lawmakers reluctant to propose and adopt a single concept of originality for the generality of copyright works. This should not come as a surprise if one considers that, until recently, under common law systems such as the United Kingdom's (UK) and Ireland's, the concept of 'authorship' was merged with that of 'ownership' and used primarily, and pragmatically, for the main purpose of granting default copyright protection to 'authors', such we refer to as film or sound recording producers, who clearly were *not* the artists creating the protected works.[49] It was in the *Infopaq* case that the CJEU made a decision that can be considered a breakthrough. In that case, which

[44] See Alain Strowel, 'Copyright strengthened by the Court of Justice interpretation of Article 17(2) of the EU Charter of Fundamental Rights', in Oreste Pollicino, Giovanni Maria Riccio and Marco Bassini (eds), *Copyright and fundamental rights in the digital age* (Edward Elgar 2020) 40.

[45] Jane Ginsburg, 'The Concept of Authorship in Comparative Copyright Law' (2003) 52(4) DePaul Law Review 1063, 1078.

[46] Software Directive, Art. 1(3).

[47] Council Directive 93/98/EEC of 29 October 1993 harmonizing the term of protection of copyright and certain related rights (1993 Term Directive) [1993] OJ L 290/3, Art. 6; repealed by Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights (2006 Term Directive) [2006] OJ L 372/12, Art. 6.

[48] Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases (Database Directive) [1996] OJ L 77/20.

[49] Ginsburg, 'The Concept of Authorship in Comparative Copyright Law' (n 45) 1070.

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concerned the copyrightability of 11-word extractions from Danish newspaper articles, the Court ruled that a work is protected under the InfoSoc Directive in so far as it is original in the sense of being an 'author's own intellectual creation.'[50] To the dismay of EU Member States which traditionally (and fictionally) granted authorship directly to enterprises or other legal persons, *Infopaq* and the subsequent CJEU's rulings on the concept of originality effectively removed the policy space for EU Member States to set their own approaches to the originality standard. Accordingly, originality subsists when a human, individual author makes free and creative choices and stamps the work with her or his personal touch.[51]

In a legal context where the continental-European approach to copyright is prevalent - increasingly so after the departure of the UK from the EU - the standard of originality eventually adopted by the CJEU, and imposed on all Member States, ends up strengthening the level of protection granted to music composers. That is because this standard ensures that only persons - therefore: neither enterprises nor AI technology developers - can become first owners of copyright in their musical works and the main beneficiaries of the articulated legal protection that this section aims to summarise. This situation is very different from that of legal systems, such as the US, where this principle is non-existing so that authorship can be contractually transferred from a creator to a company. Under US copyright law, a company can commission and pay for the creation of a work and legitimately acquire all statutory rights in this work. This happens as a result of the so-called 'work made for hire' doctrine, which allows entrepreneurs to acquire *ex ante* creators' rights that, in continental-Europe systems, can be transferred and acquired only *ex post,* with the exception of moral rights (see *infra*, §2.4).[52]

Comparatively, producers and performers occupy a distinct position in copyright law, as their rights are neither based on the concept of 'originality' nor framed to reward 'authorship'. By codifying the notion of 'neighbouring' or 'related' rights at international level, the Rome Convention aimed at recognising the distinct legal status of performers' and producers' rights, protecting music performance and their sound recordings because of their artistic value and the substantial financial investment they require. The rationale for protecting sound recordings was straightforward: protecting recordings from unauthorised slavish copying enabled by advancing technologies in the second half of the 20th century.[53] That is because sound recordings required expensive recording equipment, trained personnel (especially recording engineers), and other costly resources, which

[50] Case C-5/08 *Infopaq International A/S v Danske Dagblades Forening* [2009] ECLI:EU:C:2009:465.

[51] Case C-145/10 *Eva Maria Painer v Standard VerlagsGmbH and Others* (hereafter *'Painer'*) [2011] ECLI:EU:C:2011:798, paras 89-92.

[52] In a jurisdiction such as the US, which has never joined the 1961 Rome Convention on neighbouring rights, and never implemented its main legal concepts, phonograms are still protected through full copyright (*i.e.*, not through a neighbouring right!) as a 'joint work', *i.e.*, the sound recordings themselves, whereby *"the contributions [made] by each author may be merged into inseparable or interdependent parts of a unitary whole."* See 'joint work' 17 USC § 101 (1974). This means that music performers, sound recording engineers and the record companies that hire them for their productions are, legally, 'coauthors' of these works. In this legal context, a doctrine like the 'work made for hire' is essential to make sure that a record producer can validly acquire and commercially exploit all co-authors' economic rights in sound recordings from the outset. See 'work made for hire' 17 USC § 101 (1974).

[53] WIPO, 'Guide to the Rome Convention and to the Phonogram Conventions' (1981) 10-12 <https://tind.wipo.int/record/28745?v=pdf>.

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are no longer indispensable (critics say).[54] Accordingly, in the (pre-digital) case of a record company, it was the company itself, rather than the makers of the records, that was (and still is) recognised as the 'phonogram producer' who bears the financial risk associated with the production.

For performers, the situation under international copyright law has been more complex from the outset, as neither Rome Convention nor the 1996 WPPT provide a definition of what a 'performance' is. As clarified in the (non-binding) explanatory guide to the Rome Convention, 'performers' can, theoretically, range from those who mechanically execute the instructions inherent in the underlying musical work to those who infuse their performance with a personal touch.[55] Over the past few decades, this 'non-definition' has led to varying approaches adopted by different countries and their national courts. For instance, there are copyright systems that impose an artistic threshold that performers must meet to qualify for legal protection.[56] Other laws require some form of individuality,[57] or set out no requirements at all, thereby preventing the establishment of a uniform standard.[58] In practice, singers and instrumentalists are generally likely to meet the minimum artistry or individuality threshold required under certain national laws, given the distinctive character of a musician's performing style or a singer's unique voice, vocal range, intonation, and overall expression during their performance. In fact, some legal scholars even advocate for an extension of copyright protection to performers who fulfill the originality requirement.[59]

Addressing the fact that not all Member States were signatories to the Rome Convention, the 1992 Rental, Lending and Neighbouring Rights Directive found an excellent justification to provide minimum legal protection for performers, record producers, and other neighbouring rights holders in 1992.[60] However, even this Directive, as much as the 2001 InfoSoc Directive, failed to specify (and harmonise) requirements for protection. Even the CJEU, which played a central role in harmonising the standard of originality and, indirectly, the definition of 'authorship', did not provide any guidance on the requirements for neighbouring rights' subsistence. As far as record producers rights are concerned, the CJEU's *Pelham I* judgment merely reiterated the Rome Convention's assumption

[54] P Bernt Hugenholtz, 'Neighbouring Rights are Obsolete' (2019) 50 IIC 1006, 1008-1009.

[55] See WIPO, 'Guide to the Rome Convention and to the Phonogram Conventions', 21-22.

[56] German case law requires a certain "intrinsic artistic value" for the protection of performances by neighbouring rights. This shall be the case when the audience receives a "sensory impression that stimulates their mood, feeling, emotion or imagination". See German Federal Court of Justice, judgment of 14 November 1980 - I ZR 73/78 ('*Quizmaster*').

[57] In France, for instance, the Court of Cassation ruled that a performance is protected by neighbouring rights only if it possesses an "original and personal" character. See Cour de cassation (French Court of Cassation), Civil Chamber 1, 24 April 2013, Case No 11-20.900.

[58] This is the case for the UK, where national copyright law defines 'performance' in Section 180(2) of the CDPA. Under this provision, a performance can be: "(a) a dramatic performance [...], (b) a musical performance, (c) a reading or recitation of a literary work, or (d) a performance of a variety act or any similar presentation, which is, or so far as it is, a live performance given by one or more individuals." This provision does not require any artistic component but instead rewards the labour and effort involved in the performance. See also Simone Schroff, Europeana Sounds and Copyrights: The Need for and Challenges in Licensing Archival Materials (*Europeana Sounds* 2015) 36.

[59] See, for instance, Irina Eidsvold-Tøien and Are Stenvik 'Copyright for performers—an obligation under international law' (2023) 18(10) JIPLP 754.

[60] Under EU law, neighbouring rights are termed "related rights" as a neutral notion that accommodates both the droit d'auteur and copyright traditions. For the purposes of this Study, however, the terms "neighbouring rights" and "related rights" are used interchangeably.

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that this protection is justified as a return for the financial and organisational investment involved in the production of a recording.[61]

Whether this 'neutral' rationale can remain valid in 2025, leading to a *de facto* automatic protection of all sound recordings, is increasingly uncertain. From a purely technical point of view, it is true that sound recordings have become remarkably effortless. Today, anyone without any technical expertise can record the performance of a musical work using a free or pre-installed smartphone app with the easy press of a button. The simple observation of these technological developments have led legal scholars to express growing doubts about the universal protection of *all* sound recordings.[62] A similar critique can apply to music performers, if one considers that the rise of advanced technologies such as voice synthesis and tone transfer in certain music genres heightens the question concerning what, in practice, constitutes a 'performance' in the absence of a more explicit requirement for the subsistence of these rights.[63] These uncertainties are brought to an even higher level of complexity by GenAI and the ease with which tracks can be automatically generated, even for questionable - if not illegal - purposes. This can be the case, as recently reported in the media, of streaming service providers having a commercial interest in artificially increasing the number of tracks made available through their services by producing or giving exposure to fake albums so as to pay proportionately less to 'real', authentic, human-created recordings.[64]

Having said that, it is evident that a threshold under EU law consisting of a requirement such as 'originality' or 'individuality' of a performance or phonogram would be useful to give more certainty to the commercially biggest part of the music sector: the recording industry. This would actually follow the example of the US, which has never considered joining the Rome Convention (although it is a contracting party of the 1996 WPPT). Under US copyright law, sound recordings are *not* protected through a separate neighbouring right, but through a standard copyright[65] - deprived just of the right of public performance - being granted on the 'recording' conceived as a 'work' (co)authored by the performing artists and the producer.[66] In the US, if the sound recording is produced as a 'work made for hire', as is customary in the industry, the record company (or the party that commissioned the record) is considered the author.[67] In any event, the recording needs to meet

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[61] Case C-476/17 *Pelham GmbH and Others v Ralf Hütter and Florian Schneider-Esleben* [2019] ECLI:EU:C:2019:624 (hereafter '*Pelham I*') para 30.

[62] See Hugenholtz (n 54) 1006.

[63] Oleksandr Bulayenko and others, *AI Music Outputs: Challenges to the Copyright Legal Framework*' (ReCreating Europe Report 2022) 88. At this point, the only certainty at the EU level is that the criterion for the protection of performers and record producers is *not* originality: see *Pelham I*, Opinion of AG Szpunar, para 30.

[64] Ashley Belanger, 'Spotify criticized for letting fake albums appear on real artist pages' (*Ars Technica*, 15 October 2024) <https://arstechnica.com/tech-policy/2024/10/spotify-criticized-for-letting-fake-albums-appear-on-real-artist-pages/>

[65] 17 USC § 102(a)(7).

[66] For a simple, immediate reference see US Copyright Office, 'Author(s) of the Sound Recordings' <http://copyright.gov>, which explains that sound recordings are generally created by performers and/or producers ("In other words, the author of a sound recording may be the performer featured in the recording, and/or the producer who captured, manipulated, and/or edited the sounds that appear in the final recording.")

[67] ibid.

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the requirement of originality to be protected by copyright and needs to be registered, as all other copyright works, in the US, for enforcement purposes.[68]

Despite the consistency the introduction of 'originality' under EU law would bring in the system, making musical works, performances and recording subject to the same scrutiny, one must admit that this requirement would still be a minimal threshold, as it is for musical works. A hypothetical reform would not solve, by itself, the problem of protection of trivial, fake, authorless or just unprofessional records made effortlessly by amateur musicians, unethical online platforms, or even by robots. As a matter of fact, most of these trivial or fake recordings might be eligible for protection even under the (minimal) originality requirement. What would seem vital, at this stage of technological development, for performers and record producers who meticulously create and curate their performances and albums, ensuring the highest standards of artistic and technical quality, could be a form of recognition of the 'authenticity' of their works. This is a goal EU law could realistically pursue by eventually intervening and harmonising artists' moral rights, and creating an interface between artists' moral rights and the regulation of GenAI (see §2.4.2 below).[69] Moreover, professional performances and their recordings could be made subject to a form of voluntary registration for the twofold purpose of identifying those ones which underlie a genuinely artistic and entrepreneurial effort - which is still worth being protected! - and assigning them an ISRC for data processing, information and remuneration purposes.

2.1.3. Fixation

In jurisdictions following the common law tradition and the 'copyright' model, such as US or UK law, fixation is a prerequisite for copyright protection. While the Berne Convention leaves Member States with the discretion to decide whether fixation shall be a requirement for the subsistence of authors' rights under national law, Article 1(2) of the Convention stipulates that *"it shall, however, be a matter for legislation in the countries of the Union to prescribe that works in general or any specified categories of works shall not be protected unless they have been fixed in some material form."* For instance, both the US and UK systems underscore that for a work to be eligible for copyright protection, it must be fixed in a tangible medium of expression. In the United States, this requirement is explicitly outlined in 17 U.S.C. § 102(a), which mandates that "original works of authorship […] be fixed in any tangible medium of expression." This ensures that only works that are sufficiently permanent or stable to be perceived, reproduced, or communicated for more than a transitory duration are eligible for copyright protection. Section 101 of the US Copyright Act further clarifies this by stating that a work is considered "fixed" when it is embodied in a copy or phonorecord that is sufficiently stable to permit it to be perceived, reproduced, or communicated. Similarly, section 3(2) of the UK Copyright, Designs and Patents Act 1988 (CDPA) requires that works must be fixed in a material form to be protected by copyright, thereby reinforcing the concept that fixation is a fundamental condition for copyrightability.

[68] The US landmark ruling on originality as "the modicum of creativity" giving rise to copyrightable expression is Feist Publications, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340 (1991).

[69] As emphasised below (§2.4.2), the obligation for providers of AI systems to mark in a machine-readable format and detectable way AI-generated output (such as synthetic audio, image, video or text content: cf. Art. 50(2) of the EU AI Act) has the potential, if properly enforced, of helping music creators exercise their moral rights to attribution and integrity of their works, which are put at great risk by large-scale uses of GenAI technologies.

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This clarification is necessary because, as we will see, 'fixation' under EU copyright law is a term used in the music sector with a completely different meaning, in relation to the right of performers to control the recording ('fixation') of their performances.

2.1.4. Structure and contents of Chapter 2

This chapter aims to provide a detailed analysis of the current framework for copyright and related rights in the EU. This "map" concerns the rights of authors, performers and record producers with a special emphasis on the music ecosystem, and it is necessary for the reader to have a solid basis of EU copyright and related rights before advancing to Part II and Part III of the Study. This overview starts with a very relevant distinction that reflects different goals of copyright law: economic rights, on the one hand, and moral rights, on the other hand. While moral rights, especially in legal systems which follow the continental-European tradition and model (*droit d'auteur*) are non-waivable personality rights related to a creator's personal connection to their work, economic rights protect creators' ability to exploit them commercially.

The chapter thus provides an overview of rightholders' economic rights in the music sector, which consist of two sub-categories:

- Exclusive rights (§2.2); and,
- Remuneration rights (§2.3).

While exclusive rights allow creators to authorise or legally prohibit certain uses of their protected works, remuneration rights ensure that creators receive compensation for the use of such works, either when rightholders have already transferred their exclusive right or, as in the case of private copying levies, when their right is subject to a copyright exception and compensation makes the exception less prejudicial to the creators' economic interests.

§2.4 explores the domain of moral rights, for which the main source of legislative harmonisation is not EU law, but Article 6-*bis* of the Berne Convention. This section identifies the different categories of moral rights and highlights their main function, especially in digital settings where new technologies, especially GenAI, can threaten their recognition.

Finally, §2.5 addresses the term of copyright protection for authors, performers and record producers, examining the relevant EU law provisions that harmonised the length of protection, in 1993, and, extended this term for music performances and sound recordings in 2011. Simultaneously, the chapter illustrates whether the above-mentioned rights are exploited individually or collectively.

2.2. Exclusive rights

The exclusive rights of creators to use their works and to authorise others to do so are foundational in copyright law. These rights look like real property rights, if we consider their 'negative' side, insofar

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as they grant rightholders the legitimate power to prohibit third parties from using their works without permission. In the absence of a copyright exception seeking to protect the public interest, any use of a copyright work undertaken without the rightholder's permission constitutes an infringement of the creator's exclusive right with the consequence that the rightholder can seek enforcement measures. While the possibility of preventing unauthorised use matters as a means to an end, the essence and the main policy goal of exclusive rights is 'positive' if one considers that they aim to ensure that a work's exploitation aligns with the author's intentions. By granting rightholders control over the dissemination of their works, exclusive rights under copyright law allow creators to define the conditions and to set the terms, individually or even collectively, for any acts that fall within the scope of each of these rights.[70]

2.2.1. Reproduction

The reproduction right was, historically, the first (and only) right being granted to authors from the early codifications of copyright law in the common law and civil law traditions. In the music field, in particular, reproduction rights aimed at granting music composers legal protection for the printing of their musical works on tangible media, the sale of which constituted the primary exploitation of these works. Composers exploited these rights on the market by transferring or sharing the rights with music publishers who sold copies of music sheets at a time there was a significant market demand for these works. Reproduction rights are also the core of the legal protection of sound recordings, if one considers that the primary business of record companies, until recently, was the physical sale of phonograms incorporating musical works performed by musicians being hired and remunerated by a record producer. As this Study emphasises in several sections, composers' and publishers' reproduction rights in musical compositions are normally referred to in the music licensing industry as 'mechanical rights' or 'mechanicals'. These are rights whose ownership and collective management regimes are much more complex than the licensing of rights in sound recordings and music performances.

2.2.1.1. Berne Convention and its revisions

Even if 'reproduction' or 'copying' was the very first activity (and business) being reserved to rightholders in early copyright codifications, this basic, primary prerogative created under the law struggled to properly emerge in the Berne Convention in terms of scope and legal, compelling definition.[71] When the first version of the 1886 Berne Convention started being negotiated, methods for reproducing books and other 'literary works' had existed for centuries. The most radical technical development in this regard was the invention of the printing press, in Germany, around 1440. From then onwards, the development of printing businesses such as London's Stationers Company increasingly enabled and fostered the copying and distribution of books across Europe, including sheet music by early music publishing companies.[72] As a result, by 1886, all ten members of the

[70] See Mihály Ficsor, *Collective Management of Copyright and Related Rights* (3rd edn, WIPO 2022) 13.

[71] See 1710 Statute of Anne, 8 Anne, c.19; see also French Literary and Artistic Property Act 1793. These sources can be found at: 'Primary Sources on Copyright" <https://www.copyrighthistory.org/>.

[72] By way of the Royal Charter of the Company of Stationers (1557), the London Stationers Company was granted corporate legal status and conferred upon them exclusive control over printing within England. By granting the Charter, it is often understood as the point at which the Crown established a regulatory institution to control and censure the press. See Primary Sources on Copyright, 'Commentary on the Stationers Charter (1557)

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Berne Union[73] had already incorporated an exclusive right of reproduction for authors into their national laws.[74]

The reluctance of the original Berne Convention Contracting Parties to agree on a common approach to 'reproduction' had two significant implications for the 1886 text. On the positive side, the principle of national treatment, enshrined in Article 4 of the 1886 Berne Convention, ensured that foreign authors were afforded the same reproduction rights as domestic authors within Berne Union countries.This guaranteed all authors some form of reproduction right in these jurisdictions.[75] On the negative side, the lack of consensus amongst members prevented the adoption of a unified standard for a *general* right of reproduction to be formally incorporated into the Convention's text. As a result, the 1886 Convention limited harmonising the protection of authorised reproduction of works to the limited extent that Union members could agree. This included two key provisions: first, a narrowly defined right to prohibit the reproduction of works published in newspapers; and second, Article 10[76] clarifies that adaptations of copyrighted works in any form—including "musical arrangements"—qualify as reproductions, provided no significant alterations were made to the original work. Otherwise, if the original work was modified substantially, this adaptation would itself qualify as a distinct copyrighted work.[77]

In 1887, Emile Berliner filed the patent for his invention of the gramophone, marking a crucial first step in revolutionising opportunities for the reproduction of musical works. No longer limited to copying sheet music, compositions could be reproduced by embedding them into gramophone records. To promptly address this novelty, the 1908 Berlin revision introduced another narrowly defined reproduction right into the text of the Berne Convention. Article 13 of the 1908 Berlin Act exclusively granted authors of musical works the right to authorise the "adaptation of those works to instruments which can reproduce them mechanically."[78] This specific right to authorise mechanical reproduction became even more significant with the emergence of the first record labels during that period, marking the advent of the commercial sale of sound recordings - a monumental turning point that irreversibly altered the course of the music industry.

<https://www.copyrighthistory.org/cam/tools/request/showRecord.php?id=commentary_uk_1557>. See also The Stationers Company, 'Tradition and Heritage'' <https://www.stationers.org/company/history-and-heritage>. See also Benjamin Kaplan, *An unhurried view of copyright* (Columbia University Press 1967) 1-25.

[73] The original members of the 1886 Berne Convention were Belgium, France, Germany, Haiti, Italy, Liberia, Spain, Switzerland, Tunisia and the UK.

[74] Sam Ricketson and Jane Ginsburg, *International Copyright Law and Neighbouring Rights* (3rd edn, OUP 2022) 618.

[75] Art. 4(1) of the 1886 Berne Convention reads as follows: "Authors who are subjects or citizens of any of the countries of the Union shall enjoy in countries other than the country of origin of the work, for their works, whether unpublished or first published in a country of the Union, the rights which the respective laws do now or may hereafter grant to natives as well as the rights specially granted by the present Convention."

[76] With the Berlin Revision of the Berne Convention in 1908, this provision was renumbered as Art. 12. After the Brussels Conference, this provision became a general exclusive right of authors to authorise the adaptation of their work in the 1948 Berne Convention.

[77] See Art. 2 of the 1886 Berne Convention.

[78] The 1908 revision of the Berne Convention also introduced an exclusive right for authors to prohibit the cinematographic reproduction of literary and dramatic works (Art. 14 of the 1908 Berne Convention). However, as film did not have sound at that time, this right was of no importance for authors of musical works. Therefore, this Study does not cover this provision.

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Despite (ultimately unsuccessful) efforts by the French delegation to introduce a general reproduction right into the Berne Convention and to eliminate the fragmented state of the existing legal framework,[79] the 1948 Brussels revision brought no substantial progress in this regard. A major breakthrough occurred only with the fourth revision of the Berne Convention, in 1967, after the Stockholm Conference. The 1967 Berne Convention finally established a general exclusive right of reproduction for all authors of all categories of copyrighted works, thus abolishing the previously scattered provisions. As a matter of mere clarification, after removing the above-mentioned music-specific reproduction right under Article 13, Article 9(3) of the 1967 Berne Convention explicitly recognised sound and visual recordings as reproductions. After the Herculean task of reaching consensus on the scope of the exclusive reproduction right among the then 39 member countries, the final revision of the Berne Convention in 1971 introduced no further changes on this matter.

2.2.1.2. EU law and the CJEU's case law

Modern reproduction rights under EU law confer upon the rightholder in musical compositions, phonograms and performances the exclusive right to authorise or prohibit the making of copies of their respective works, whether directly or indirectly, temporarily or permanently, by any means and in any form. This broadly encompassing right granted to authors, performers, record producers, and broadcasting organisations in their respective works is fully harmonised as a result of the obligation laid down for Member States under Article 2 of the InfoSoc Directive.[80]

Notably, in 1992, Article 2(a) of the InfoSoc Directive introduced a general provision on reproduction rights for copyright holders nearly a decade after the adoption at EU level of sector-specific provisions that introduced obligations for Member States in this field to the benefit of performers, phonogram producers, film producers, and broadcasters.[81] The harmonisation of these rights, which are crucial for the music industry, was consolidated in 2001 with the adoption of Article 2 (letters from (b) to (e)) of the InfoSoc Directive. This provision created a unified framework for the generality of works protected by copyright and related rights across the EU. In this regard, Recital 21 of the InfoSoc Directive states that the Directive should define the scope of the acts covered by the reproduction right in relation to the different beneficiaries.[82] This recital emphasises the need for this definition to be in conformity with the *acquis communautaire*, highlighting that a broad definition of these acts is essential to ensure legal certainty within the internal market.

The reproduction right defined in Article 2 of the InfoSoc Directive covers "direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part". According to the Explanatory Memorandum to the 1997 proposal for the InfoSoc Directive,[83] 'direct' reproduction refers to the direct reproduction of a work or other protected subject matter on the same

[79] Ricketson and Ginsburg (n 74) 618.

[80] InfoSoc Directive, Art. 2.

[81] Cf. Art. 7 of the 1992 Rental, Lending and Neighbouring Rights Directive. This directive was subsequently replaced by the 2006 Rental and Lending Rights Directive. The 2006 version of this directive does not contain a reproduction right provision because, meanwhile, this provision had been incorporated, as a matter of scope and rights, into Art. 2 of the InfoSoc Directive.

[82] InfoSoc Directive, Recital 21.

[83] European Commission, 'Proposal for a European Parliament and Council Directive on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society' COM (97) 628 final.

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or another medium. In contrast, the term 'indirect' covers reproductions made through an intermediate stage; for example, the recording of a broadcast of a phonogram constitutes a reproduction of that phonogram. Thus, this provision clarifies that the right is not affected by the physical distance between the original work and the place where a copy is made.[84] The distinction between temporary and permanent reproduction is also important as it recognises the different forms of copying that can occur in the digital environment, all of which shall be considered acts of reproduction under this provision. Reproduction may result in a tangible permanent copy, such as a book, or in an invisible temporary copy stored in the random access memory ('RAM') of a computer, such as the copy of a sound recording being streamed from the Cloud-based database of a music streaming service onto the device of a service subscriber. All these types of copying fall within the definition of an act of reproduction.[85]

The broad notion of 'reproduction' that the InfoSoc Directive imposes to Member States for the generality of copyright works since 2001 comes, historically, from the redefinition of this concept. This occurred through the adoption of the Software Directive. By then, copyright law started protecting the copyright holder against 'temporary copying', a necessity dictated by the technical operation of computer programs.[86] The inclusion of temporary copying within the reproduction right expanded copyright's reach to cover mere use of the protected work. This development inevitably blurred the boundaries between copyright, contract law, and real property rules, fundamentally altering copyright's traditional purpose by incorporating consumption into its scope. By legally embedding what had previously been governed by licensing agreements, the Directive aimed to protect the commercial exploitation of software, particularly against private copying, which could enable viral counterfeiting due to the low cost and fidelity of digital reproduction.

To counterbalance the potentially all-encompassing notion of 'temporary copying', the InfoSoc Directive embodies one mandatory exception under Article 5(1). This provision is essential for a correct understanding of the scope of 'reproduction', even in the digital music industry, because it excludes certain temporary acts of reproduction from copyright's scope. These are acts which are transient or incidental and constitute an integral and essential part of a technological process, whose sole purpose is to enable either (1) a transmission in a network between third parties by an intermediary,[87] or (2) a lawful use of a work or other subject-matter - as long as these copies have

[84] ibid Art. 2(3). Such a formulation, referring to both direct and indirect reproduction, can be found in Art. 7(1) of the 1992 Rental Right Directive and in Art. 10 of the Rome Convention only in relation to phonogram producers.

[85] ibid. For further details, see Mireille van Eechoud and others, *Harmonizing European Copyright Law: The Challenges of Better Lawmaking* (Kluwer Law International 2009) 74.

[86] Software, which consists of human-readable source code, requires temporary reproduction during its execution, such as loading or running the program on hardware. This process inherently involves converting the source code into a machine-readable form via an operating system. Prior to this legal development, software producers relied on a contractual licensing model to control use: see Giuseppe Mazziotti, *EU Digital Copyright Law and the End-User* (Springer 2008) 58-60. These licences, which were common in the licensing of patented technologies, sought to extend copyright's reproduction right to acts of end-use, which traditional copyright law left unprotected. The Directive adopted this practice, reserving all acts of permanent or temporary reproduction, in whole or in part, to copyright holders under Art. 4(a). This meant that essential functions such as loading, displaying, running, transmitting, or storing software required explicit authorisation from the copyright owner, as these actions necessarily involved reproduction.

[87] InfoSoc Directive, Art. 5(1)(a).

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no independent economic significance.[88] Important rulings of the CJEU in decisions such as *Infopaq*[89] and *FAPL v QC Leisure*[90] shed light on the conditions under which a temporary copy can only be considered transient or incidental and for the exemption to apply.[91] This includes that duration of the act must be restricted to what is necessary for the proper execution of the technological process in question,[92] and reproduction must be integral and essential to the effective functioning of the technological process.[93] Furthermore, the reproduction should facilitate either a transmission within a network between third parties through an intermediary or a lawful use,[94] and the reproduction must lack independent economic significance, meaning it should not create an additional economic benefit beyond that of the intended use and the content should not be altered.[95]

Coupled with the exceptions of temporary and transient copying, the scope of the reproduction right has been defined by the CJEU. These parameters are vital to understanding the rights of authors and producers in the music industry, particularly as it is an environment where sound sampling (the copying of a rhythmic sequence from one phonogram and transferring the same to another phonogram)[96] is extremely prevalent. The Court in *Pelham I*[97] found that sound sampling, even if very short, would be an infringement of the producer's reproduction right,[98] unless the sample has been modified to such an extent that it is "unrecognisable to the ear".[99] The scope of this right for sound recordings or phonograms is fairly straightforward and simple. Comparatively, the scope of the reproduction right for authors[100] demonstrates an inextricable link between the notion of reproduction and the author's originality.[101] Thus, there is an act of reproduction if the elements copied are the expression of the author's intellectual creativity.[102] For authors, *i.e.* songwriters, this would be the copying of a part of the music lyrics and/or melodic compositions. There is controversy in this regard to the copying of melodies, since composers are limited to the confines of finite musical notes and established chord progressions. Certain chord sequences are "common building blocks"[103] that are used in the pop genre, for example, and therefore certain melodies can be made

[88] ibid Art. 5(1)(b).
[89] *Infopaq* (n 50).
[90] Case C-403/08 *Football Association Premier League Ltd and Others v. QC Leisure and Others* [2012] ECLI:EU:C:2011:631 (hereafter '*Premier League*').
[91] *Infopaq* (n 50) para 54.
[92] ibid para 64.
[93] InfoSoc Directive, Art. 5(1).
[94] *Premier League* (n 90), paras 165-172.
[95] ibid para 176.
[96] *Pelham I* (n 61) para 21.
[97] ibid.
[98] InfoSoc Directive, Art. 2(c).
[99] *Pelham I* (n 61) para 39.
[100] InfoSoc Directive, Art. 2(a).
[101] *Infopaq* (n 50) paras 50-51.
[102] ibid para 51.
[103] Ed Sheeran statement after successful trial in New York against copyright infringement claim by Gaye Estate in Tom Murray, '"I will never allow myself to be a piggy bank": Ed Sheeran shares defiant message after copyright trial win' *The Independent* (London, 4 May 2023) <https://www.independent.co.uk/arts-entertainment/music/news/ed-sheeran-statement-marvin-gaye-trial-b2332734.html>. For further details on the controversy regarding the copying of melodies and common chord progressions, see Iyar Stav, 'Musical

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to sound the same. Consequently, this can lead to "maximising tendencies"[104] whereby claims of infringement of reproduction rights become a culture and cause detriment to the songwriting industry.

Exploitation of reproduction rights

- Recording rights: Major record producers manage these rights on an individual basis. Independent producers, instead, while keeping their rights management individual, rely on rights aggregators such as Music and Entertainment Rights Licensing Independent Network (Merlin).

- Publishing rights: CMOs commonly oversee composers and music publishers' reproduction (known as 'mechanical') rights so as to harmonise and streamline licensing practices. However, in the industry practice of Anglo-American music publishers, they traditionally acquire all composers' and lyricists' reproduction rights and manage them individually or via agencies such as the Harry Fox agency in the US. In the UK, for instance, the publishers' Mechanical-Copyright Protection Society ('MCPS') has a service agreement in place with PRS for Music under which PRS provides rights management and administrative services to MCPS (whose mechanical rights - therefore - remain formally separate from PRS's "performing" rights: see below). In digital markets, as the Study explains, music publishers who withdraw their repertoires from the European CMOs' system licence mechanical rights individually.

2.2.2. Communication to the public

'Communication to the public' is a broad concept that encompasses a cluster of commercial exploitations of copyright works. This concept follows, historically, the development of music as a performing art played and commercially exploited in public spaces and then across new exploitation modes and markets created by the emergence of recording and communication technologies. The latter enabled transmissions of music performances and sound recordings through mass media, such as radios and TVs. A brief overview of the revisions of the Berne Convention regarding public performances and communications to the public between 1886 and 1971 helps understand the scope and implications of this right for music creators.

2.2.2.1. Berne Convention and its revisions

In the late 19th century, performative art forms, including music, held a central place in society. Performances of musical works in public venues attracted large audiences, making concert halls the vibrant social hubs of that era. Thus, the exploitation of musical compositions during this period was primarily through live performances. Reflecting this reality, the first version of the Berne Convention

Plagiarism: A True Challenge for the Copyright Law' (2014) 25 DePaul Journal of Art, Technology & Intellectual Property Law 1, 3-4.

[104] Jonathan Griffiths, 'The Role of the Court of Justice in the Development of European Union Copyright Law' in Irini Stamatoudi and Paul Torremans (eds), *EU Copyright Law. A Commentary* (Edward Elgar 2014) 1096, 1098.

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from 1886 recognised the public performance right solely for works inherently performative in nature. Its Article 9(1) applied to the live performance of musical compositions as well as dramatic and dramatico-musical[105] works in front of a present audience. However, it is important to note that this provision from 1886 did *not* require Member States to grant all authors an exclusive right to authorise the public performance of their works in their national copyright legislation. Rather, the 1886 Berne Convention merely established the principle of national treatment for this right: countries granting the public performance right to resident authors were required to extend an equivalent protection also to foreign ones.[106] Nevertheless, this right did not apply to all types of works. For published musical works, the states of the Berne Union only had to grant this national treatment when the foreign composer (or his or her publisher) had not expressly included a prohibition on public performance on the copy of the respective work.[107] The rationale behind this restriction, which might appear bizarre from today's perspective, was rooted in the national copyright traditions of some influential Member States, according to which the primary purpose of musical works was in fact to be performed in public.[108]

With the first revision of the Berne Convention in 1908, following the Berlin Conference, when Article 9 was renumbered as Article 11, this discrimination ended so that all authors of musical works enjoyed national treatment in this respect. As previously highlighted (see *supra*, §2.2.1.1), a major development of the early 1900s was the advent of sound recording technology, which gave rise to an entirely new industry and an entirely new method of disseminating musical works - which is still the backbone of today's music ecosystem. Suddenly, music could be preserved and played repeatedly, on demand, by consumers. To adapt the Berne framework to protect authors also for this new form of rights exploitation, the 1908 revision introduced Article 13. In the 1908 revision of the Convention, Article 13 conferred not only a music-specific exclusive right of reproduction to authorise the making of sound recordings but, even more importantly for this subsection, the exclusive right to authorise the public performance of these recordings.[109] An essential element of this right was (and still is) that the audience should have been present in the same location where the recording was performed.

The advent of early radio broadcasting in the early 1920s, which further grew the market for public performance in scope and volume, was the most notable technical development in the Convention revision from 1928. In this respect, the post-World War I years marked a revolution in music consumption, as musical works could suddenly be performed in one location while *simultaneously*

[105] These include operas, operettas, ballets, musical theatres, revues and the like.

[106] A proper exclusive right was only conferred to the public representation of the translation of a dramatic or dramatico-musical work, see Art. 9(2) of the 1886 Berne Convention.

[107] Art. 9(3) of the 1886 Berne Convention.

[108] Ricketson and Ginsburg (n 74) 696. The authors refer, *inter alia*, to the German Copyright Act from 1870, which stated in its § 50 that '[m]usical works which have been published in print may be performed in public without the authorisation of the author, unless the author has reserved the right of public performance on the title page or at the head of the work.'

[109] The substance of this provision was moved to Art. 11 during the 1967 Stockholm revision, when the previous Art. 13 was deleted. As a result, the amended Art. 11(1)(i) of the 1967 Berne Convention reads as follows: 'The authors of dramatic, dramatico-musical, and musical works shall enjoy the exclusive right of authorising: (i) the public performance of their works, *including such public performances by any means or process*.'

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being enjoyed in another.[110] This was undoubtedly beyond the scope of Article 11, which required the audience to be physically present in the same location as the performing artist. Consequently, Article 11-*bis* entered the Convention's text. It was at this point, in 1928, that the notion "communication to the public" first appeared in the Berne Convention. Specifically, Article 11-*bis* accorded authors the exclusive right to authorise the communication of their works to the public "by radio diffusion," thus covering the broadcasting of a work by linear transmission. To strike a fair balance between authors' rights and the general public interest in broadcasting,[111] Article 11-*bis*(2) was added. This provision granted the members of the Berne Union the flexibility to implement a system of compulsory licences, under which authors' rights could have been transformed into rights to equitable remuneration on the condition that these licensing schemes did not infringe authors' moral rights under Article 6-*bis*.

Over the following two decades, technological advancements in mass media consumption continued to evolve at a rapid pace, enabling works to be transmitted not only by radio but also through television. This was a development for which the national laws of countries with well-established copyright traditions were unprepared.[112] Therefore, to foster harmonisation and keep pace with emerging technologies, in 1948, the members of the Berne Union engaged in the most comprehensive revision and adaptation of the Convention with the intent to broaden and refine the scope of the 1928 broadcasting right under Article 11-*bis*(1). In the 1948 version, this provision explicitly covers all acts of communication to the public of a work by either wired or wireless diffusion. Moreover, Article 11-*bis*(1) granted authors the additional exclusive rights to authorise (i) secondary transmissions of their works by other broadcasting organisations and (ii) the use of loudspeakers or similar devices to communicate a radio broadcast of their work to a larger public audience. Accordingly, the scope of the aforementioned optional compulsory licensing system introduced in 1928 was expanded to cover also these new exploitation modes now encompassed by the revised Article 11-*bis*(1) of the Berne Convention.

Since broadcasts were already being made using sound or video recordings instruments at that time, a final third paragraph was added to Article 11-*bis* of the Berne Convention, clarifying that an author's authorisation to broadcast his or her work does not automatically include permission to create a recording of it. Instead, it is up to the members of the Berne Union to regulate these so-called 'ephemeral' recordings.[113]

The 1948 revision brought significant updates also to Article 11 of the Berne Convention. Most remarkably, the public performance right was finally harmonised, shifting from a subject of national treatment to an exclusive right foreseen by the Convention itself. Consequently, the Berne

[110] Ricketson and Ginsburg (n 74) 695.

[111] WIPO, 'Guide to the Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1971)' (1978) 70 <https://www.wipo.int/edocs/pubdocs/en/copyright/615/wipo_pub_615.pdf>.

[112] Paul Abel, 'The Brussels Copyright Convention and Its Influence on Domestic Copyright Legislation (In Particular in the United Kingdom and in Austria)' (1954) 3(2) The International and Comparative Law Quarterly 330, 330-331.

[113] Since the InfoSoc Directive, Member States of the EU have the option to introduce a copyright exception for the making of these ephemeral recordings by the broadcasting organisation (Art. 5(2) d)), which 23 Member States have implemented into their national copyright law frameworks. See for an overview of the national implementations <https://www.copyrightexceptions.eu/except ions/info52d/>.

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Convention set a new minimum standard for the performance rights of musical, dramatic, and dramatico-musical works, which all member countries were obligated to uphold. Around this time, collecting societies for composers and publishers, the oldest of which emerged in the second half of the 19th century, consolidated internationally, playing a pivotal role in the development and expansion of markets where "performing rights" were collectively licensed across a wide array of public venues.[114]

With the 1948 revision, the concept of communication to the public[115] was also incorporated into Article 11. The newly adopted Article 11(2) of the Berne Convention encompassed transmissions of performances beyond the acts of broadcasting covered by Article 11-*bis* — for instance, the transmission of a concert by an organisation via landline to its subscribers — [116] effectively bridging gaps in copyright protection created by evolving methods of signal transmission.

Lastly, to give rise to a triad, the 1948 Revision Act added Article 11-*ter*, which extends the protection granted to authors under Article 11 also to authors of non-performative literary works, such as novels and poetry. In this regard, Article 11-*ter* of the Berne Convention addressed the authors' exclusive right to authorise the public "recitation" of their works in front of a present audience. However, since this right is irrelevant for musical works—which are covered instead by the public performance right under Article 11—the Study will not further delve into the historical evolution of this provision, which essentially mirrored the amendments made to Article 11. Overall, regarding Articles 11 to 11-*ter* of the Convention, it is clear that the Brussels revision from 1948 stands out as the most consequential of the five in the history of the Berne Convention, effectively addressing shortcomings in authors' protection brought about by new modes of copyright exploitation triggered by innovation.

Despite the advent of satellite transmissions in the 1960s, no significant amendments to the existing legal framework under Article 11-*bis* were necessary, as a flexible interpretation of the 1948 version of this provision allowed it to also apply to this technology.[117] Thus, the 1967 Stockholm revision as well as the one from 1971 following the Paris conference made only minor adjustments to the wording which did not alter the scope of the rights granted. The same applied to the public performance right in Article 11, leaving the core elements of both Articles untouched for almost 80 years. Ultimately, the Paris amendment from 1971 marked the end of the revision process of the Berne Convention - an almost century-long process that has evidently adapted the subject matter of the Convention to evolving technologies that could potentially undermine authors' rights.

2.2.2.2. EU law and the CJEU's case law

The harmonisation of broadcasting and communication to the public rights at European level occurred, firstly, for the subject matter of the neighbouring rights of performers, record producers

[114] Ricketson and Ginsburg (n 74) 698.
[115] Art. 11 of the 1948 Berne Convention explicitly refers to the 'public distribution of the [...] performance'. However, the term "distribution" in this context did not carry the same meaning as it does today under Art. 4(1) of the InfoSoc Directive. Instead, it was essentially synonymous with "communication to the public". The wording of the provision was subsequently revised in the 1967 revision to remove any confusion.
[116] WIPO, 'Guide to the Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1971)' (1978) 65 <https://www.wipo.int/edocs/pubdocs/en/copyright/615/wipo_pub_615.pdf>.
[117] Ricketson and Ginsburg (n 74) 713.

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and broadcasters. Their entitlements were addressed and harmonised internationally, for the first time, in the 1961 Rome Convention. Article 8 of the 1992 Rental, Lending and Neighbouring Rights Directive conferred to performers the exclusive right to authorise or prohibit the broadcasting by wireless means and the communication to the public of their live performances. Moreover, Article 8(2) of the same directive obliged Member States to grant a single equitable remuneration to be shared between the relevant performers and phonogram producers and to be paid by the user if a sound recording published for commercial purposes, or a reproduction of such phonogram, is used for broadcasting by wireless means or for any communication to the public.

At a slightly later stage, in 1993, the EC adopted Directive 93/83/EEC,[118] commonly referred to as the 'SatCab Directive'. To prevent market fragmentation by facilitating cross-border satellite broadcasting between Member States, this Directive establishes the 'country of origin principle'.[119] This principle (or 'emission theory') creates a legal fiction whereby the communication to the public of a work or subject matter takes place only in the Member State where the satellite transmission is initiated. This results in the transmission of a work requiring a licence *only* in the country where the transmission originates, rather than in each country where it is received. Hence, the legislator sought to ensure that all Member States grant a basic level of exclusive rights to rightholders, thereby preventing broadcasting organisations from strategically choosing a jurisdiction for the initial act of communication that would allow them to bypass the requirement of obtaining a remunerated licence.[120] Therefore, the SatCab Directive introduces an exclusive right for authors to communicate their work to the public by satellite.[121] For performers and record producers, by contrast, Article 4 of the SatCab Directive merely establishes a minimum standard of protection[122] by referring to the aforementioned Article 8(2) of the Rental and Lending Rights Directive, clarifying that this provision also extends to satellite transmissions. In the case of simultaneous cross-border cable retransmission of a programme, which requires a separate licence from the respective rightholders, the SatCab Directive does not establish a corresponding exclusive right. Rather, it assigns exclusive authority to CMOs to license retransmission rights to broadcasters,[123] promoting efficient and streamlined rights clearance for retransmitted radio and TV programmes.[124] In this respect, the Directive marked a milestone in EU copyright law, representing the first instance of mandatory collective rights management.[125]

[118] Council Directive 93/83/EEC on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission ('SatCab Directive') [1993] OJ L248/15.
[119] ibid Art. 1(2)(b).
[120] ibid Recital 5.
[121] ibid Art. 2.
[122] ibid Art. 6.
[123] ibid Art. 9. Broadcasters are the only group of rightholders permitted to individually licence their broadcasts, see Art. 10 of the SatCab Directive.
[124] P Bernt Hugenholtz, 'SatCab Revisited: The Past, Present and Future of the Satellite and Cable Directive' in Susanne Nicoltchev, *Convergence, Copyrights and Transfrontier Television* (European Audiovisual Observatory 2009) 12.
[125] ibid 10, where Hugenholtz argues that this approach established by the 1993 SatCab Directive was 'far ahead of its time'.

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This revolutionary yet pragmatic approach to rights clearance has been carried forward by the 1993 SatCab Directive's digital successor: Directive 2019/789 (hereinafter the 'SatCab II Directive').[126] With the advent of on-demand services provided by radio and TV broadcasters such as catch-up and online archives, podcasts and similar ancillary online services, the 1993 Directive required updating since it was originally confined to satellite transmissions. In this regard, the SatCab II Directive modernised the over 20-year-old legal framework of the SatCab Directive, expanding its coverage to also include online transmissions and cross-border retransmissions.[127] On the front of collective licensing, the SatCab II Directive appears to also address a gap left by the CRM Directive by extending the 1993 SatCab Directive's emission theory to the making available of certain programmes via on-demand services.[128] More precisely, the CRM Directive introduced the possibility for CMOs to issue multi-territorial licences for online uses of musical works, provided they comply with a set of technical and legal criteria.[129] However, this option of pan-European licensing does not exist for the clearance of neighbouring rights, which the EU legislator expects to be licensed by the individual music rightholders, namely the labels, as is generally the case. That said, there are neighbouring rights CMOs established in several Member States—for instance, those administering performers' or phonogram producers' rights—that grant licences for various on-demand uses or collect statutory remuneration for performers. Without the country of origin principle, broadcasters would be burdened with the cumbersome task of securing licences from multiple national neighbouring rights CMO, depending on where their on-demand services are accessible. Thus, the revised SatCab Directive maintains the 1993-established broadcasters' privilege to obtain all necessary music rights only from their local CMO, even if it does not meet any of the requirements set out in the CRM Directive.[130] Yet, as Article 3 of the SatCab II Directive extends the country of origin principle only to some types of programmes, specifically radio programmes, TV news and own TV broadcasters' programmes, excluding sport events, its practical impact in this respect is significantly limited. Beyond these limitations, the provision introduces further challenges. Taking into consideration the CJEU's opinion in the *AKM* case,[131] the emission theory applies not only to the licensing of works and subject matter but also to infringement proceedings.[132] This effectively hinders certain infringement proceedings being undertaken by CMOs if it means suing a foreign entity abroad, perhaps not even within the EU. Unlike with satellite broadcasting, the emission principle concerning the broadcasters' ancillary services does not contain any measures against abuse, for e.g., by non-EU entities.

[126] Directive (EU) 2019/789 of the European Parliament and of the Council laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions of television and radio programmes, and amending Council Directive 93/83/EEC (SatCab II Directive) [2019] OJ L130/82.

[127] See Art. 2 of the SatCab II Directive, which updates the definitions of the 1993 SatCab Directive to include broadcasts by ancillary internet services.

[128] SatCab II Directive, Art. 3.

[129] CRM Directive, Arts. 24-31. For a more detailed analysis of this so-called 'passport system', see §6.3.3.

[130] Giuseppe Mazziotti, 'Media Policy and Copyright in Europe: the Progressive Expansion of the Law for Broadcasters to Online Platforms' in Christine Godt and Matthias Lamping (eds), *A Critical Mind: Hanns Ullrich's Footprint in Internal Market Law, Antitrust and Intellectual Property* (Springer 2023).

[131] Case C-290/21 *AKM v Canal+ Luxembourg Sàrl* [2023] EU:C:2023:76.

[132] ibid para 32.

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Turning back to the original chronology, in 2001, Article 3 of the InfoSoc Directive intervened in this area of copyright law using a more modern language and addressing simultaneously both author's rights and neighbouring rights, giving them a broader scope that includes the interactive making available of protected works to the public. This significant change had become a legal necessity after the expansion and adaptation of the communication to the public right in the so-called 1996 World Intellectual Property Organization (WIPO) 'Internet' treaties, where the EU played a leading role as a negotiator. These treaties are, respectively, (i) WCT, a 'special agreement' under the Berne Convention (Article 8)[133] and (ii) the WPPT (Article 10 and Article 14).[134] This new concept of interactive making available clearly reflects the 'end-to-end', interactive dimension of web-based communications which is distinct from the traditional, 'top-down' character of previous mass-media (*i.e.*, broadcasting) communications. This exclusive right granted to authors, performers, and producers in their respective copyright entitlements therefore allows these rightholders to authorise or prohibit not only the broadcasting of their works,[135] by wire or wireless means, but also the making available of these works in a way that members of the public can access them at a time and place chosen by them.[136]

Article 3 of the InfoSoc Directive was introduced with a twofold purpose: on the one hand, it aimed at implementing the above-mentioned provisions embodied into the 1996 WIPO "Internet" Treaties on behalf of the EU and its Member States. On the other hand, it sought to harmonise the subject matter of this right to reflect the importance of web-based communications within the European 'Single Market'. As emphasised by the CJEU in its case law, the EU copyright legislation does not offer a precise definition of what constitutes a "communication to the public."[137] However, Recital 23 of the InfoSoc Directive clarifies that *"[this] right should be understood in a broad sense covering all communications to the public [that is] not present at the place where the communication originates.*" Consequently, it is important to keep 'communication to the public' distinct from the legal concept of 'public performance', which falls outside the scope of Article 3 and remains regulated under national law. As the CJEU put it, the (unharmonised) right of public performance requires the performers to have direct contact with their audience in a way that the public is present at the place where the performance originates.[138]

Given its potentially very broad scope and its implications for the pursuit of a fair balance between copyright protection and the preservation of online media freedom and other fundamental rights, the CJEU has endeavoured to provide conceptual clarity on the dimension of communication to the

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[133] See 1996 WCT, Art. 8 (*Right of Communication to the Public*), available at <https://www.wipo.int/wipolex/en/text/295166>.

[134] See the 1996 WPPT, Art. 10 (*Right of Making Available of Fixed Performances*) and Art. 14 (*Right of Making Available of Phonograms*), dealing with the rights of two kinds of beneficiaries, *i.e.*, performers and record producers, that were initially harmonised through the 1961 Rome Convention. The text of the treaty is available at <https://www.wipo.int/wipolex/en/text/295578>.

[135] InfoSoc Directive, Art. 3(1).

[136] ibid Art. 3(2).

[137] Case C-306/05 *Sociedad General de Autores y Editores de España (SGAE) v Rafael Hoteles SA* [2006] ECLI:EU:C:2006:764 para 33 (hereafter '*SGAE v Rafael Hoteles*').

[138] Case C-283/10 *Circul Globus Bucureşti (Circ & Variete Globus Bucureşti) v. Uniunea Compozitorilor şi Muzicologilor din România - Asociaţia pentru Drepturi de Autor (UCMR-ADA)* [2011] ECLI:EU:C:2011:772.

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public. This incremental development can be demarcated into two main phases: 'pre-*Svensson*'[139] and 'post-*Svensson*'.[140]

In the early phase, pre-*Svensson*, the CJEU's ruling in *SGAE v Rafael Hoteles* established a momentous precedent regarding the criteria an act of exploitation must meet to qualify as a "communication to the public." This case centered on Rafael Hoteles, a 4-star hotel located in Madrid, which—like most hotels—provided television sets in its guest rooms. SGAE, a Spanish collecting society for composers and music publishers, sought compensation for these alleged acts of unauthorised communication to the public involving works from its repertoire. The CJEU ultimately concluded that installing television sets in hotel rooms does indeed amount to such an act of public communication, thus requiring a separate licence by the rightholder, which in turn would entitle SGAE to request an additional compensation for the rightholders represented by it.

To identify an act of communication to the public, the CJEU formulated a three-prong test[141] aimed at ensuring an autonomous and consistent interpretation of this concept across national courts.[142] The first criterion, though seemingly straightforward, requires that the act qualifies as a "communication," which excludes cases where solely physical facilities are provided,[143] such as the mere display of a TV set in a store. In this context, the Court, referencing Recital 23 of the InfoSoc Directive, adopts a broad interpretation of the term "communication" to adequately protect the intellectual property rights of rightholders.[144] Accordingly, the technological means of transmission is deemed irrelevant to determining whether a communication has occurred.[145]

Second, also rather evident at first sight, the CJEU requires that the act involves a communication to an actual "public", an "indeterminate"[146] and "fairly large number of persons",[147] rather than being limited to an intimate, private circle. In this respect, even a consecutive small number of people, as is the case in hotels with rapidly changing guests, amounts to a public overtime.[148] In subsequent years, The CJEU has refined this criterion, introducing a more nuanced approach by underscoring, for instance, that the public must constitute the deliberate and intended audience of the communication, rather than merely encountering it "by chance."[149] Ultimately, this distinction between "public" and "private" is critical, as granting public access to works often serves (direct or

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[139] Case C-466/12 *Nils Svensson and others v Retriever Sverige AB* [2014] ECLI:EU:C:2014:76 (hereafter *'Svensson'*).

[140] See Justin Koo, 'The EU Right of Communication to the Public - Still Looking for a Good Link' in Eleonora Rosati (ed), *The Routledge Handbook of EU Copyright Law* (Routledge 2021) 174.

[141] ibid 175.

[142] *SGAE v Rafael Hoteles,* para 31.

[143] InfoSoc Directive, Recital 27.

[144] *SGAE v Rafael Hoteles,* para 36.

[145] ibid para 46.

[146] ibid para 37, with reference to its previous judgments in Case C-89/04 *Mediakabel BV v. Commissariaat voor de Media* [2005] ECR I-04891, para 30 and Case C-192/04 *Lagardère Active Broadcast v. Société pour la perception de la rémunération équitable (SPRE) and Gesellschaft zur Verwertung von Leistungsschutzrechten mbH (GVL)* [2005] ECR I-07199, para 31.

[147] *SGAE v Rafael Hoteles,* para 38.

[148] ibid.

[149] Case C-135/10 *Società Consortile Fonografici (SCF) v Marco Del Corso* (hereafter '*SCF*') [2012] ECLI:EU:C:2012:140, para 91.

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indirect) commercial purposes. Denying rightholders a fair share in the profits generated from such exploitation would be unjust, provided the third condition of the CJEU's three-prong test is also met.

This third and most consequential criterion marked a pivotal and groundbreaking moment in CJEU jurisprudence, introducing the entirely novel concept of the "new public" in cases involving specifically the retransmission or reception of works in public settings.[150] This concept profoundly influenced the Court's case law in the years that followed, particularly in cases addressing the online realm. The "new public" specifically refers to an audience that the rightholder did not contemplate when authorising the initial communication.[151] This is equally relevant from an economic standpoint, since the rightholder (or her or his representative) sets the licensing fee for the original communication based exclusively on the audience initially envisioned, without accounting for this new public.[152]

A partial abandonment of the "new public" criterion occurred in 2011, when the CJEU decided in the case of *ITV v TVCatchup Ltd*.[153] TVCatchup Ltd operated a website that enabled users to live-stream retransmissions of various UK broadcasting channels via the internet without their authorisation. Access to this service was restricted to users within the UK who were already legally authorised to view these channels under valid TV licences, namely the "original public". Nonetheless, in this case, the CJEU deemed the question of whether there was a "new public" involved irrelevant. Instead, the Court determined that TVCatchup had, indeed, performed an act of communication to the public under Article 3(1) of the InfoSoc Directive. The rationale behind this conclusion was that the retransmissions were subsequent communications of the broadcast by "different technical means" – specifically, the Internet – from those used for the original transmission, in this case television broadcasting.[154]

In the "post-*Svensson*" phase, starting with *Svensson* itself, the CJEU rulings addressed a notable and critical shift away from analogue issues that involved traditional forms of dissemination of copyright works, bringing to light new issues triggered by the emergence of 'on demand' technologies which equally invoked the broadcasting and communication to the public right.[155] From an international copyright law perspective, this shift entailed a progressive reliance on the concept of "making available to the public" under Article 8 of the WCT to be viewed as a complement to the (pre-existing) concept of communication to the public under Article 11-*bis* of the Berne Convention. In this phase, the CJEU had the opportunity to review forms of communication to the public that went beyond analogue transmissions such as broadcasts and cable transmissions, embracing the essence of interactive communications via the Internet, namely, the supply of access to copyright

[150] *SGAE v Rafael Hoteles,* para 40.
[151] ibid para 41.
[152] Mazziotti, 'Media Policy and Copyright in Europe: the Progressive Expansion of the Law for Broadcasters to Online Platforms' (n 130).
[153] Case *C-607/11 ITV Broadcasting Ltd and others v TVCatchup Ltd* [2013] ECLI:EU:C:2013:147.
[154] ibid paras 26 and 39. However, this approach adopted by the CJEU has not been without criticism due to its inconsistency with international copyright law, namely Art. 11-*bis*(1)(ii), (iii) of the Berne Convention, see Association Littéraire et Artistique Internationale (ALAI) 'Opinion on the criterion "New Public", developed by the Court of Justice of the European Union (CJEU), put in the context of making available and communication to the public' (17 September 2014) 20-21 <https://www.alai.org/en/assets/files/resolutions/2014-opinion-new-public.pdf>.
[155] Koo (n 140) 173, 175.

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works.[156] The logic of access - rather than 'just' communication - is ubiquitous in digital settings since an act of communication arises when a potential infringer creates the concrete possibility for members of the public to receive the work, rather than the provision of the actual work itself. The online access and exploitation of music can arise by way of sites offering and using streaming, downloading, stream ripping, and torrenting processes to give the public unauthorised access to music.[157]

The *Svensson* ruling has a special relevance because it inaugurated a significant chapter in the case law of the CJEU revolving around hyperlinks and their relationship to the right of communication to the public. The case involved the unauthorised hyperlinking to freely accessible newspaper articles that users could freely access on the internet through the website of the Gothenburg Post. In such a scenario, the Court found that the supply provision of a hyperlink constituted an act of communication of these works. Yet, to determine the lawfulness of this act, the Court observed that these hyperlinks did not target address a 'new public' because they did not target an additional group of persons beyond the (general) public the copyright owner contemplated at the time of first communicating these works to the public.[158] In doing so, this ruling relied on the above-mentioned concept of 'new public', which is not explicitly outlined in EU law and started being listed in a range of elements and factual circumstances specific to each online case.

For the specific situation regarding *Svensson*, this meant that hyperlinks could have been considered legitimate without the copyright owner's permission, with the practical consequence of depriving the rightholders of significant licensing opportunities. Similarly, in the *Bestwater* case, which involved the embedding of a freely available YouTube video on another website without the rightholder's consent, the CJEU reached the same conclusion.[159] The Court reasoned that the embedded video neither reached a new public nor employed a distinct technical means enabling a separate form of exploitation, thereby rendering the act lawful. The interpretation of the "new public" criterion the CJEU relied in *Svensson* and *Bestwater* created a legal conundrum because it suggested, at the international copyright law level, that the enjoyment and exercise of copyright could be made subject to requirements such as the 'new public' and 'technical restriction', arguably conflicting with the EU's obligations under international copyright treaties.[160] At the EU law level, *Svensson* implied that the right of communication to the public could be exhausted, contrary to Article 3(3) of the InfoSoc Directive.[161]

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[156] ibid 176.

[157] Francisco Garcia-Valero and others, *Online Copyright Infringement in the European Union: Music Films and TV (2017-2020), Trends and Drivers* (EUIPO, 2021) 24. <https://euipo.europa.eu/tunnel-web/secure/webdav/guest/document_library/observatory/documents/quantification-of-ipr-infringement/online-copyright-infringement-in-eu/online_copyright_infringement_in_eu_en.pdf>.

[158] *Svensson* (n 139) paras 25-26.

[159] Case C-348/13 *BestWater International GmbH v Michael Mebes and Stefan Potsch* [2014] ECLI:EU:C:2014:2315.

[160] These requirements are not recognized as permissible limitations of the right of communication to the public or the right of broadcasting under international agreements. Their application risks excluding numerous forms of online use from the scope of Article 3 of the InfoSoc Directive, effectively privileging online intermediaries who can exploit the commercial value of copyright-protected works without authorisation. See ALAI (n 154) at 9-10.

[161] See, for instance, Koo (n 140) 176.

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Considering not only the legal contradictions this interpretation openly raised, but also the exceptionally negative consequences it could have had - economically - for the creative industries, subsequent rulings of the CJEU significantly reconsidered and reduced the scope of *Svensson* by introducing further elements and criteria that narrowed down the effects of the 'new public' doctrine. In *GS Media*, a case involving a Dutch tabloid that provided clickable links to fashion photographs protected by a paywall published unlawfully online before their official release, the CJEU held that acts of communication performed by having actual or presumed knowledge of the illegal character of their activity should fall within the scope of the exclusive right of communication to the public.[162] This way, *GS Media* introduced subjective elements into the CJEU's analysis. Since hyperlinking facilitated circumvention of technical protections and enabled access to unlawfully disclosed content, the Court held that the infringement depended on whether the hyperlink provider was aware of the illegal nature of the linked content. Moreover, in this judgment, the Court established a presumption of knowledge of the content's illegality when the hyperlink provider acted with a profit motive.[163]

From *GS Media* onwards, the CJEU consistently emphasised two key criteria in evaluating whether the right of communication to the public was infringed: *(i)* knowledge of the linked content's illegal nature and *(ii)* the for-profit nature of the user's activity. These criteria were subsequently applied in cases involving defendants not only making unauthorised copyright works available but also distributing technologies or systems that facilitated infringement.[164] The first was *Filmspeler*, where the Court ruled against a defendant distributing a device preloaded with add-ons containing links to websites offering unauthorised streams of copyrighted films. Similarly, in *Ziggo*, the Court addressed activities such as operating 'The Pirate Bay', a peer-to-peer ('P2P') platform enabling users to access reassembled segments of copyrighted works. In both cases, the CJEU reached the conclusion that the defendants had infringed the right of communication to the public by extending the scope of this right to activities performed by technology providers who facilitated (*Filmspeler*) or enabled (*Ziggo*) users' infringing actions.

Clearly, this interventionist attitude made the Court's decisions go beyond the intention of EU lawmakers and seek to harmonise secondary copyright liability through the back door.[165] Building on requirements such as "deliberate intervention" in content retransmission and the reach of a "new public" through distinct communications, the CJEU developed criteria addressing indirect liability for online copyright infringement, thereby addressing gaps in EU law. Despite the challenges these broad interpretations might cause in the EU-wide understanding of communication to the public, the post-2014 CJEU's judicial activism in this field should be commended not only for having curbed the

[162] Case C-160/15 *GS Media BV v Sanoma Media Netherlands BV and others* (hereafter '*GS Media*') [2016] ECLI:EU:C:2016:644, paras 47-51.
[163] ibid para 51.
[164] Case C-527/15 *Stichting Brein v. Jack Frederik Wullems (also trading under the name Filmspeler)* [2017] ECLI:EU:C:2017:300, para 19 (hereafter '*Filmspeler*'); and also Case *C-117/15 Reha Training Gesellschaft für Sport- und Unfallrehabilitation mbH v Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte eV (GEMA)* [2016] ECLI:EU:C:2016:379, para 35, where the Court argues that these complementary criteria are 'not autonomous and are interdependent'.
[165] Birgit Clark and Julia Dickenson, 'Theseus and the Labyrinth? An Overview of 'Communication to the Public' under EU Copyright Law: after Reha Training and GS Media. Where Are We Now and Where Do We Go from Here?' (2017) 39(5) EIPR 265, 277, see also Case C-610/15 *Stichting Brein v. Ziggo BV and XS4ALL Internet BV* [2017] ECLI:EU:C:2017:99, Opinion of AG Szpunar, para 3.

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disproportionately unfair consequences of *Svensson* but also for providing greater clarity in EU digital markets where national laws still determine the reach of online enforcement mechanisms and the terms of secondary copyright liability.

In the following years, the ever-expanding unauthorised exploitation of copyright works in the fast-growing attention markets created and boosted by social media platforms became more pronounced. Simultaneously, rightholders kept struggling with increasing legal uncertainties and difficulties while having to enforce their (national) rights - by necessity - in multiple EU jurisdictions, not being able to count on a clear and EU-wide standard of copyright liability in the most lucrative (for tech companies) and least transparent (for rightholders) digital exploitations. This situation led to the proposal for a new copyright directive in September 2016 and to a policy- and law-making scenario that culminated, as illustrated in depth in Chapters 5 and 6 of this Study, in the adoption of the 2019 DSM Directive. In terms of policy goals, Article 17 of this directive is a straightforward attempt to bring fairer and less discriminatory market conditions for all the exploiters of digital music in Europe. It is evident that the legislative approach undertaken by EU lawmakers in 2019 with the introduction of a clear EU copyright liability standard for OCSSPs upholds the CJEU's case law trajectory since *GS Media*, as it aims to prevent inconsistencies in national legislation and in the case law. For platforms falling within the scope of this provision, the previously outlined criteria established by the CJEU do not need to be applied when determining whether they communicate copyrighted content to the public, as they do so by definition.[166] That being said, as discussed in Chapter 5, the CJEU remained engaged in clarifying liability standards in the online sphere, especially in two joined cases whose ruling was issued after the adoption of the DSM Directive: *YouTube* and *Cyando*.[167]

Exploitation of communication to the public rights

- Recording rights: Record labels licence their communication to the public right for online exploitations either directly or through digital rights licensing partners such as Merlin, which negotiates on behalf of independent labels that typically have less bargaining power. For broadcasting, record labels either negotiate licensing agreements directly or rely on neighbouring rights CMOs to grant licences to broadcasting organisations. The SatCab Directive mandates collective management for cable retransmission. Notably, when an already published phonogram is used for broadcasting by wireless means or any other form of communication to the public, labels must account for the mandatory sharing of the resulting single equitable remuneration with performers, as required under Article 8(2) of the 2006 Rental and Lending Rights Directive (see *infra, §*2.3.2). Regarding the use of sound recordings in public spaces (i.e., offline), record labels licence their rights of communication to the public via their trade associations (e.g., IFPI), which collaborate with

[166] Art. 17(1) of the DSM Directive unambiguously states that "an online content-sharing service provider performs an act of communication to the public or an act of making available to the public for the purposes of this Directive when it gives the public access to copyright-protected works or other protected subject matter uploaded by its users."
[167] Joined cases C–682/18 and C-683/18 *Frank Peterson v Google LLC and Others and Elsevier Inc.v Cyando AG* [2021] ECLI:EU:C:2021:503.

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music licensing companies. These companies, in turn, distribute the received licensing fees back to the labels.

- Publishing rights: Although composers and lyricists can increasingly retain some of these "performing" rights, their individual licensing is inefficient and impractical due to the exceptional volume of individual transactions it would entail with multiple commercial users. CMOs normally administer these rights to facilitate efficient licensing, particularly for cross-border or large-scale uses. The SatCab Directive mandates collective management for cable retransmission.

Exploitation of musical works' public performance rights

- Composers' and music publishers' CMOs predominantly manage public performance rights for live events, broadcasts, and digital streams, ensuring streamlined administration. It is viable for composers and publishers to license smaller-scale uses or, to the contrary, to directly licence theatrical or other "grand" live performances.

2.2.3. Distribution

The right to legally control the distribution and circulation of physical media incorporating reproductions of works, performances and phonograms has always been very relevant in the creative industries. This is especially true in a sector, like the music industry, where the primary way to exploit the subject matter of the above-mentioned rights, at least until the emergence of digital technologies and a progressive dematerialisation of media embodying musical works and recordings, was the sale of physical formats. It was precisely because of the tension that progressively emerged between the free movement of these physical goods within the 'Common Market' and the enforcement of copyright at national level that EU institutions started considering the necessity to harmonise intellectual property rights.[168]

Prior to 1991, when there was no harmonisation of copyright laws, national courts started seeking clarity on the inherent tension between the EC-wide constitutional principle of freedom of movement and national copyright laws that enabled the blocking of parallel imports of protected sound recordings on a cross-border basis.[169] The CJEU ruled that, while Article 295 of the EC Treaty allowed Member States to define the scope of intellectual property rights, the *exercise* of these rights was subject to Treaty rules.[170] In the specific situation that emerged in *Deutsche Grammophon*, this

[168] This conflict first came under CJEU scrutiny in the landmark *Deutsche Grammophon* case: see case *C-78/70, Deutsche Grammophon v. Metro-SB-Grossmärkte* [1971] ECR 487. A German gramophone manufacturer sought to prevent the importation into Germany of records that had been lawfully produced and sold in France by its French subsidiary.

[169] ibid.

[170] ibid paras 11-13, where the Court clarified that Art. 30 of the EC Treaty granted protection to intellectual property rights against the constraints of Article 28, but only to the extent necessary to safeguard the specific

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principle implied that, once the sound recording producer exercised her exclusive distribution right by placing a copyright phonogram on the market for the first time, the rights incorporated into this record should have been considered 'exhausted.' As a result, Community law prevented Deutsche Grammophon from using its exclusive rights to block parallel imports of its physical records from France into Germany.[171]

The first distribution right to be codified at EU level for music creators was the right of distribution of performers and phonograph producers under the 1992 Rental, Lending and Neighbouring Rights Directive.[172] This directive was crucial for the protection of the music industry as a whole because it created a common level playing field for neighbouring rights, obliging Member States to grant fixation rights to performers and a comprehensive cluster of exclusive rights to performers and record producers, including distribution (in addition to reproduction, broadcasting and communication to the public) rights. The notion of 'distribution' under Article 9(1) of the 1992 Directive embodied a clear reference to physical media by indicating that neighbouring rightholders should have an exclusive right to make available 'these objects' to the public by sale or otherwise. Moreover, Article 9(2) codified the above-mentioned principle of exhaustion by providing that the distribution right shall be exhausted "[...] with the first sale in the Community of that object made by the rightholder or by his consent".

In 2001 the InfoSoc Directive included a provision on the distribution rights of authors, Article 4, which followed the model and the language of the "physical" right of performers and record producers as regards its scope and the conditions for its exhaustion.[173] However, this version of the distribution right comes with a significant achievement in terms of language: its careful distinction between the exclusive rights applicable to different modes of exploitation enabled by digital technologies. Articles 3(3) and 4(2) of the InfoSoc Directive seek to keep the right of communication to the public (which extends to making intangible works available online) distinct from the right of distribution, which remains limited to the sale of physical objects.[174] To address potential ambiguities, Recital 28 clarifies that the exhaustion principle applies only to tangible copies of works, meaning that once a physical

subject matter of the right. The CJEU explicitly ruled that it was incompatible with rules providing for the free movement of products within the common market for a sound recording manufacturer to exercise their exclusive distribution rights in a way that prohibited the sale of products in one Member State if those products were initially placed on the market in another Member State, either by the manufacturer or with their consent. For further details, see Andrea Renda and others, 'The Implementation, Application and Effects of the EU Directive on Copyright in the Information Society' (2015) CEPS Special Report No 120, 7.

[171] The concept of 'exhaustion' was further developed and examined through the lens of the free movement of goods within the common market in another CJEU ruling regarding the music industry: see joined cases 55/80 and 57/80 *Musik-Vertrieb membran GmbH and K-tel International v GEMA* [1981] ECLI:EU:C:1981:10, paras 25-27. In these joined cases, the Court held that the German copyright management society (GEMA) was not entitled to restrict the importation of gramophone records and cassettes into Germany that had been lawfully placed on the market abroad. Additionally, GEMA could not demand royalties in Germany lower than those already paid in the Member State of the records' producer, as such actions violated the principle of free movement of goods within the Community and fragmented the common market.

[172] 1992 Rental, Lending and Neighbouring Rights Directive, Art. 9.

[173] Art. 4 of the InfoSoc Directive establishes the right of distribution as the exclusive right for authors to authorise or prohibit any form of distribution to the public of their works (or copies) by sale or otherwise.

[174] Under Art. 4(2), which reflects established EU law on exhaustion, the distribution right is not considered exhausted within the Community unless the initial sale or other transfer of ownership of a tangible object occurs within the Community and is authorised by the copyright holder or carried out with their consent.

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object containing the work is sold, the copyright holder loses the right to control its resale. Meanwhile, Recital 29 confirms that the exhaustion principle does not apply to services, such as online services, which involve making copyrighted works available to the public in intangible formats.[175]

Historically, two rulings of the CJEU provided greater clarity in distinguishing the different scope of the distribution right under EU copyright law. In the first one (*UsedSoft*), which specifically dealt with the resale of licences of computer programs,[176] the CJEU interpreted the notion of distribution as applicable not only in the domain of physical formats but also with regard to digital copies downloaded via the internet.[177] Although these copies were downloaded with the rightholder's (*i.e.,* Oracle's) consent, the copies were ultimately enabled by a licence that a German company, named UsedSoft, transferred from an old Oracle customer to a new one, without Oracle's permission. In this ruling the CJEU held that, the principle of exhaustion should have applied even if the copies of the work were intangible and the subject matter of the transfer was not a 'good', but a licence "for an unlimited period".[178] The CJEU argued that, if this principle had been confined to tangible copies of software, the very purpose of the exhaustion principle would be undermined.[179] The conclusion of the Court was a logical consequence of not having an exclusive right of making computer programs available to the public in a directive that was enacted at a time, *i.e.* 1991, when the exploitation of these works occurred solely through physical distribution. The Court justified its conclusion by referring to the (un-altered) version of the Software Directive from 2009, specifying that, for computer programs, "*[T]he online transmission method is the functional equivalent of the supply of a material medium. Interpreting Article 4(2) of Directive 2009/24 in the light of the principle of equal treatment confirms that the exhaustion of the distribution right under that provision takes effect after the first sale in the European Union of a copy of a computer program by the copyright holder or with his consent, regardless of whether the sale relates to a tangible or an intangible copy of the program*".[180] Although *UsedSoft* acknowledged the limitation of exhaustion to works embodied in tangible media under the InfoSoc Directive,[181] the Court found that the rationale of the Software Directive, to be interpreted as a *lex specialis* in the field of EU copyright, should have prevailed in this specific case.[182]

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[175] This interpretation was already clarified in the Explanatory Memorandum to the 1997 proposal for the InfoSoc Directive, which states that, consistent with the *acquis communautaire* on this issue, the terms "copies" and "originals and copies" refer exclusively to fixed copies intended for circulation as tangible objects: see European Commission, 'Proposal for a European Parliament and Council Directive on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society' COM (97) 628 final, Art. 4(1).

[176] Case C-128/11 *UsedSoft GmbH v Oracle International Corp* (hereafter '*Usedsoft*') [2012] ECLI:EU:C:2012:407.

[177] ibid paras 47-48.

[178] ibid paras 46-48 and 55.

[179] ibid paras 62-63, where the CJEU reaffirmed that the exhaustion principle aims to prevent market partitioning and limit restrictions on the distribution of works to what is necessary to safeguard the specific subject matter of intellectual property.

[180] ibid para 61.

[181] ibid para 60.

[182] ibid para 56, where the Court further specified that the current version of the Software Directive (Directive 2009/24) constitutes a *lex specialis* in relation to the InfoSoc Directive. The CJEU's ruling clearly disappointed the European Commission and several national governments that intervened in the Court proceedings, siding with Oracle, to persuade the Court that the logic of the InfoSoc Directive, and therefore Oracle's claim, should have eventually prevailed. One of the most tangible outcomes of this ruling was the pressure placed on

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The opportunity for the CJEU to address the distinction between the rights of communication to the public and that of distribution under the generalist copyright legislation built by InfoSoc Directive came with a Dutch case concerning the resale of second hand e-books.[183] Tom Kabinet's online platform allowed its subscribers to purchase e-books that were either donated or sold to the platform by other users, with the company requiring donors to delete their original copies. Technically, Tom Kabinet added digital watermarks to verify the legality of the resold copies and offered them at lower prices than official distributors. Dutch publishers' associations NUV and GAU applied for an injunction before The Hague District Court, claiming that this service infringed their copyright by making available and reproducing e-books without the rightholders' proper permission. Essentially, the Hague court asked the CJEU for guidance on whether Tom Kabinet's online resales should have been considered as acts of distribution under Article 4(1) of the Directive and, if so, whether this right was exhausted under Article 4(2).

The CJEU explicitly acknowledged that the lack of differentiation between tangible and digital copies the Court relied upon in *UsedSoft* was the result of provisions specifically designed for software, which assimilate tangible and intangible copies for the purposes of exhaustion.[184] In *Tom Kabinet*, instead, the central question was whether "*[...] the supply by downloading, for permanent use, of an e-book constitutes an act of distribution for the purposes of Article 4(1) of the InfoSoc Directive, or whether such supply is covered by the concept of 'communication to the public' within the meaning of Article 3(1) of that directive*".[185] The CJEU took the view that Tom Kabinet's supplies fell within the scope of "communication to the public" under Article 3(1) of the InfoSoc Directive. The Court argued that unlike tangible books, used digital copies remain perfect substitutes for new copies over time. Consequently, a second-hand market for e-books would significantly undermine copyright holders' economic interests, as it would fail to ensure appropriate rewards for their works.[186] This distinction reflects the EU legislature's intention in the InfoSoc Directive to avoid assimilating tangible and intangible copies for the purposes of distribution rights.[187]

According to some scholars, by reducing the questions posed by the Dutch court to a "binary choice" between Articles 3 and 4 of the InfoSoc Directive to classify Tom Kabinet's conduct, the CJEU avoided addressing the interpretative challenges posed by the digital exhaustion debate. *Tom Kabinet* was criticised, in particular, for having adhered to a traditional, literal interpretation of the existing legislative framework and for having excluded - in a crystal-clear way - the extension of

software developers to swiftly revise their standard licences for the European market, ensuring the wording clearly distinguished the provision of a service (*i.e.*, not subject to exhaustion) from the sale of a good.

[183] Case C-263/18 *Nederlands Uitgeversverbond and Groep Algemene Uitgevers v. Tom Kabinet Internet BV, Tom Kabinet Holding BV, Tom Kabinet Uitgeverij BV* (hereafter '*Tom Kabinet*') [2019] ECLI:EU:C:2019:1111.

[184] ibid para 55.

[185] ibid para 33, where the Court emphasised that '[...] the crux of that question […] is whether such supply is subject to the rule of exhaustion of the distribution right provided for in Article 4(2) of that directive or whether, on the contrary, it falls outside such a rule, as expressly provided for in Article 3(3) of the directive in the case of communication to the public.'

[186] ibid para 58.

[187] ibid paras 42 and 56.

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Article 4(2) of the InfoSoc Directive to digital copies.[188] Yet, such a straightforward reliance on a structural distinction drawn by the InfoSoc Directive after the sector-specific 'outdated' and potentially misleading precedent set out by *UsedSoft* should be welcomed, since it enhances legal certainty.

To conclude: it seems obvious that in digital markets for copyright works, including the recorded music market which grew exponentially in the past two decades, exhaustion should logically be confined predominantly to 'distribution' of physical goods. From an economic point of view, this conclusion draws on the assumption that, as in the example of *Tom Kabinet,* physical goods and digital goods are not economically or functionally equivalent since dematerialised (*i.e.,* digital) copies do not deteriorate with use.[189] Moreover, for the logic of exhaustion to apply to digital goods, their sale or transfer shall be protected against file duplication or manipulation so that their ownership and authenticity can be traced and technically guaranteed, as in the case of non-fungible tokens (NFTs).[190] In this regard, it is important to recall that, for the legitimacy of 'digital exhaustion' under the InfoSoc Directive, both *UsedSoft* and *Tom Kabinet*, despite their opposite conclusions, confirmed that digital exhaustion requires the copy of the works that are being sold or transferred from an old to a new owner to be simultaneously deleted or made unavailable for the first owner.[191]

Exploitation of distribution rights

- Recording rights: Physical distribution of sound recordings is managed directly by record labels but then it is subject to 'exhaustion' of these rights at the time a record is placed on the market for the first time with the rightholder's authorisation.
- Publishing rights: composers' and publishers' distribution rights for physical copies of their works are bundled with reproduction/mechanical rights and licensed by CMOs.

2.2.4. Rental and lending

Starting to regulate an area of copyright law before it became part of international treaties, the European Community (EC) introduced the exclusive right to authorise or prohibit rental and lending for authors (in respect of the original and copies of his work) and performers (in respect of fixations of his performance), as well as for phonogram and film producers under the above-mentioned 1992 Rental, Lending and Neighbouring Rights Directive.[192] Article 2(1) of the 2006 Rental and Lending

[188] For a comprehensive analysis, see Caterina Sganga, Digital Exhaustion after Tom Kabinet: A Nonexhausted Debate in Tatiana-Eleni Synodinou and others (eds), *EU Internet Law in the Digital Single Market* (Springer 2021).
[189] Tom Kabinet (n 183) para 58.
[190] Anna Bigda-Wójcik, 'Unlocking the Digital Realm: Exploring NFTs as Catalysts for Digital Copyright Exhaustion' (2023) 18(11) Journal of Intellectual Property Law & Practice 808, 815-820.
[191] See *Usedsoft* (n 176) paras 42 and 70; *Tom Kabinet* (n 183) para 58.
[192] Art. 2 of the 1992 Rental, Lending and Neighbouring Rights Directive. Now Art. 3(1) of the 2006 Rental and Lending Rights Directive. Art. 4(1)(c) of the 1991 Software Directive already recognised, within the scope

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Rights Directive (which replaces Article 1(2)(3) of the previous 1992 Rental, Lending and Neighbouring Rights Directive) refers to 'rental' as the act of making a work available for use for a limited period, in exchange for either direct or indirect economic or commercial advantage. Conversely, the act of 'lending' is defined as making a work available for use for a limited period without any direct or indirect economic or commercial advantage, typically through establishments that are accessible to the public.[193] These acts, while essential for public access and dissemination of creative works, can negatively impact the economic interests of rightholders. To address this, the EU established two remuneration rights: (i) an equitable remuneration for rental (see *infra*) and (ii) the public lending remuneration[194]– aimed at safeguarding rightholders' interests while maintaining the balance between access and protection.

At the international level, the rental right was first recognised under the 1994 TRIPS Agreement, where it applied to making originals or copies of computer programs available to the public (Article 11). Building on this foundation, the WCTexpanded the rental right to cover not just computer programs, but also cinematographic works and works embodied in phonograms (Article 7(1)). The WPPT furthered this protection by extending this right to works and performances fixed on phonograms (Articles 9 and 13).

In contrast, the Berne Convention and the 1961 Rome Convention do not address rental rights, creating a gap in international frameworks. Meanwhile, public lending rights exist outside any international treaty or agreement altogether. In lieu of this omission, WIPO sought to address lending rights in the mid-1990s by proposing a protocol to amend the Berne Convention, but the initiative did not gain sufficient support from Member States.

2.2.5. Fixation (of performances)

The fixation right is a fundamental element of performers' legal protections which grants them exclusive control over the recording of their live performances. This right ensures that performers can prevent unauthorised fixation, as well as the subsequent use of the related sound recordings. At the international level, the 1961 Rome Convention explicitly recognises this right.[195] Similarly, the Article 14 of the TRIPS Agreement grants performers the right to prevent the fixation of their live performances, but its scope is narrower.[196] While the Rome Convention applies broadly to fixation on any medium, TRIPS restricts this protection to fixations made on phonograms. However, the use

of software, the exclusive right to authorise or prohibit 'any form of distribution to the public, including the rental, of the original computer program or of copies thereof.' This provision thus included rental as a subcategory of the distribution right.

[193] ibid Art. 2(1)(a)(b).

[194] Art. 6 of the 2006 Rental and Lending Rights Directive. Of lesser relevance for the music industry, this right will not be elaborated further. Art. 6 permits Member States to derogate from the exclusive public lending right, provided authors receive remuneration for such lending. This allows flexibility in balancing the interests of rightholders with cultural and educational objectives. Member States also have discretion to exempt specific categories of establishments from remuneration obligations.

[195] Rome Convention, Art. 7. Under Art. 7(1)(b), performers are empowered to prohibit the fixation of their unfixed (live) performances without their consent, extending this protection to any unauthorised recording regardless of the medium usedHowever, the scope of Art. 7 of the Rome Convention is significantly limited by Art. 19, which stipulates that the protections under Art. 7 do not apply to performers who have consented to the incorporation of their performance into a visual or audiovisual fixation.

[196] TRIPS Agreement, Art. 14.

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of the term "the possibility of preventing" in both Article 7 of the Rome Convention and Article 14 of the TRIPS Agreement creates notable ambiguity regarding the enforceability and scope of these rights. This language implies that contracting states are not obligated to implement robust legal measures to prevent unauthorised fixations. Instead, Member States are afforded discretion in determining whether and how to implement these protections, potentially leading to significant variations in their application under national laws.

As highlighted in the Records of the Diplomatic Conference on the International Protection of Performers, Producers of Phonograms and Broadcasting Organisations, the wording "the possibility of preventing" in the Rome Convention was deliberately chosen to accommodate specific legal systems, such as that of the UK.[197] This phrasing, which was opposed by several delegations, was retained to allow countries like the UK to maintain their existing frameworks, which provided protection against bootlegging through criminal statutes rather than recognising performers' rights as distinct from copyright. Czechoslovakia had proposed an alternative phrasing—"shall have the right to authorise or prohibit"—mirroring the language used in Article 10 of the Rome Convention for producers of phonograms and Article 13 for broadcasting organisations. Nonetheless, the Conference decided to preserve the wording from the Hague Draft, reflecting a compromise to accommodate diverse legal traditions.[198]

Unlike its predecessors, the 1996 WPPT clarifies and strengthens the economic rights of performers. Article 6(ii) of the WPPT explicitly grants performers exclusive rights to authorise the fixation of their unfixed performances, moving beyond the vague language of 'prevention' found in the two aforementioned treaties. This exclusive right ensures that no interference with performers' economic interests is permissible without their explicit consent, reflecting a shift toward more robust and enforceable protections.[199] Similarly, the Beijing Treaty on Audiovisual Performances (BTAP) adopts a parallel provision in Article 6(ii), which also grants performers the exclusive right to authorise the fixation of their unfixed performances.[200]

The legal definition of fixation is further clarified in international instruments. Article 2(c) of the WPPT defines 'fixation' as "the embodiment of sounds, or of the representations thereof, from which they can be perceived, reproduced, or communicated through a device."[201] Similarly, Article 2(b) of the BTAP defines 'audiovisual fixation' as "*the embodiment of moving images, whether or not accompanied by sounds or the representations thereof, from which they can be perceived, reproduced, or communicated through a device*."[202]

At the European level, while Article 2(b) of the InfoSoc Directive grants performers the exclusive right to authorise or prohibit the reproduction of the fixation of their performances, it does not explicitly

[197] International Labour Office, UNESCO and United International Bureaux for the Protection of Intellectual Property, 'Records of the Diplomatic Conference on the International Protection of Performers, Producers of Phonograms and Broadcasting Organizations' (1968) 43. For further details, see Daniel J Gervais, 'The Protection of Performers Under US Law in Comparative Perspective' (2015) 5(1) IP Theory 125, 125–126.
[198] ibid.
[199] WPPT, Art. 6. For further details on the WPPT's approach, see Fan Liu, 'Research on the Protection of Performers' Rights in the Network Platform' (2023) 5 International Journal of Frontiers in Sociology 105.
[200] BTAP, Art. 6.
[201] WPPT, Art. 2.
[202] BTAP, Art. 2.

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establish a distinct fixation right. This lack of clarity could lead to interpretative challenges in distinguishing between the initial act of fixation and subsequent acts of reproduction, thereby potentially fostering confusion between the two concepts. Nevertheless, the fixation right, as an autonomous right, is harmonised through Article 7 of the Rental and Lending Rights Directive (Directive 2006/115/EC).[203] This provision mandates that Member States grant performers the exclusive right to authorise or prohibit the fixation of their performances.[204] Additionally, broadcasting organisations are afforded the exclusive right to control the fixation of their broadcasts, whether these are transmitted by wire, air, cable, or satellite.[205] However, this right does not extend to cable distributors when they merely retransmit broadcasts made by other organisations.[206]

2.2.6. Rights to control derivative works

Authors shall enjoy the exclusive right to authorise or prohibit the translation, adaptation, or other alteration of their work is expressly recognised at international level under Articles 8 and 12 of the Berne Convention. These provisions create an international foundation for these protections.[207] This framework ensures that authors and their successors in title retain control over transformative uses of their works, including synchronisation, as a key aspect of their economic rights.

In the music sector, the right to control derivative works and or other transformative uses of musical compositions is exemplified by 'synchronisation' rights, also known as 'sync rights'. These entitlements refer to the exclusive right to use a musical composition in combination with images—whether static or dynamic—most commonly in visual media formats such as films, television shows, video games, or advertisements, to create cohesive audio-visual content. This right allows the rightholder to control how their musical works are paired with moving images, ensuring they receive due compensation for such uses. International copyright law does not explicitly recognise synchronisation rights as a distinct legal category. Instead, these rights are typically subsumed under the broader framework of adaptation rights conferred upon copyright owners by international treaties.

Where original, derivative works are afforded protection equivalent to that of the original works they transform, alter or incorporate. However, derivative works may constitute copyright infringement if they consist of transformative uses that require the prior consent of rightholders.[208] In the music sector, examples of derivative works include lyrics translations, musical arrangements, parodies, medleys, samples of sound recordings, etc. Furthermore, in today's daily practice of social media services, UGC is often a combination of users' photos or short videos with licensed digital music that

[203] Rental and Lending Rights Directive, Art. 7, replacing Art. 6 of the 1992 Rental, Lending and Neighbouring Rights Directive, which originally provided for these same rights, ensuring performers' and broadcasters' ability to control the fixation of their works.
[204] ibid Art. 7(1).
[205] ibid Art. 7(2).
[206] ibid Art. 7(3).
[207] Art. 8 of the Berne Convention for the Protection of Literary and Artistic Works (Paris Text 1971) prescribes that '[a]uthors of literary and artistic works protected by this Convention shall enjoy the exclusive right of making and of authorising the translation of their works throughout the term of protection of their rights in the original works.'; Art. 12 establishes that '[a]uthors of literary or artistic works shall enjoy the exclusive right of authorising adaptations, arrangements and other alterations of their works'.
[208] Renda and others, 'The Implementation, Application and Effects of the EU Directive on Copyright in the Information Society' (n 170) 53.

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the service provider makes available to its users for them to pair a recording and the related musical composition with their contents, so as to have a proper 'soundtrack'.

Moreover, in the film and in the audiovisual industries, which are not part of this Study, a well-established practice is that of clearing synch rights with a music publisher and a record producer for audiovisual authors to legitimately incorporate musical works and sound recordings in their works. This happens when film directors and producers do not rely (in whole or in part) on the work of composers who write *ad hoc* soundtracks for their cinematographic works**.** In this second case, the composer of the soundtrack, under the vast majority of EU Member States' copyright laws, acquires the legal status of co-author of the film work, retaining separate exploitation rights for the music soundtrack itself. Although there is no harmonisation of the concept of authorship for film works under EU law, Article 2(2) of Directive 2006/116/EC provides that the 70-year term of copyright protection after the author's death shall start lapsing from the death of the last surviving person among the principal director, the screenplay writer, the author of the dialogue and the soundtrack composer.[209]

Returning to derivative works, these rights are unharmonised at EU level. This copyright's field never raised the attention of EU lawmakers as a potential obstacle or distortion for cross-border or EU-wide exploitations of derivative works. This situation makes the afore-mentioned international obligations of EU Member States (all of which are members of international copyright agreements, including Berne) even more relevant. However, the fact that international harmonisation is weaker and less compelling for national lawmakers than the harmonisation pursued through EU directives leaves room for significant divergences and contrasts in the scope and nature of these rights across the Member States. Thus, each Member State retains the authority to define and regulate transformative uses and derivative rights, leading to diverse interpretations and protections across the EU.[210] For instance, in France, adaptation rights are subsumed under reproduction rights, thereby not considered an independent category of protection.[211] Conversely, Italy,[212] Germany,[213] and the United Kingdom[214] explicitly recognise adaptation rights as a distinct legal category, granting them autonomous protection separate from reproduction rights. This distinction underscores a more granular approach, emphasising the unique nature of transformative uses such as translations, arrangements, or other alterations of a work.

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[209] Directive 2006/116 on the term of protection of copyright and certain related rights, L 372/12, 27.12.2006 (which replaced the 1993 Term Directive), Art. 2(2): 'The term of protection of cinematographic or audiovisual works shall expire 70 years after the death of the last of the following persons to survive, whether or not these persons are designated as co-authors: the principal director, the author of the screenplay, the author of the dialogue and the composer of music specifically created for use in the cinematographic or audiovisual work.'

[210] Renda and others, 'The Implementation, Application and Effects of the EU Directive on Copyright in the Information Society' (n 170) 53-54.

[211] Art. L.122-4 of the French CPI establishes that any representation or reproduction of a protected work without the explicit consent of the author or their rights holders constitutes an infringement. This provision equally extends to acts such as translation, adaptation, transformation or arrangement.

[212] The adaptation right and the right to elaborate upon a musical work, recognized as exclusive rights of the author under Arts. 18 and 61 of the ICA.

[213] Under § 23(1) of the German Copyright Act, adaptations or other transformations of a work, 'in particular, of a melody', by a third party may only be published or exploited with the author's consent.

[214] CDPA, Sect. 21.

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In terms of applicable EU law provisions, while Article 4(1)(b) of the Software Directive[215] and Article 5(b) of the Database Directive grant exclusive rights concerning translation and adaptation, these provisions are sector-specific and apply only to software and databases, leaving other categories of copyright works outside their protections. The only provisions in the InfoSoc Directive that deal, indirectly, with these rights are copyright exceptions to the adaptation right. A crystal-clear example lies in Article 5(3)(k), which explicitly lists exceptions for caricature, parody, and pastiche - whose role was strengthened by the inclusion of these exceptions among the "specially protected" ones under Article 17 of the DSM Directive. These acts potentially covered by exceptions, by their nature, involve transformative uses and therefore fall squarely within the scope of the author's exclusive adaptation right. However, the inclusion of these exceptions alongside other narrowly defined limitations referred, under Article 5(3), to the reproduction and communication to the public rights raises questions about the Directive's intent and coherence.[216]

Last but not least, one should consider that there is a potential overlap between the scope of the right to restrict derivative works, the subject matter of the author's moral right to the integrity of a work, and the legitimate exercise of copyright exceptions that presuppose a partial reuse, modification or alteration of an original work without the right holder's consent. In jurisdictions that are traditionally very protective of authors' interests, such as France, the right to authorise derivative works falls often within the realm of moral rights rather than economic rights. Scholarly commentary suggests that associating music with images that contradict its intended spirit may constitute a violation of the author's moral rights.[217] Moreover, according to some scholars, the EU legislature has deliberately refrained from harmonising the adaptation right, a decision that may be attributed to the "strong moral rights undertone" that characterises issues related to adaptation.[218] Certainly, this situation can create legal uncertainty, especially for cross-border uses of adapted works in the digital environment.

Exploitation of derivative works (including synch rights)

- Recording rights *:* Record producers' synch rights and other rights to authorise derivative works are licensed individually.

[215] Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs (Software Directive) [2009], OJ L 111/16, Art. 4(1)(b).

[216] Mazziotti, *EU Digital Copyright Law and the End-User* (n 86).

[217] André R. Bertrand, *Droit d'auteur*, (3rd edn, Dalloz 2010) 248. Synchronisation rights (*droit de synchronisation*), while not explicitly codified in French law, are recognized in practice within the music and audiovisual industries. These rights, governing the use of pre-existing music in audiovisual works like advertisements, typically require specific authorisation despite their unclear legal basis. Case law has established that adaptation rights, derived from reproduction rights, fall under the author's transferable economic rights but must be exercised in accordance with the author's moral rights. The Paris Court of Appeal confirmed that incorporating music into an advertisement engages the author's moral rights and necessitates their authorisation, without affecting the economic nature of adaptation rights. See CA Paris Pôle 5 ch. 2, 19 mars 2010, *Saga c/ RAM et Universal*.

[218] Mireille van Eechoud and others (n 85) 84.

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- Publishing rights *:* composers' and publishers' synch rights and other rights to authorise derivative works are negotiated and licensed individually. CMOs sometimes end up managing synchronisation rights so as to cover UGC on social media platforms.

2.3. Remuneration rights

Unlike exclusive rights, which give rightholders the right to authorise or prohibit specific uses of their protected works, the rights to remuneration provided in several EU directives from 1992 onwards intend to protect the income of music creators by targeting activities and exploitations that fall either under a copyright exception or under a statutory licensing scheme. In these directives, as we will see, creators' remuneration is expected to be 'equitable' or 'fair.

In EU copyright law, the concept of 'fairness' and 'fair' remuneration of rightholders has been a central theme of debate for over three decades. A chronological examination of the historical development and evolution of the European institutions' policy discourse in the music sector conducted within the Fair MusE project reveals that since the early 1990s, several directives — despite variations in terminology— have sought to promote equitable or 'fair' remuneration of authors and performers.[219] As emphasised above, fair remuneration is one of three main dimensions accompanying and permeating the concept of 'fairness' in the copyright-related EU legal and policy documents from the mid-1990s to present. The two other dimensions being the enhancement of copyright protection for the benefit of rightholders and the balancing of different rights and interests to achieve a fairer music industry. Although this conclusion holds true for all the three EU institutions involved in the legislative process (*i.e.*, the European Commission as a proponent; the European Parliament and the Council as co-decisors), Fair MusE's language analysis in D2.1 clearly shows that the Parliament was by far, and still is, the most engaged policy maker from a fairness-oriented perspective. Its efforts have primarily been achieved through the harmonisation of non-waivable rights and other measures designed to allocate a share of the revenues generated from a given exploitation of copyright works to individual creators, with the additional goal of safeguarding cultural diversity.

2.3.1. Equitable remuneration for rentals and lending of phonograms

When harmonising the exclusive rights to authorise the rental and lending of sound recordings and films, the 1992 Rental, Lending and Neighbouring Rights Directive also introduced a non-waivable right to equitable remuneration for authors and performers who transferred or assigned their own rental rights to a phonogram or film producer (cf. Article 4 of the Rental, Lending and Neighbouring Rights Directive). This provision functions as a measure protecting the income of individual rightholders who systematically transfer or assign the rights they hold under Article 3(1)(a-b). The

[219] Vlassis and others (n 24).The research methodology employed a combination of quantitative lexicometric analysis and qualitative in-depth study of 121 EU legal and policy documents from the mid-1990s to present, allowing for a thorough examination of the diachronic framings of 'fairness' across various EU institutions.

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right to an equitable remuneration for rental aims to compensate for a weaker bargaining position during contract negotiations, most notably for performers.[220]

This remuneration right, mandatory under EU *acquis*, is instead optional in the WCT, the WPPT, and the Beijing Treaty.[221] Within the EU, Member States are free to decide whether to implement this right through mandatory provisions in contracts, collective agreements, or collective rights' management.[222] Paired with technological developments – whereby the rental right only applies to physical mediums –, the equitable remuneration for rental amounts to low revenues in recent years.[223]

Exploitation of equitable remuneration for rental rights

- Individual management: Producers and performers may negotiate rental rights directly for high-value agreements. Yet, this approach contradicts the objective of Article 5 of the 2006 Rental and Lending Rights Directive, which aims to counterbalance performers' weaker bargaining position in negotiations with producers.
- Collective management: Article 5(3) of the 2006 Rental and Lending Rights Directive grants Member States the option to assign the administration of these remuneration rights to collecting societies. Consequently, some national laws mandate collective management of equitable remuneration for rental rights. In this regard, CMOs facilitate the distribution of equitable remuneration through collective mechanisms.

2.3.2. Performers' and record producers' rights for secondary uses of sound recordings

The right to single equitable remuneration for broadcasting and communication to the public of phonograms is an important mechanism to protect the economic interests of performers and phonogram producers in the broadcasting sector. This remuneration right works as a compulsory licence, since users must provide remuneration to performers and producers when they use a sound recording directly for broadcasting or any other form of communication to the public for a commercial

[220] Silke von Lewinski, 'The EC Rental Rights Directive' (1996) 1 Int'l Intell Prop L & Pol'y 203, 207.

[221] Art. 7(3) of the WCT, Art. 9(2), 13(2) of the WPPT, Art. 12(3) Beijing Treaty. On the EU's efforts to also introduce this right in third countries by ways of including it in trade agreements, see Christophe Geiger and Oleksandr Bulayenko, 'Creating Statutory Remuneration Rights in Copyright Law: What Policy Options under the International Legal Framework?' in Henning Grosse Ruse-Khan and Axel Metzger (eds), *Intellectual Property Ordering beyond Borders* (CUP 2022), 433-434.

[222] Von Lewinski (220) 208-209. See also Vlassis and others (n 24) 38-55. By analysing EU legislation and policy measures adopted from 1992 to 2022, the authors trace the origins of the concept of 'fairness' to early efforts to harmonise neighbouring rights. The non-waivable right to equitable remuneration for authors and performers transferring their rental rights in phonograms, introduced by Art. 4 of the 1992 Rental, Lending and Neighbouring Rights Directive, is a meaningful example in their analysis of 'fairness' under EU copyright law.

[223] For performers, see AEPO-ARTIS, 'Performers' Rights in Europe: Situation and Elements for Improvement' (2022) 66. For AEPO-ARTIS, the right should be extended to the digital environment and be subject to mandatory collective management.

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purpose.[224] The same way as the remuneration right provided for rentals and lending of sound recordings, this right is complementary to the exclusive rights awarded to performers and producers under the EU neighbouring rights *acquis.*

2.3.2.1. International copyright law

This right is broadly recognised at the international level as a result of obligations embodied in Article 12 of the 1961 Rome Convention and Article 15 of the 1996 WPPT.[225] However, its scope and implementation vary significantly across the globe. In 1961, Article 12 of the Rome Convention first introduced the foundational obligation for broadcasters to pay single equitable remuneration to performers, producers, or both. Even though Article 12 explicitly provided choice as to who the beneficiary of the remuneration could be, the intent of the Contracting Parties was to ensure sharing between the two categories of rightholders, as this provision states that Member States should lay down the conditions of sharing remuneration in domestic law when an agreement between the parties is not reached.[226]

Considering the simultaneous uses of multiple music repertoires across the world, and the fact that this remuneration is collected at national level, the identification of relevant rightholders on the grounds of the principle of reciprocity is very relevant. To this end, the Rome Convention details the rules of formal reciprocity[227] and material reciprocity.[228] In this context, *formal* reciprocity means 'national treatment', according to which the remuneration rights applicable in a given Member State will apply equally to nationals and nationals of third states. *Material* reciprocity, instead, means that the protection at issue can be limited or denied in state A for nationals or residents of state B, if state B does not grant these rights in its jurisdiction as a result of a formal reservation.[229]

The single remuneration obligation was upheld, reinforced and extended to new Contracting Parties in 1996 via Article 15 of the WPPT. This Treaty also provides that Contracting Parties may determine the *share* of remuneration between the performers and producers under national law if no agreement between them is reached.[230] Moreover, the same way as the Rome Convention, Article 15(1) extends the scope of this remuneration right to cases of direct *and indirect* uses of phonograms.[231]

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[224] Samuel Ricketson, 'WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment' (2003) WIPO Doc No. SCCR/9/7, 45.

[225] From an EU law perspective, although the EU itself is not a party to the Rome Convention, nearly all its Member States—the only exception being Malta—have acceded to it, thus ensuring the relevance of the applicability of these provisions in this context. See the list of contracting parties to the Rome Convention, available on the WIPO website at <https://www.wipo.int/wipolex/en/treaties/ShowResults?search_what=C&treaty_id=17>.

[226] Rome Convention, Art. 12.

[227] ibid Art. 16(1)(a)(i).

[228] ibid Art. 16(1)(a)(iv).

[229] Ole-Andreas Rognstad, 'Performing artists' right to remuneration – on the junction of external treaty competence, national treatment, material reciprocity and fundamental rights: RAAP' (2021) 58(5) Common Market Law Review 1523, 1524.

[230] John Adrian Lawrence Sterling, *World Copyright Law: Protection of Authors' Works, Performances, Phonograms, Films, Video, Broadcasts and Published Editions in National, International and Regional Law* (2nd edn, Sweet & Maxwell 2003) 739.

[231] WPPT, Art. 15(1). This means, for instance, that this remuneration right extends to cases where a phonogram is initially made available online and later broadcast or communicated to the public.

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Interestingly, the WPPT differs from the Rome Convention because it does not contemplate formal reciprocity (*i.e.*, national treatment). Article 15(3) allows Contracting Parties the option to restrict, limit or even entirely deny the application of the right to equitable remuneration for broadcasting uses.[232] According to Article 4(2) of the WPPT, when a Contracting Party makes use of this reservation, this Party automatically triggers the application of material reciprocity so that other Contracting Parties are not required to extend protection to nationals of the Party that has made the reservation for the specific uses covered by such reservation.[233]

This flexibility granted by Article 15(3) of the WPPT reflects continuity with the Rome Convention, which similarly allowed Contracting States to restrict, modify, or opt out of applying this right under Rome's Article 16(1)(a).[234] This provision has therefore enabled other WPPT Contracting States, such as the US and Australia, to limit or to exclude this right from their copyright frameworks.[235]

2.3.2.2. EU law

In 1992, Article 8(2) of the 1992 Rental, Lending and Neighbouring Rights Directive harmonised the right of single equitable remuneration in the EU and made it mandatory for Member States. This provision, which remained unaffected in the recasting of text adopted through the 2006 Rental and Lending Rights Directive, explicitly provides that remuneration paid by the broadcasters shall be shared between the relevant performers and producers, and that Member States may lay down the conditions of collection management and sharing remuneration in national law, in the absence of a sharing agreement.[236]

Recital 5 of the Directive in its 2006 version clarifies the context and the objectives of this right: "*The creative and artistic work of authors and performers necessitates an adequate income as a basis for further creative and artistic work, and the investments required particularly for the production of phonograms and films are especially high and risky. The possibility of securing that income and recouping that investment can be effectively guaranteed only through adequate legal protection of the rightholders concerned.*"[237]

For the sake of clarity, the remuneration right under Article 8(2) covers acts of exploitation that go beyond mere broadcasting. Accordingly, the obligation to pay an equitable remuneration is not limited to radio and television stations but extends to any user who communicates a sound recording to the public. In two rulings delivered in 2012, the CJEU assessed the scope of this right in practice. The first case concerned a dispute between the Italian record producers' collecting agency Società

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[232] ibid Art. 15(3).
[233] ibid Art. 4(2).
[234] Rome Convention, Art. 16(1)(a).
[235] Australia has expressly declared, pursuant to Art. 16(1)(a) of the Rome Convention, that it will not apply the provisions of Art. 12 (see WIPO Lex). The US, which is not a member of the 1961 Rome Convention, has made a declaration under Art. 15(3) of the WPPT stating that it will apply the provisions of Art. 15(1) WPPT 'only in respect of certain acts of broadcasting and communication to the public by digital means for which a direct or indirect fee is charged for reception, and for other retransmissions and digital phonorecord deliveries, as provided under United States law' (see WIPO Lex - WPPT Notification).
[236] Rental and Lending Rights Directive, Art. 8(2) - which repealed the 1992 Rental, Lending and Neighbouring Rights Directive.
[237] ibid Recital 5.

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Consortile Fonografici (SCF) and dentist Marco Del Corso.[238] Del Corso had installed a radio in his private dental practice to play background music in the waiting area without paying royalties to SCF. The collecting society claimed that the dental practice business communicated sound recordings to the public, thereby justifying the demand for an equitable remuneration. The second case involved collecting society Phonographic Performance (Ireland) Limited (PPI) in a dispute against the Republic of Ireland.[239] PPI argued that the Irish government breached EU law by adopting and maintaining a legal provision that exempted hotel operators broadcasting music in hotel rooms from the payment obligation under Article 8(2).

In both cases, the CJEU relied on the criteria established in its previous case law (see *supra*, §2.2.2.2) to determine whether hoteliers or dental practices can be deemed to communicate sound recordings to the public. Notably, the Court's reasoning placed particular emphasis on the profit-making nature of the sound recording's use, given the inherently compensatory purpose of the remuneration right.[240] In light of this, the judges sided with Del Corso, as his use of sound recordings had no effect on the number of patients in his practice or his overall revenue. Instead, patients were exposed to the sound recordings purely "by chance", with no intentional or selective choice of the music being played.[241] In contrast, in the Irish case, the Court held that the possibility of listening to music in hotel rooms enhances the value and appeal of the guests' stay, thereby justifying an increase in the overall room rate by the hotel.[242] Consequently, consistent with the CJEU's 2006 judgment in *Rafael Hoteles*, when hoteliers provide TVs or radios in hotel rooms, they indeed communicate sound recordings to the public. This means that they cannot be exempted by national law from the obligation to pay a single equitable remuneration under Article 8(2).

Eight years later, the *RAAP* case raised an issue of material reciprocity in the implementation of these rights and in the payment of remuneration to non-EU based artists.[243] In this ruling, the CJEU provided further interpretation to Article 8(2) of the Rental and Lending Rights Directive, particularly with reference to defining the scope of 'relevant performers' and clarifying the influence of the principle of reciprocity when viewed together with the WPPT. The case involved two CMOs operating in Ireland: one representing music performers - Recorded Artists Actors Performers Ltd (RAAP) - and one representing record labels (PPI). These societies disagreed as to whether the remuneration collected on the grounds of Article 8(2)'s compulsory licensing scheme from radio and TV broadcasters should have been paid to an artist based in Ireland who was not an Irish national or a resident of a European Economic Area (EEA) Member State. The Court ruled in favour of RAAP. Yet, in doing so, this ruling opened a Pandora's box in which the overall remuneration collected in the EEA on the grounds of Article 8(2) should be allocated, proportionately, also to citizens and residents of jurisdictions where this right does not subsist, like the US.

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[238] *SCF* (n 149).

[239] Case C-162/10 *Phonographic Performance (Ireland) Limited v Republic of Ireland* (hereafter 'Phonographic Performance') [2012] ECLI:EU:C:2012:141.

[240] *SCF* (n 149) para 89; *Phonographic Performance* (n 239) para 36.

[241] *SCF* (n 149) para 97-98.

[242] *Phonographic Performance* (n 239) para 44.

[243] Case C-265/19 *Recorded Artists Actors Performers Ltd v Phonographic Performance (Ireland) Ltd and others* [2020] ECLI:EU:C:2020:677 (hereafter '*RAAP*').

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Interpreting Article 8(2) in light of Article 4(2) and Article 15 of the WPPT, the CJEU held that this EU law provision precludes a Member State from restricting equitable remuneration solely to performers or producers based in the EEA. This would conflict with the EU's obligations under international agreements like the WPPT, which require equal treatment for performers from contracting states. The court argued that, while third states may enter reservations limiting equitable remuneration, such limitations do not automatically justify similar restrictions by EU Member States unless explicitly legislated.[244] According to this ruling, Member States cannot unilaterally limit remuneration rights without clear EU-level provisions. Since Article 8(2) mandates that the remuneration must be "shared" between performers and producers, national laws that exclude certain performers (e.g., non-EEA nationals) or allocate the entire remuneration to producers contravene this requirement. Any limitation on the right to equitable remuneration must comply with Article 52(1) of the Charter of Fundamental Rights of the European Union which includes ensuring the limitation is lawful, respects the essence of the right, and is proportionate to the objective pursued.[245]

In the very recent *Kwantum* case,[246] the CJEU relied very closely on the *RAAP* judgment as it restated that the EU legislature holds exclusive competence to define any limitations on copyright rights under the harmonised framework,[247] and so Member States may not unilaterally invoke the principle of material reciprocity.[248] The main question addressed in *Kwantum* involved the conflict between Article 2(7) of the Berne Convention - which permits Contracting Parties to define the scope of their copyright protection for applied art based on material reciprocity - and the InfoSoc Directive, which fully harmonises specific aspects of EU copyright law, including the exclusive rights of reproduction[249] and distribution.[250] Here, the Court found that allowing Member States to individually apply Article 2(7) of the Berne Convention would undermine the objectives of the InfoSoc Directive, which aimed to avoid fragmentation of the internal market by ensuring legal consistency and the harmonisation of copyright law.[251] Yet, as remarked in legal scholarship, it is difficult to justify the CJEU's extension of copyright protection to all works outside the EU by relying on the absence of a specific provision in the InfoSoc Directive governing its international application. This interpretation is highly problematic as the InfoSoc Directive was not designed to harmonise the concept of "work" in a way that the question of its international application should have never been triggered.[252]

Thus, the *RAAP* ruling, and the restatement of its main finding in *Kwantum*, prioritised EU harmonisation and fundamental rights at the expense of the financial interests of the European recorded music industry and, in particular, of European performers and their organisations. The

[244] ibid para 75, cf. paras 70–71.
[245] ibid para 86.
[246] Case C-227/23 *Kwantum Nederland BV and Kwantum België BV v Vitra Collections AG* [2024] ECLI:EU:C:2024:914 (hereafter '*Kwantum*').
[247] As alluded to in *RAAP*, such legislative power is provided for and must be in accordance with Art. 52(1) and Art. 17(2) of the EU Charter of Fundamental Rights; see also *Kwantum* para 69.
[248] ibid para 79.
[249] InfoSoc Directive, Art. 2.
[250] ibid Art. 4(1).
[251] *Kwantum* (n 246), para 63 referring to Recitals 6 and 9 of the InfoSoc Directive.
[252] P Bernt Hugenholtz, 'Everything is harmonized. The CJEU's decision in Kwantum v. Vitra' (*Kluwer Copyright Blog*, 6 November 2024) <https://copyrightblog.kluweriplaw.com/2024/11/06/everything-is-harmonized-the-cjeus-decision-in-kwantum-v-vitra/>.

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CJEU's stance on material reciprocity is deeply alarming and problematic, as it diverts remuneration away from EU national performers to third-country rights holders.[253] This leads to lower payments for European performers especially in those EU Member States where the US repertoires prevail over domestic ones and proportionately gain higher remuneration fees.[254]

What is more, European performers' revenues face additional losses coming from another judgment of the CJEU (*Atresmedia* v *AGEDI and AIE*) that ended up repealing their equitable remuneration rights for the use of performances in audiovisual media, such as TV programs, commercials, and music videos.[255] The key question for the CJEU in this case was whether a sound recording can still be treated as a 'phonogram' when it is synchronised and incorporated into audiovisual content. As EU copyright law does not define the notion of 'phonogram', the court had to refer to the international copyright framework. In this respect, Article 2(b) of the WPPT explicitly stipulates that sound recordings embedded in audiovisual or cinematographic fixations are excluded from the definition of 'phonograms'.[256] Thus, according to the CJEU, Atresmedia's TV broadcasts should not trigger the obligation under Article 8(2). The judges held that, instead of relying on Article 8(2), record labels and performers can secure appropriate remuneration through the negotiation of paid synchronisation licenses.[257] This judgment sparked significant debate, especially among performers' organisations, on the assumption that performers are unlikely to receive a fair share of this "synch" licensing fees under the buy-out contracts they sign with record labels.[258] Conversely, the remuneration right under Article 8(2) would ensure a fairer distribution, with a 50:50 split regulated by some national copyright laws or shaped by established industry customs.[259]

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[253] It has been estimated that, due to the *RAAP* ruling, approximately EUR 125 million is diverted annually to third-country rights holders—income that would have otherwise supported EU performers: see IMPALA, 'Time to wake up - the EU sleepwalking into a financial and cultural disaster for Europe's music sector' (*IMPALA*, 15 March 2023) <https://impalamusic.org/timetowakeup/>.

[254] Etienne Gabriel Valk, 'The CJEU's Unintelligible Impairment of the Financial Health of EU Performers: Ever-Increasing Suspense in Neighbouring Rights' (2024) 73(9) GRUR International 850, 851.

[255] See C-147/19 *Atresmedia Corporación de Medios de Comunicación SA v AGEDI, AIE* [2020] ECLI:EU:C:2020:791. This ruling concerned a media company, Atresmedia, which operates multiple TV channels in Spain. Atresmedia refused to pay remuneration under Article 8(2) to the collecting societies Entidad de Gestión de Derechos de Propiedad Intelectual (AGEDI) and Sociedad de Artistas Intérpretes o Ejecutantes (AEI) for sound recordings lawfully embedded in its transmitted audiovisual content.

[256] Art. 2(b) of the WPPT reads as follows: '"phonogram" means the fixation of the sounds of a performance or of other sounds, or of a representation of sounds, other than in the form of a fixation incorporated in a cinematographic or other audiovisual work.'

[257] Case C-147/19 *Atresmedia Corporación de Medios de Comunicación SA v AGEDI, AIE* [2020] ECLI:EU:C:2020:791 para 46.

[258] AEPO-ARTIS, 'Performers' Rights Study' (November 2022) 27 <https://www.aepo-artis.org/wp-content/uploads/2022/11/AEPO-ARTIS_Performers_Rights_Study_2022_digital.pdf>.

[259] ibid 23. See also Lucie Guibault, Olivia Salamanca and Steph van Gompel, 'Remuneration of authors and performers for the use of their works and the fixations of their performances' (2015) 47 < https://op.europa.eu/en/publication-detail/-/publication/c022cd3c-9a52-11e5-b3b7-01aa75ed71a1>. Dutch copyright law provides an example of a statutory 50/50 split in Article 7(4) of the Dutch Related Rights Act, which states: 'The remuneration shall accrue to both the performer and the producer or their successors in title and shall be shared equally between them.' In contrast, §76(3) of the Austrian Copyright Act mandates this equal distribution only when the performer and the record producer have not agreed otherwise.

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Secondary uses of sound recordings (broadcasting and communication to the public)

- In all Member States except Malta and Luxembourg, the exploitation of these remuneration rights occurs through mandatory collective management, which streamlines collection and equitable distribution of fees.[260] In the remaining jurisdictions, performers and producers may independently negotiate remuneration for broadcasts.
- As national laws do not consistently extend the remuneration right under Article 8(2) to *all* forms of communication to the public, the amount CMOs can collect differs across jurisdictions.[261]

2.4. Moral rights

Most EU Member States incorporate the concept of 'authorship' in their laws that closely follows the *droit d'auteur* model emerging from post-revolutionary France in the 19th century. This model clearly reflects a natural rights perspective where copyright law places an exceptionally strong emphasis on the protection of the personal and artistic link that exists between a work and its author. This protection is deeply rooted in a concept of literary and artistic property that considers creativity and creative works as tangible manifestations of an author's personality and treats certain non-economic prerogatives as un-waivable personality rights. This means that such protection subsists independently of an author's economic rights, and persists even if the author has transferred her copyright ownership to another party, thereby ensuring that the work's integrity remains aligned with the creator's original vision.[262] Moral rights recognise the inherent connection between an author and their work, viewing creative expression as an extension of the author's personality, dignity, and intellectual legacy, rather than solely as a tradable commodity.

In contrast to economic rights, moral rights remain completely unharmonised under EU law. As these rights remain outside the scope of the most comprehensive copyright harmonisation instrument at the EU level, *i.e.* the InfoSoc Directive, their recognition and scope still vary significantly among EU Member States.[263] As a preliminary remark and distinction, one shall consider that EU members

[260] AEPO-ARTIS Study (n 258) 24.

[261] ibid 25, highlighting French law, which grants the equitable remuneration right exclusively to "communication in public places" (see Art. L.214(1) French CPI).

[262] Päivi Hutukka, 'Copyright Law in the European Union, the United States and China' (2023) 54 IIC 1053. See for further details, Henry Hansmann and Marina Santilli, 'Authors' and artists' moral rights: a comparative legal and economic analysis' (1997) 26 The Journal of Legal Studies 109.

[263] As acknowledged in Recital 19 of the InfoSoc Directive: 'The moral rights of right holders should be exercised according to the legislation of the Member States and the provisions of the Berne Convention for the Protection of Literary and Artistic Works, of the WCT and of the WIPO Performances and Phonograms Treaty. Such moral rights remain outside the scope of this Directive.' In this context, it has been argued that the absence of harmonisation of moral rights at the EU level is due to their limited impact on the functioning of the Internal Market. See Commission, 'Staff Working Paper on the Review of the EC Legal Framework in the

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such as Ireland and, until Brexit, the UK,[264] clearly followed a copyright law model where moral rights shall be "asserted" in order to be enforceable. The existence of this formal requirement or obstacle openly contradicts the continental-European idea of moral rights as *personality* rights, especially if one considers that in both these jurisdictions these rights can be waived, even without an instrument in writing.[265] In continental-European countries with a strong 'authors' rights' imprint, such as France and Germany, instead, the rights at issue are non-waivable and protected in depth. In a nutshell, France can be regarded as the birthplace of moral rights.[266] French law incorporates a robust fourfold framework in its Intellectual Property Code (CPI) by providing several categories of moral rights. Firstly, a right of attribution (or, according to an old-fashioned terminology, "paternity right") which aims to foster respect for the author's name and protect the link between the author and her work.[267] Secondly, *a* right of controlling disclosure, which reserves the right to determine the method and the conditions for the publication of a work to the author.[268] Thirdly, a right of retraction or withdrawal, which allows the author to remove a copyright work from circulation,[269] and finally a right of integrity,

Field of Copyright and Related Rights' (19 July 2004) SEC(2004) 995, 16 <https://edz.bib.uni-mannheim.de/www-edz/pdf/sek/2004/sek-2004-0995-en.pdf>.

[264] CDPA, Sect. 78.

[265] In the UK at least, the right of attribution is not infringed unless the author asserts their right through an instrument in writing signed by the author: see CDPA, Sect. 77(1). Once asserted, any exploitation of the work must ensure to identify the author. The right of integrity, instead, is enforceable without the need for assertion. Moral rights in the UK are non-transferable; however, they can be waived through an instrument of writing signed by the author who is surrendering their moral rights. Waivers may relate to specific works or even future works of the author. They may be conditional, unconditional or even subject to revocation: see Sect. 87(2),(3). Furthermore, Sect. 87(4) of the CDPA expressly states that nothing in Chapter IV precludes the operation of 'contract or estoppel in relation to an informal waiver'. Some scholars argue that the logical implication is that an author could waive their moral rights, not only through formal means but also via contract or estoppel which do not necessarily have to occur through written mechanisms, since oral contracts are legally binding: see Jonas Brown-Pedersen, 'The Inadequacy of UK Moral Rights Protection: A Comparative Study on the Waivability of Rights and Recontextualisation of Works in Copyright and Droit D'auteurs Systems' (2018) 3 LSE Law Review 115, 122. The Irish approach mirrors this, as Sect. 116(2) of the Copyright and Related Rights Act 2000 requires the same written formality, with identical attention to informal waivers under Sect. 116(4).

[266] See Ricketson and Ginsburg (n 74) 584-585. For further details, see Alain Strowel, *Droit d'auteur et copyright, Divergences et convergences* (Bruylant et Paris, L.G.D.J.: Bruxelles 1993) 722. Regarding the importance of moral rights under French law, it is crucial to refer to the wording of Art. L.111-1 of the French CPI: 'The author of a work of the mind shall enjoy in that work, by the mere fact of its creation, an exclusive incorporeal property right which shall be enforceable against all persons. This right shall include attributes of an intellectual and moral nature as well as attributes of an economic nature' - see the English translation of this provision made available by WIPO at <https://wipolex-res.wipo.int/edocs/lexdocs/laws/en/fr/fr467en.html>. According to some French scholars, the order in which these faculties are listed in the provision is not accidental. It is well-established in the French legal system that the author's moral rights take precedence over economic rights: see Michel Vivant and Jean-Michel Bruguière, *Droit d'auteur et droit voisins* (4th edn, Dalloz 2019) 445.

[267] See Art. L.121-1, in its entirety: 'An author shall enjoy the right to respect for his name, his authorship and his work. This right shall attach to his person. It shall be perpetual, inalienable and imprescriptible. It may be transmitted mortis causa to the heirs of the author. Exercise may be conferred on another person under the provisions of a will.'

[268] See Art. L.121-2(1): 'The author alone shall have the right to divulge his work. He shall determine the method of disclosure and shall fix the conditions thereof.'

[269] See Art. L.121-4(1): 'Notwithstanding assignment of his right of exploitation, the author shall enjoy a right to reconsider or of withdrawal, even after publication of his work, with respect to the assignee.'

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which enables authors to prevent alterations or other modifications of their works which could harm their honour or reputation.[270]

Germany, similarly, offers moral rights protections that exceed the Berne Convention standards and organises them under a detailed and nuanced framework comprising three main components. Specifically, authors are entitled to: *(i)* decide whether and how they wish to be attributed;[271] *(ii)* safeguard the integrity of their work by prohibiting any "derogatory treatment" of it that could prejudice their, the authors', legitimate interests in the work;[272] and *(iii)* determine whether and how their work should be published.[273] Notably, this third right, although not particularly relevant to musical compositions, even extends to the disclosure of the work's *content*, provided that it or its main ideas have not previously been lawfully published.[274] Moreover, the German "Urheberrecht" grants a unified author's right that combines both personal and exploitation rights, since moral and economic interests are considered to be so closely intertwined that they cannot be separated.[275] This monistic approach is evident in the German Copyright Act, which emphasises that "the author's right protects the author with regard to his intellectual and personal connections with the work and the

[270] See Art. L.121-1 (n 235): 'An author shall enjoy the right to respect for [...] his work.'

[271] See §13 of the German Copyright Act: 'The author has the right to be identified as the author of the work. The author may determine whether the work is to bear a designation of authorship and which designation is to be used.'

[272] See §14 of the German Copyright Act: 'The author has the right to prohibit the distortion or any other derogatory treatment of his or her work which is capable of prejudicing the author's legitimate intellectual or personal interests in the work.'

[273] See §12(1) of the German Copyright Act: 'The author has the right to determine whether and how his or her work is to be published.'

[274] See §12(2) of the German Copyright Act: 'The author reserves the right to communicate or describe the content of his or her work to the public as long as neither the work nor the essential content or a description of the work has been published with his or her consent.'

[275] Aleksei Kelli and others 'The Exercise of Moral Rights by Non-Authors' (2014) 6 Journal of the University of Latvia Law 114; Stefan Bechtold and Chrstian Engel, 'The valuation of moral rights: a field experiment' (2017) Preprints of the Max Planck Institute for Research on Collective Goods Bonn 2017/4, 5. The monistic approach in German copyright law is also the reason why both economic and moral rights expire simultaneously.

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use of the work."[276] Other western European jurisdictions, such as Italy, [277] Spain,[278] and Portugal,[279] follow mostly the French model. Conversely, EU countries such as Finland,[280] Sweden,[281] Denmark,[282] and Luxembourg,[283] limit recognition of these rights to the minimum requirements set out under Article 6-*bis* of the Berne Convention: the rights *"to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation*".[284]

The following subsections provide a quick overview of the main features of the rights to attribution (§2.4.2) and integrity (§2.4.3) and their protection over time (§2.4.4). Although 'attribution' and

[276] See § 11 of the German Copyright Act.

[277] The influence of the French droit d'auteur model on the Italian copyright system stems from the transposition of statutes enacted in pre-unitary Italy in the early 19th century into the legislative acts adopted after 1865. The 1836 Codice Albertino, the first Italian copyright code in the Kingdom of Piedmont and Sardinia, emphasised the protection of authors' intellectual property, centering on the author as the owner of their intellectual work. Moral rights were first codified in the Royal Legislative Decree of 7 November 1925, n. 1950, which outlined authors' rights to the paternity and integrity of their works (s. 16), a similar framework to the current protection. Additionally, the 1925 decree granted authors the right to withdraw their works from circulation for moral reasons, with the obligation to compensate publishers and printers (s. 15, corresponding to the current Art. 142 ICA). These moral rights were expanded in the 1941 ICA, which grants authors perpetual rights over the paternity and integrity of their works (Art. 20 ICA), the right to disclose their identity when works are published anonymously or pseudonymously (Art. 21 ICA), the right to keep works undisclosed (Art. 24 ICA), and the right to withdraw works from circulation when serious moral interests are involved (Art. 142 ICA). For further details, see Giuseppe Mazziotti, 'Moral Rights in Italy: 'Ieri, Oggi e Domani' — A Fabrizio Leonelli, in memoriam' (2019) 14 Journal of Intellectual Property Law & Practice 285, 286-287.

[278] The comprehensive protection of moral rights in Spain closely follows the French model. According to Art. 14 of the Spanish Intellectual Property Act (Royal Legislative Decree 1/1996 of 12 April) (hereafter 'TRLPI'), the author is granted several inalienable moral rights that cannot be waived or assigned. These rights include: (1) the right to decide whether and how the work is to be made available to the public; (2) the right to determine whether the work should be communicated under the author's name, a pseudonym, or anonymously; (3) the right to claim authorship of the work; (4) the right to protect the integrity of the work and object to any distortion or modification prejudicial to the author's interests and reputation; (5) the right to modify the work, respecting the rights that third parties have acquired; (6) the right to withdraw the work from circulation due to changes in ethical or intellectual beliefs; and (7) the right of access to a sole or rare copy of the work in another person's possession, to exercise the right of communication or other applicable rights.

[279] Art. 56 of the Portuguese Copyright and Related Rights Code (CRRC) establishes that authors shall have, throughout their lifetime, the moral right to protect the authorship, the authenticity, and the integrity of their work, even if they have transferred their economic rights. This right is inalienable, non-renounceable and perpetual, at least up to the author's death (in accordance with the specifications of Art. 57.

[280] See Sect. 3 of the Finnish Copyright Act (404/1961).

[281] See Art. 3 of the Swedish Copyright Act (Act 1960:729, of 30 December 1960, as amended up to 1 April 2000).

[282] See § 3 of the Danish Copyright Law (Act No. 395 of 14 June 1995).

[283] See Art. 11 of the Luxembourg Copyright Act (Law of 18 April 2001, on Copyright and Related Rights and Databases).

[284] These jurisdictions have adopted a restrictive approach to moral rights, both minimising their recognition and allowing for their waiver or transfer under certain circumstances. For instance, the Finnish Copyright Act, Sect. 3(3), states: '[moral rights] may be waived by [the author] with binding effect only in regard to use limited in character and extent.' Moreover, under Sect. 3(3) of the Danish Copyright Act, '[the attribution and integrity rights] of the author cannot be waived except in respect of a use of the work which is limited in nature and extent.' Similarly, Art. 3(3) of the Swedish Copyright Act states: 'The author may, with binding effect, waive his [attribution and integrity rights] only in relation to uses that are limited in character and scope.' In Luxembourg, Art. 11(2) of the Luxembourg Copyright Act allows authors to lawfully transfer and assign all or part of their moral rights, provided that their honour or reputation is not harmed.

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'integrity' are central and common to all EU Member States as Contracting Parties of the Berne Convention, these rights might require harmonisation efforts to avoid existing discrepancies and ensure greater consistency across the EU, especially in the digital environment.[285]

2.4.1. Moral rights in the international copyright framework

From a historic perspective, French courts were the first in Europe to recognise authors' moral rights in the early 19th century.[286] From that time, it took more than a century for the members of the Berne Union to agree upon a minimum standard for the protection of these rights. This happened through the second revision of the Berne Convention in 1928.[287] This outcome was far from being a foregone conclusion if one considers the fundamentally different approaches to moral rights that, meanwhile, had emerged in European civil law countries and in a common law jurisdiction such as the UK.[288] The consensus reached during the Rome Conference was and still is enshrined in Article 6-*bis*(1) of the Berne Convention, which includes both the author's right to attribution and his or her integrity right. As for the attribution right, this provision simply defines it as the right "to claim authorship of the work." The second right, the right to integrity, was slightly modified by the 1948 Brussels Act and grants every author the right "to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the [...] work, which would be prejudicial to his honor or reputation." When examined more closely, the direction of this right under the Berne Convention appears to diverge from, for instance, the definition of this right under German law, which was previously outlined. In Germany this right is only infringed when an alteration of the work harms the author's 'prestige' rather than his or her legitimate interest in the work.[289] In this regard, through a specific reference to the author's 'honour' or 'reputation', Article 6-*bis*(1) of the Berne Convention shapes the right to integrity as a personality right.

With the 1948 Brussels Revision, the attribution right was reinforced and incorporated into the field of copyright exceptions, thereby aiming to strike a fair balance between the interests of public access to knowledge and cultural goods and authors' rights. This Revision introduced Article 10(3) in the Berne Convention, stipulating that, whenever a published work is used under the exception for quotation[290] or for certain educational purposes,[291] not only must the source be cited, but also the author's name if it is indicated in that source. Interestingly, prominent commentators of the Berne

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[285] See Kelli and others (n 275) 113, where the authors advocate for at least minimum harmonisation of moral rights at the EU level. For further details on the need for EU regulations on moral rights, see Ruxandra Vişoiu, 'Moral Rights Under EU Copyright Law' (2022) Challenges of the Knowledge Society 544, 548-549.

[286] The first case concerning moral rights, specifically the author's right to integrity, was decided on 17 August 1814 by the Seine Tribunal Court, concerning alterations made to a work by the author's publisher. See Bureaux for the Protection of Intellectual Property, 'Le droit moral. Son évolution en France' (June 1952) 65(6) Le Droit D'Ateur 63, 64, available at <https://tind.wipo.int/record/39568/files/HJC_cr_1952_06_fr.pdf&ved=2ahUKEwjk-czurcuKAxXdRPEDHaBiN64QFnoECBgQAQ&usg=AOvVaw09QyxDPgTsBMUBOec6QcQA>.

[287] Ricketson and Ginsburg (n 74) 586.

[288] Mira T Sundara Rajan, *Moral Rights: Principles, Practice and New Technology* (Oxford Academic 2011) 240.

[289] As a result of the Berne Convention's wording, some national copyright laws of members of the Berne Union do not provide for an explicit right of integrity, but rather for the author's "right of reputation". See Sundara Rajan (n 288) 240.

[290] See Berne Convention, Art. 10(1).

[291] ibid Art. 10(2).

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Convention such as Ricketson and Ginsburg interpret its Article 10 as implicitly recognising an additional moral right: given that the above-mentioned exceptions apply solely to works that have already been published, these scholars infer that Article 10 implicitly grants authors discretion over the initial publication of their work.[292]

Subsequent international intellectual property agreements made no progress with regards to authors' moral rights. The 1994 TRIPS Agreement not only refrained from developing the existing legal framework further, but explicitly exempted signatory countries from any obligation to grant such rights.[293] This exclusion of mandatory moral rights protection resulted from political and economic pressure exerted by the US on other WTO members during negotiation rounds. Due to the limited scope of moral rights under US law,[294] the US sought to prevent the inclusion of these aspects in the TRIPS Agreement so as to avoid trade sanctions imposed by the WTO Dispute Settlement Body.[295] Furthermore, the first of the two "internet treaties," the WCT, simply obliges WTO members to adhere to Article 6-*bis* of the 1971 Berne Convention, without offering any further advancements or clarifications.[296]

However, a significant shift occurred in the realm of performers' rights with the adoption of the second "internet treaty", the 1996 WPPT. Until that point in international copyright law, moral rights had been granted exclusively to authors. This was based on the fact that, historically, copyright law had viewed performers primarily as vehicles for the dissemination of culture or information, rather than as independent creators of artistic works.[297] It favoured virtuoso musicianship and held composition in higher esteem despite the performer's growing prominence. As a result, performers have long been regarded as subordinate to 'true' authors, a disparity reflected in the lower level of protection afforded to performers' rights under, for instance, the 1961 Rome Convention.[298]

Nevertheless, performers of musical works have a personal connection to their performance, stemming from their individual engagement with and interpretation of the respective underlying composition.[299] In this specific respect, performers bear a closer resemblance to authors than to

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[292] Ricketson and Ginsburg (n 74) 608.

[293] The second sentence of Art. 9(1) of the TRIPS Agreement prescribes that 'Members shall not have rights or obligations under this Agreement in respect of the rights conferred under Art. 6bis of that Convention or of the rights derived therefrom.'

[294] In fact, the United States became a member of the Berne Union (only) in 1989. However, given that the Berne Convention, unlike the TRIPS Agreement, lacks enforcement mechanisms for moral rights, the decision to join the Union posed relatively less risk for the US.

[295] Elisabeth Schéré, 'Where is the Morality? Moral Right in Intellectual Property and Trade Law' (2018) 41(3) Fordham International Law Journal 773, 779.

[296] Art. 1(4) of the WCT prescribes that '[c]ontracting Parties shall comply with Articles 1 to 21 and the Appendix of the Berne Convention'. Yet, Rajan argues that the moral right to (digitally) disclose a work can be inferred from Art. 8 of the WCT, which grants authors the right to make their work available to the public. See Sundara Rajan (n 288) 262.

[297] ibid 264.

[298] ibid. However, as noted in legal scholarship, the exclusion of performers from protection under the Berne Convention was also a result of "bad timing," as the need for protecting performers—driven by the rise of recording technology (see *supra*, §2.1.2)—emerged only after the negotiations had already voted against including performers in the Convention. See Hugenholtz, 'Neighbouring Rights are Obsolete' (n 54) 1006.

[299] As noted above (§2.1.2), some jurisdictions even require a certain "personal touch" in order to grant performers' rights in the first place.

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record producers or broadcasting organisations, which, by contrast, are traditionally commercial entities primarily driven by the pursuit of maximum profit from their sound recordings or programmes. Acknowledging this reality, Article 5(1) of the WPPT grants performers both an attribution and an integrity right concerning exclusively aural performances and those fixed in sound recordings, thereby offering explicit protection to performers of musical works. Although Article 5(1) of the WPPT almost echoes the wording of Article 6-*bis* of the Berne Convention, the moral rights protection granted to performers is clearly weaker than that of composers, reflecting the traditional undervaluation of performers.[300] Yet, as intended by the "internet treaties", the WPPT effectively addressed the growing importance of performers, recognising that performances have become "the most powerful art form of the digital era"[301] while also considering their increasing vulnerability.

2.4.2. Attribution right

As highlighted above, the right of attribution aims at fostering the identification of authors whenever their works are being used. The main justification for this right lies in the attempt to protect the personality of authors considering the special bond they have with their own intellectual works. Attribution rights can give rise to legal actions aimed at restricting uses that would compromise the value of authorship and constitute an attack to interests of and prerogatives of non-pecuniary nature.

As the Berne Convention establishes only a minimum standard for this right, Article 6-*bis* fails to provide guidance on important issues. Notably, it remains unclear whether the right of attribution encompasses the right *not* to be identified as the author of a work, otherwise referred to as the right to object to false attribution.[302] This ambiguity allows Member States to interpret the scope of the right differently while also granting them the flexibility to extend broader protections.[303]

Despite the existing discrepancies within Europe's copyright law frameworks, the authors' non-pecuniary right to be credited for their work ends up promoting exceptionally valuable goals from a public policy perspective. These goals can be described as 'authenticity' and the preservation of cultural heritage, broadly defined.[304] In a digital economy where creative works can be increasingly used and shared for multiple creative, distributive and transformative purposes, attribution does

[300] In brief, Art. 5(1) of the WPPT makes an exception of the attribution right, 'where omission is dictated by the manner of the use of the performance'. As for the right to integrity, the key difference between Art. 5(1) of the WPPT and Art. 6-*bis* of the Berne Convention is that the WPPT focuses specifically on distortion, mutilation, or modification of a performance, whereas the Berne Convention explicitly includes 'derogatory actions' in relation to a work, thus encompassing more types of modifications. Additionally, a performer's integrity right can only be infringed if the distortion, mutilation, or modification harms their reputation; harm to the performer's honor, in contrast to Art. 6-*bis* of the Berne Convention, is not sufficient. See on this, more in depth, WIPO, 'Guide to the Copyright and Related Rights Treaties' (2003) 242-243.

[301] Sundara Rajan (n 288) 262.

[302] Van Anh Le, 'Moral rights and their position in the digital world' (2022) 64(3) The VMOST Journal of Social Sciences and Humanities 46, 46-54.

[303] For instance, some Member States adopt an expansive approach to attribution rights. In these countries, the right of attribution has two aspects: an *affirmative* aspect, which ensures that an author's name remains associated with their work; and a *negative* aspect, which allows authors to reject any false or unwanted associations with works they did not create or do not wish to be connected to. In this regard, see, for instance: Arts. 20 and 21 of the ICA; Art. L.123-3 of the French CPI; and §§ 13 and 66 of the German Copyright Act, which explicitly recognise the author's right to publish pseudonymously or anonymously.

[304] Patrick Masiyakurima, 'The Trouble with Moral Rights' (2005) 68(3) Modern Law Review 411, 424.

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more than just promoting the original values of this right under the Berne Convention. This right also emphasises the economic and systemic value of crediting human authorship. As argued in the literature, there is a hybrid interest designed to preserve the economic benefits awarded to creators by ensuring the correct attribution of their works so as to foster fair remuneration for their use.[305] The right of attribution ultimately protects artists' reputation in the market and this helps them better exercise their economic rights.

From a broader public policy perspective, promoting a correct and reliable identification of authors who create cultural works, some of which can become iconic, facilitates informed and intentional conservation and dissemination of these works.[306] This is also the reason why the most permissive and open among Creative Commons' licences actively promote the retention and exercise of attribution rights by authors who consciously decide to relinquish some or all their economic rights and help build a digital public domain. In a data-driven economy where genAI is becoming increasingly relevant, the 'attribution' right can eventually work as a source of authenticity with the aim to reduce the adverse effects of 'fakes' in the creative industries and, even more so, on cultural heritage. This outcome is easier in those jurisdictions where authors have an express (moral) right to deny any misattributed authorship to works that are not created by them. As we will see more in depth below, the ultimate purpose of authors' rights to stimulate and reward (only) human creativity finds increasing recognition under EU technology regulation. In this regard, Article 50(2) of the EU AI Act embodies an obligation for providers of AI systems - including general-purpose AI ('GPAI') systems that generate synthetic audio, image, video or text content - to ensure that the outputs of the AI system are marked in a machine-readable format and detectable as artificially generated or manipulated.[307] It is evident that this obligation, if properly enforced, can give a boost to the exercise of attribution rights and other creators' rights that large-scale uses of AI technologies put at risk.

2.4.3. Integrity right

Philosophically, the existence of a deep connection between an author and the outcome of her intellectual work is largely derived from Kantian and Hegelian theories on dignity and autonomy, respectively. Therefore, the essence of the integrity right empowers authors to preserve the original expression of their creative work, which they may feel reflects, or is an extension of, their personality and values.[308] From this perspective, an attack on the work is regarded as a personal attack on its creator.[309] This concept is reflected in a requirement embodied in Article 6-*bis* of the Berne Convention, after its 1928 Rome revision, according to which the right to object to any distortion,

[305] ibid 428.

[306] According to Masiyakurima, the right of attribution implies a fostering of public interest as it facilitates public access to artefacts that embody educational and/or aesthetic value. Ibid, 424-425.

[307] Art. 50(2) of the AI Act specifies that: 'Providers shall ensure their technical solutions are effective, interoperable, robust and reliable as far as this is technically feasible, taking into account the specificities and limitations of various types of content, the costs of implementation and the generally acknowledged state of the art, as may be reflected in relevant technical standards [...].'

[308] John Merryman, Albert Elsen and Stephen Urice *Law, Ethics and the Visual Arts* (5th ed, Kluwer Law International 2007).

[309] Peter Jaszi, 'Toward a Theory of Copyright: The Metamorphoses of Authorship' (1991) 1991(2) Duke Law Journal 497.

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mutilation or other modification of an author's work can be enforced only if unauthorised acts are prejudicial to the author's honour or reputation.[310]

From a practical point of view, even in the music ecosystem, the exercise of the right to integrity of a copyright work is intertwined, on the rightholders' front, with the enforcement of the exclusive right to authorise derivative works. On the users' side, 'integrity' shall be limited in order to concretely allow the enforcement of copyright exceptions, whose relevance has grown significantly with the advent of digital technologies. What distinguishes - legally speaking - the moral right to integrity is precisely the higher level of offence or attack brought to the creators' personality by a follow-on creator or by a user. As put it under Article 6-*bis* of the Berne Convention, the threshold for the exercise of this moral right is the prejudice to the honour or reputation of the rightholder that shall be concretely assessed on a case by case basis.

In the music industry, certain genres are characterised by a high level of antagonism, critique and deeply transformative use which inevitably triggers tension between the enforcement of music composers, performers and record producers with the rights of other creators willing to target, criticise, re-use or just make fun of previous works. This attitude by some music creators has grown exponentially in the past couple of decades, considering how easy it is, with relatively affordable technical equipment, and even more so with today's broadly available genAI tools, to "rip, mix, and burn"[311] pre-existing creative works. In the music ecosystem, exceptions and limitations including quotation, parody and pastiche aim to protect freedom of expression, and presuppose the legitimacy of unauthorised uses which entail changes or other alterations of musical works, performances or sound recordings.

In common law jurisdictions such as the UK and the US, both of which have large and successful music industries, a main difference to be considered in cases of creators' conflicts and their antagonism is that the US is not formally bound by Article 6-*bis*, considering the express reservation the US made when joining the Berne Union in 1989. The UK, instead, although it is no longer an EU member, is bound by the Berne Convention with the consequences that its courts shall consider its Article 6-*bis*. A famous dispute that arose between two rappers in *Confetti Records*[312] provides an interesting analysis in the application and interpretation of the right of integrity.[313] Among a variety of issues regarding validity and breach of contract, this case included a moral rights claim by composer Andrew Alcee and his record producer Confetti Records against a defendant who added rap lyrics to the song 'Burnin'. In short, the claimants considered this alteration of the song and of the record to be derogatory because the lyrics allegedly referred to drugs and violence, potentially causing an offence to Alcee's honour or reputation. The court did not buy this argument while considering both rap lyrics to have "street" meaning that the court itself could not even grasp even

[310] The relevant definition of the right of integrity, as set out in Art. 6-*bis*(1) of the 1928 revision of the Berne Convention, is 'the right… to object to any distortion, mutilation or other modification of the said work, which would be prejudicial to his honour or reputation.'
[311] Lawrence Lessig, *Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity* (Penguin 2004) 24.
[312] *Confetti Records (A Firm), Fundamental Records, Andrew Alcee v Warner Music UK Ltd (Trading as East West Records)* 2003 EWCH 1274 (CH).
[313] ibid para 149.

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when the sound recording and its words were played half speed.[314] As a result, the UK court did not find this use "derogatory", despite the alteration of the song. Moreover, since at the time of the release of 'Burnin', Alcee was costumed in a video as a 1930s mobster, the court found that the use of his work in a violent context did not impinge his reputation but rather confirmed the impression the author intended to create.[315]

Comparatively, a factually similar case involving a hip hop group '2LiveCrew' and settled by the US Supreme Court in 1994, *Oh Pretty Woman,*[316] showed that, in a jurisdiction which does not grant moral rights and where copyright exceptions are more broadly and flexibly defined, under the 'fair use' doctrine, courts can be more lenient and more open towards transformative uses.[317] In that famous ruling, the US Supreme Court did not endeavour to conduct a factual assessment of distortion, mutilation or other derogatory treatment of the song. Rather, it found that the imitation and mockery of a characteristic style of a songwriter in a specific song had a comic or parodistic effect which was fully legitimate,[318] and constituted a free expression that could not be limited under copyright law, no matter how prejudicial this parody could be for the author's reputation.

Investigating how moral rights have been enforced in each single jurisdiction of the EU goes beyond the purposes of this Study, since it would require a comparative law analysis spanning decades of case law in the creative industries. However, it is remarkable that, despite the lack of EU harmonisation of these rights, the CJEU is increasingly referring to them, at least indirectly, in its rulings where rightholders' claims clash with freedom of expression in the specific domain of copyright exceptions. Interestingly, in the *Deckmyn* case, showing deference to the continental-European moral rights tradition, the CJEU established a *quasi-moral* rights standard, stating that original creators "have, in principle, a legitimate interest in ensuring that the work protected by copyright is not associated" with messages they oppose, even if the work meets the Court's criteria for parody.[319] This case involved the distribution of calendars affiliated with a far-right political party, featuring a cover illustration that consisted on the alteration and parody of a well-known comic book character. These alterations had been made to the original artwork from the comic book to convey an anti-immigration message. The defendants argued that their use of the artwork was permissible as a parody, which is an exception explicitly contemplated under EU law. Although the Court concluded that 'parody', despite the absence of a specific definition under the InfoSoc Directive, was an autonomous concept under EU law, to be interpreted uniformly across the EU, its rulings denied that hate speech could be protected under the related copyright exception. The CJEU ruling was ultimately protective of the author' right to control his work's associations with discriminatory or antagonist messages, even at the expense of a user's freedom of expression. It was obvious in this case that the Court was interpreting the Belgian cartoonist's right as including a non-economic right

[314] Further, the definitions of the words that were identified could not be established, so the alterations made to the musical work could not be confirmed as derogatory: ibid paras 153-157.
[315] ibid para 160.
[316] *Campbell v Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994).
[317] ibid 588; the US Supreme Court demonstrated in this case that parody is permissible when taking 'the "heart" of the original, [because] the heart is also what most readily conjures up the song for parody, and it is the heart at which parody takes aim."
[318] ibid 589.
[319] Case C-201/13 *Johan Deckmyn and Vrijheidsfonds VZW v Helena Vandersteen and Others* [2014] ECLI:EU:C:2014:2132 (hereafter '*Deckmyn*') para 31.

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not to have his work used in a way that could prejudice his honour or reputation, because of the political implications of the use. This is certainly an interesting perspective, considering that moral rights could be eventually harmonised at the EU level, even in response to the threats brought by AI.

However, as remarked in the literature, it is important to consider the potential risks of an "absolutist" construction of authors' moral rights in the EU, whose enforcement could prevent *any* derivative use of works that their authors simply disagree with.[320] Advocate General ('AG') Szpunar later reinforced this stance in *Pelham*, a case involving the unauthorised sampling of a sound recording, where he argued that "[m]oral rights, particularly the right to the integrity of the work, may legitimately preclude use of that work, even where that use is covered by an exception".[321] This position was further emphasised in the *Spiegel Online* case, where the AG Szpunar's opinion found that exceptions under Article 5(1) to (3) of the InfoSoc Directive apply only to economic rights, leaving the exercise of (non-harmonised) moral rights unaffected.[322] Although *Deckmyn* was initially interpreted as requiring the author's moral rights to be assessed within the proportionality review for a parody exception, AG Spuznar's opinions thereafter appear to solidify a more restrictive interpretation, which has since gained traction in several European national courts.[323]

2.4.4. Protection of moral rights over time

At the international level, Article 6-*bis*(2) of the Berne Convention requires moral rights to be protected at least until the expiration of economic rights.[324] In some Member States following the continental-European (*droit d'auteur*) model, such as France,[325] Italy,[326] Spain,[327] Portugal,[328] and others, moral rights persist beyond the expiration of economic rights and can continue in perpetuity because these rights are considered *personality* rights.[329] Conversely, other Member States align

[320] Christophe Geiger and Elena Izyumenko, 'Designing a Freedom of Expression-Compliant Framework for Moral Rights in the EU: Challenges and Proposals' in Ysolde Gendreau (ed), *Research Handbook on Intellectual Property and Moral Rights* (Edward Elgar 2023) 292, 304.
[321] *Pelham I* (n 61) para 97.
[322] Case C-516/17 *Spiegel Online GmbH v Volker Beck* [2019] ECLI:EU:C:2019:16, Opinion of AG Szpunar, para 55.
[323] An example of such application in national courts is the case *Studio 100 nv en Waldemar-Borsens Stiftung v Greenpeace Belgium vzw*, 4 April 2019 before the Commercial Court of Brussels.
[324] Berne Convention, Art. 6-*bis*(2).
[325] Art. L.121-1 of the French CPI states that moral rights are perpetual, inalienable, and imprescriptible, meaning they endure indefinitely, cannot be transferred, and are unaffected by time limitations.
[326] Art. 23(1) of the ICA establishes that, upon the author's death, certain heirs are entitled to exercise the author's rights of paternity and integrity without time limitation.
[327] According to Art. 15(1) of the Spanish Intellectual Property Act, the moral rights of paternity and integrity do not expire upon the author's death. These rights can continue to be exercised without limitation in time by the person expressly designated by the author in a testamentary provision or, in the absence of such provision, by the author's heirs.
[328] Art. 9(3) of the Portuguese CRRC foresees that even after the economic rights have been transmitted or have expired, the author enjoys moral rights over his work, especially the right to claim respective paternity and ensure its genuineness and integrity.
[329] Christina Angelopoulos, 'The Myth of European Term Harmonisation: 27 Public Domains for the 27 Member States' (2012) 43(5) IIC 567, 586. For further details, see Katharina de la Durantaye, 'Dualist vs. Monist Approaches to Copyright within the European Union - An Obstacle to the Harmonization of Moral

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the duration of moral rights with that of the economic rights, with the consequence that they expire simultaneously.[330] Once the term of economic rights expires, the work generally enters the public domain, allowing for unrestricted use by the public without requiring permission from the original rights holders. This transition to the public domain is a key feature of copyright law, allowing for greater access to cultural and intellectual works.[331] Since the term of protection for musical compositions is structurally different from the term applicable to performances, once these are fixed in a phonogram, the following subsections will detail both terms and the related rationales separately.

2.5. Terms of protection

In 1993 the harmonisation of the term of protection of copyright and certain related rights was one of the earliest European legislative measures in this field. The main goal of the 1993 Term Directive (Directive 93/98/EEC) was that of removing disparities and distortions in cross-border trade caused by varying lengths for the protection of copyright and related rights across the Member States. Once again, it was the CJEU that highlighted the tension between national copyright rules and the constitutional principle of free movement of goods in a case where diverging terms of protection for musical compositions in Germany and Denmark interfered with the exhaustion of rights in sound recordings which incorporated those musical works.[332] In *EMI Electrola* v *Patricia*, the CJEU was asked by the Hamburg regional court to clarify whether the enforcement, in Germany, of the exclusive right of distribution in musical works embodied in sound recordings marketed by EMI Electrola, a German subsidiary of UK-based EMI Records Limited, could have been considered 'exhausted' when these records were re-imported into Germany from another Member State (Denmark). The CJEU emphasised that the fact that the sound recordings were lawfully marketed in another Member State was due "*... not to an act or the consent of the copyright owner or his licensee, but to the expiry of the protection period provided for by the legislation of that Member State.*"[333] This led the Court to the conclusion that the barrier to free movement stemmed ultimately from differences between national periods of protection afforded by copyright and related rights, which concerned either the duration of the protection itself or the details thereof, such as the time when the protection period began to run. Considering that, at that time, the terms of protection were (still) under the responsibility of national legislatures, the CJEU concluded that German law was perfectly legitimate

Rights?' in Ysolde Gendreau (ed), *Research Handbook on Intellectual Property and Moral Rights* (Edward Elgar 2023) 152-166.

[330] In Germany, for instance, the term of protection for moral rights is identical to that of economic rights, *i.e.*, 70 years post mortem auctoris (§64 of the German Copyright Act).

[331] However, Italy appears reluctant to allow cultural heritage works to enter the public domain even after economic rights have expired, citing their cultural importance. The Italian Code of Cultural Heritage and Landscape (ItCCHL) (Legislative Decree No. 42 of January 22, 2004) broadly defines cultural heritage and requires anyone wishing to copy or use it— even if it is in the public domain — to obtain authorisation from the Italian government or relevant cultural institutions. For further details, see Giulia Dore and Giulia Priora, 'The EU Imperative to a Free Public Domain: The Case of Italian Cultural Heritage' (*Communia*, April 2024) 18-32 <https://communia-association.org/wp-content/uploads/2024/04/The-EU-imperative-to-a-free-public-domain_-The-case-of-Italian-cultural-heritage-1.pdf>; see also Giulia Dore and Giulia Priora, 'The Spectre of Re-Fencing Off the Public Domain: Italian Copyright and Cultural Heritage Legal Scenarios' (2024) 73 GRUR International 1050, 1050-1066.

[332] Case C-341/87 *EMI Electrola GmbH v Patricia Im- und Export Verwaltungsgesellschaft GmbH* [1989] ECLI:EU:C:1989:30.

[333] ibid para 10.

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in allowing EMI Electrola to enforce its exclusive rights within Germany's borders, irrespective of the expired term of protection in Denmark.[334] In doing so, the Court clearly highlighted that the disparity between national laws on this front was giving rise to restrictions on Community-wide trade in sound recordings.[335]

The 1993 Term Directive and its amendments sought to resolve territorial fragmentation issues by establishing a harmonised framework. The directive focuses solely on the length of economic rights of authors, performers and record producers, leaving each Member State with the freedom to regulate the duration of moral rights (Article 9).[336]

2.5.1. Authors' rights

The Term Directive provides that the term of protection for literary or artistic works, within the meaning of Article 2 of the Berne Convention, shall be 70 years from the author's death or, in the case of a work of joint authorship, from the death of the last surviving author.[337] Using the flexibility embodied the Berne Convention's minimum standard of 50 years *post mortem auctoris*,[338] such a longer term reflects the EU's commitment to consider the extended average lifespan within the EU and the impact of the world wars on cultural output and the need to foster creativity.[339]

At the international level, the 1993 Term Directive sparked intense policy and scholarly debates on copyright's term extensions and its critical relationship with the notion of public domain, especially in jurisdictions, such as the US, where copyright has an inherently utilitarian justification. The 1998 Sonny Bono Copyright Term Extension Act ('CTEA')[340] was a clear response to the EU's term extension through an act that sought to align the US law model with the European. By amending Chapter 3, Title 17 of the United States Code, the CTEA extended the US copyright term to the life

[334] ibid paras 11-14.
[335] ibid para 12.
[336] See Term Directive, Recital 20.
[337] Art. 1(1)(2) of the 1993 Term Directive, which remained unchanged in its 2006 codified version.
[338] Berne Convention (Paris Text 1971), Art. 7(1). Furthermore, Art. 7(6) clarifies that the Convention establishes only a minimum period of protection, allowing countries to extend this term. In this regard, see also Term Directive, Recital 2.
[339] Term Directive, Recitals 6, 7, 11. Through a provision on the application of the harmonised term of protection over time (Art. 10), the 1993 Term Directive required Member States having shorter copyright terms to reinstate protection for works in which copyright had expired, aligning with the new standard. However, national copyright laws providing *longer* protection terms were allowed to keep such terms for works created *before* the Directive's adoption (*i.e.*, 1 July 1995), while they should have adhered to the Directive's stipulated terms for works created afterwards: on this specific issue, see for instance Gemma Minero, 'The Term Directive' in Irini Stamatoudi and Paul Torremans (eds), *EU Copyright Law: A Commentary* (Edward Elgar 2021) 254.
[340] Sonny Bono Copyright Extension Act (CTEA), Pub. L. No. 105-298, 112 Stat. 2827 (1998) (amending 17 U.S.C. §§ 301-304). The CTEA was enacted on 27 October 1998 in memory of the Congressman and musician Sonny Bono, who as a veteran of the entertainment industry strongly advocated for extending the duration of copyright protection indefinitely - see Lessig (n 311) 215.

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of the author plus 70 years (previously 50 years).[341] The CTEA sought to protect US authors from discrimination under the reciprocity clause laid down in Article 7(1) 1993 Term Directive.[342]

In *Eldred v. Ashcroft*,[343] Eric Eldred and other publishers of public domain works challenged the CTEA, represented by (then) Stanford Law School professor Lawrence Lessig, one of the founding fathers of Creative Commons.[344] The plaintiffs argued that the Act violated both the Copyright Clause and the First Amendment of the Constitution. Lessig, who conceived the case and sought out clients to bring the challenge,[345] contended that the repeated extensions of copyright terms by Congress violated the "limited times" requirement in the Copyright Clause. Additionally, the plaintiffs claimed that the retroactive extensions included in the law were not "promoting the progress of science" as required by the US Constitution. In a 7–2 opinion delivered by Justice Ginsburg, the US Supreme Court upheld the constitutionality of the CTEA, rejecting all claims while arguing that Congress acted within its authority under the Copyright Clause when extending copyright terms. The Court held that the CTEA's 20-year extension of *existing* copyrights did not violate the "limited times" requirement since "limited" does not mean "inalterable".[346] Moreover, Justice Ginsburg emphasised that copyright and the First Amendment are fundamentally compatible, both seeking to promote the creation and dissemination of knowledge.[347] The Court's Opinion noted that the CTEA was a rational exercise of authority, aimed at harmonising US copyright laws with those of the EU.[348]

Despite its exceptional relevance as a measure supporting the European creative sector, the Term Directive did not resolve and properly address all term-related protection issues. One of these issues was that of posthumous works. These are works that are first published or made accessible to the public after the author's death. Under Article 1(1) of the Term Directive, the 70-year term of copyright protection shall be calculated from the date of the author's death "irrespective of the date when the work is lawfully made available to the public".[349] As stressed in the literature, this approach applies

[341] The Sonny Bono Copyright Term Extension Act, §102(b)(1)(2), amending § 302 of Title 17 of the United States Code. The prior extension took place in 1976. The pre-1976 US copyright term model, based on 28 + 28 years after the moment of registration, was a two-tiered system that required initial registration for protection and allowed for a renewal after the first 28-year term. This model was unique to the US and incompatible with international copyright standards. The US amended the term of protection in 1976 in anticipation of joining the Berne Convention. The 1976 Act extended copyright duration to life of the author plus 50 years.

[342] This provision remained the same under Art. 7(1) of Directive 2006/116/EC.

[343] *Eldred v Ashcroft,* 537 U.S. 186, 65 U.S.P.Q.2d (BNA) 1225 (2003).

[344] Creative Commons was founded in 2001 and released its first set of free licences in 2002. Since then, the project has provided a range of standard licensing terms for authors willing to relinquish some of their rights to the benefit of follow-on authors and the public at large. Creative Commons licences have been progressively extended and adapted to multiple jurisdictions so as to enable creators to validly specify which rights they intend to retain and which rights want to give away. For a brief history of Creative Commons see <https://creativecommons.org/timeline/>.

[345] Richard A Posner, 'The Constitutionality of the Copyright Term Extension Act: Economics, Politics, Law, and Judicial Technique in Eldred v Ashcroft' (2003) The Supreme Court Review 143.

[346] *Eldred v Ashcroft* (n 343) 199.

[347] ibid 245-247.

[348] ibid 208. The ruling set a precedent for future cases, reinforcing a broad interpretation of the Copyright Clause's "limited Times" provision and allowing Congress substantial discretion in determining copyright durations. The Eldred decision served as a precedent in subsequent cases challenging copyright laws, such as *Golan v Holder, 565 U.S. 302 (2012)*, which further solidified the government's ability to remove works from the public domain.

[349] 2006 Term Directive, Art. 1(1).

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equally to works published during the author's lifetime and works first released posthumously.[350] It seems clear that the lack of an explicit provision for posthumous works creates an implicit incentive for the author's heirs to publish such works promptly. The practical rationale behind this lies in the fact that the earlier a posthumous work is made available to the public, the longer it can benefit from the effective duration of the standard 70-year copyright term.[351]

Another front where the Term Directive was ambiguous and still raises uncertainties in its 2006 version is the term of protection applicable to works of joint authorship.[352] Following Article 7-*bis* of the Berne Convention, Article 1(2) of the Directive established that the 70-year term of protection shall be calculated from the death of the last surviving author.[353] However, the Directive does not provide a clear definition of what constitutes 'joint authorship' with the consequence that this concept remains within the remit of national courts.[354] The absence of a binding definition of joint authorship for the EU members leaves a wide scope open to national legislation, which may adopt either a broad and flexible concept — where combining two original works for joint exploitation qualifies as joint authorship — or a stricter concept, according to which the contribution of each author must be indistinguishable from one another.[355] As remarked in the literature, this interpretation carries significant implications, as adopting the stricter concept results in the term of protection being calculated, individually, for each author's contribution within a joint work.[356] Consequently, in Member States that have adopted this strict approach, an author's contribution to a collective work could potentially enter the public domain decades earlier than in Member States that treat the exact same subject matter as a single work.[357] This not only leads to fragmented protection periods and hence legal uncertainties, but also evidently limits the effectiveness of the harmonisation efforts undertaken by the EU legislator since 1993 with regard to the term of copyright protection.[358] The Term Extension Directive[359] intervened a few years after the codification and recasting of the Term Directive in 2006 to bring clarity on the term of protection for musical compositions with words. To ensure greater clarity in the implementation of this term, Article 1 of the directive defines 'musical compositions with words' as works where both the lyricist's and the composer's contributions are specifically created for a single musical composition. Given that these compositions are overwhelmingly co-authored — for example: operas usually involve collaboration between a lyricist and a composer as much as

[350] See, for instance, Minero (n 339) 254-255.

[351] ibid. Nevertheless, it should be noted that this rule can pose significant challenges for the author's heirs, particularly when discovering, editing, or preparing such works for publication and making them accessible to the public requires considerable time and resources (e.g. incomplete works).

[352] 2006 Term Directive, Art. 1(2).

[353] ibid. See also Berne Convention, Art. 7-*bis*.

[354] Cf. Term Directive, where Recital 14 clarifies that 'the question of authorship of the whole or a part of a work is a question of fact which the national courts may have to decide.'

[355] Minero (n 339) 255.

[356] Angelopoulos, 'The Myth of European Term Harmonisation: 27 Public Domains for the 27 Member States' (n 329) 572-574. Germany and Italy, for instance, follow this strict approach. According § 8 of the German Copyright Act, joint authorship exists, "[w]here several persons have jointly created a work without it being possible to separately exploit their individual shares in the work". Similarly, Art. 10 of the ICA provides that '[i]f the work has been created by the indistinguishable and inseparable contributions of two or more persons, the copyright shall belong to all the joint authors in common.'

[357] ibid 573.

[358] ibid 574. For further discussion on this issue, see Mireille van Eechoud and others (n 85) 235-238.

[359] Art. 1(1), introducing a new paragraph 7 in Art. 1 of the original Term Directive.

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music works in genres such as jazz, rock, and pop music—, there was a clear need for consistent treatment across Member States.[360] Prior to the intervention of the 2011 Term Directive, some Member States granted musical compositions with words a *single* term of protection, calculated from the death of the last surviving author, while others applied separate terms of protection for music and lyrics.[361] Moreover, the 2011 directive remarks that the lack of complete harmonisation in this field created obstacles to the free movement of goods and services, such as cross-border collective management services.[362] To remedy these flaws, Article 1(1) of Directive 2011/77 sets out a single term of protection for musical works where lyrics and music are created to be used together. This protection shall expire 70 years after the death of the last surviving contributor, whether the author of the lyrics or the composer of the musical composition, and irrespective of whether these persons can be designated as co-authors under national laws.[363] Moreover, the directive requires Member States to transpose such a uniform term of protection not only for new works but also to works that were already protected when the 2011 directive entered into force.[364]

2.5.2. Performers' and record producers' rights

The same way as for authors' rights, the term of protection of performers' and record producers' rights has evolved significantly through several international agreements adopted in the past few decades. The initial protections for performers and phonogram producers were established by the Rome Convention of 1961, which set a relatively short minimum term of protection of 20 years from the end of the year in which the fixation, performance, or broadcast occurred (Article 14).[365] A significant extension came at a later stage with the signing of the TRIPS Agreement under the WTO in 1994 and the WPPT in 1996. In both treaties, this term was extended to 50 years calculated, for performers, from the fixation of their performances while, for phonogram producers, from the first publication or, if not published, from the fixation of the phonogram.[366]

At the EU level, it was Article 3 of the 1993 Term Directive that harmonised the terms of protection of rights related to copyright by considering, specifically, the exclusive rights of performers and phonogram producers. For both these rights, this directive prescribed a length of 50 years lapsing from, respectively, the publication or communication to the public (whichever the earlier) of the performance and of the phonogram's fixation. A significant EU reform of this provision materialised when Article 1(2)(a) and Article 1(2)(b) of Directive 2011/77 amended Article 3 by extending the

[360] ibid Recital 18.
[361] ibid.
[362] ibid Recital 19.
[363] ibid Art. 1(1).
[364] ibid Recital 19.
[365] Rome Convention, Art. 14. This protection was later enhanced through treaties such as the Phonograms Convention of 1971, which provided additional safeguards against the unauthorised importation and distribution of phonogram copies: cf. Convention for the Protection of Producers of Phonograms against Unauthorised Duplication of their Phonograms, Geneva, 29 October 1971, Art. 4, in its entirety: 'The duration of the protection given shall be a matter for the domestic law of each Contracting State. However, if the domestic law prescribes a specific duration for the protection, that duration shall not be less than twenty years from the end either of the year in which the sounds embodied in the phonogram were first fixed or of the year in which the phonogram was first published.'
[366] The starting point for the calculation of this term is slightly different as regards the protection of phonograms: whereas, in the WPPT (Art. 17), it is either the first publication or, if not published, the fixation of the phonogram, in the TRIPS Agreement it is only its fixation, without reference to publication (Art. 14(5)).

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term, for both performances and phonograms, from 50 to 70 years lapsing from the date of publication or communication of the phonogram to the public. As explained in the Directive's recitals, the introduction of a 70-year term was necessary as many performers begin their careers young, and the previous term for performances fell short of their lifetimes.[367] However, rather than being driven by performers, this provision was heavily lobbied by record producers who claimed that additional revenue was necessary to invest in new talent.[368] To gain support in the European Parliament, the Term Extension Directive included provisions requiring record labels to share the additional revenue from this extension with performers. Moreover, the term extension targeted only the music sector, excluding audiovisual performers without clear justification.[369]

Several provisions of Directive 2011/77 show that this directive was a music-specific intervention in the EU law domain and could be agreed upon, politically, because of the protections granted, specifically, to performers. Article 1(2) of the 2011 Directive amended Article 3 of the Term Directive by introducing new provisions in its paragraph 2, from letter (a) to (e). First, Articles 3(2)(a) embodies a "use it or lose it" mechanism which grants performers a non-waivable termination right and allows them to terminate their contracts with record producers, and to claim their rights back for further exploitation, if the record producer does not market the sound recording during the period of extended protection. Second, Articles 3(2), letters from (b) to (d), obliges EU Member States to establish a new supplementary remuneration right for performers, which will be briefly illustrated below (see §2.5.3). Third, the new Articles 3(2)(e) introduced a provision, also known as "clean slate", which makes sure that, during the period of extended protection, performers who are remunerated through royalties effectively receive the full amount of such payments without suffering from deductions such as advance payments or other contractually defined deductions. These provisions – as well as gaps and inconsistencies in their national implementations – are historically very important for the purposes of this Study because they set the stage for the copyright contract law provisions embodied into Chapter 3, Title IV of the DSM Directive (cf. Articles 18-23).[370]

This evolution reflects the EU's ongoing efforts to address the needs of performers and producers in a rapidly changing digital and global marketplace. While the international conventions set a baseline, the EU directives embody provisions, such as those of the Term Directive and its amendments, which extend performers' rights and help performers benefit financially from the extended period of protection. However, this increased protection focuses solely on the length of the rights and, for performers, certain contractual conditions, without altering other aspects of the rights themselves.[371]

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[367] Recital 5 of the Term Extension Directive.

[368] Giuseppe Mazziotti, 'Cultural Diversity and the EU Copyright Policy and Regulation' in Evangelia Psychogiopoulou (ed), *Cultural Governance and the European Union* (Palgrave Macmillan 2015), 91, 98-99.

[369] Art. 3(2) of the Term Extension Directive does suggest a possible extension of the term of protection also in the audiovisual sector. However, as of early 2025, such a legislative initiative has never materialised.

[370] For instance, under Swedish implementation, the "clean slate" provision may be derogated from by contract. Ana Ramalho and Aurelio Lopez-Tarruella, 'Implementation of the Directive 2011/77/EU: Copyright Term of Protection' (Legal Affairs 2018) 29 <https://www.europarl.europa.eu/RegData/etudes/STUD/2018/604957/IPOL_STU(2018)604957_EN.pdf>. Building on this, Art. 23(1) of the DSM Directive does not allow derogation from Arts. 19-21 contractually.

[371] ibid 13.

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2.5.3. Performers' right to annual supplementary remuneration under Directive 2011/77

Article 1(2)(c) of Directive 2011/77 amended the Term Directive by introducing, under Article 3(2)(a) and 3(2)(b), a mandatory, non-waivable right to equitable compensation for performers who have transferred or assigned their exclusive rights to phonogram producers in exchange for a lump-sum payment.[372] This provision introduces very important accompanying measures to help 'session musicians' effectively benefit from the additional revenues generated by the term extension.[373]

Clearly, the annual supplementary right is designed to remunerate *only* session musicians. The mechanism is complex because it is based on collective management and on the supply, upon request, of information shedding light on the revenues obtained by record producers during the period of extended protection.[374] Article 3(2)(c) of the Term Directive, as revised by Directive 2011/77, prescribes that the performers' annual, non-waivable remuneration *"[...] shall correspond to 20% of the revenue which the phonogram producer has derived, during the year preceding that for which the said remuneration is paid, from the reproduction, distribution and making available of the phonogram in question, following the 50th year after it was lawfully published or, failing such publication, the 50th year after it was lawfully communicated to the public."*

This mandatory remuneration mechanism presupposes the development of data supporting an annual transfer of revenues from record producers to thousands of performers. To this end, the Term Extension Directive requires this mechanism to be handled by record producers' and performers' collective organisations. At the same time, record producers are obliged to provide, upon a request from entitled non-featured performers, "any information which may be necessary in order to secure payment of that remuneration".[375] This provision clearly constitutes a predecessor and forerunner of the duties of transparency and data disclosures contained, respectively, in Articles 16 and 17 of the CRM Directive and in Articles 17 and 19 of the DSM Directive.

To conclude: along with other mandatory remuneration rights under EU law, the performers' right to annual supplementary remuneration was among the first provisions to deviate from a widely accepted principle of contractual freedom that underpins much of copyright law.[376] These rights paved the way for a more interventionist approach in copyright contract law as the one embodied in

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[372] Term Extension Directive, Recitals 9-14.

[373] ibid Recitals 9-10. Interestingly, this provision is the only one under EU copyright law that introduces a distinction between featured and non-featured (*i.e.*, "session") musicians. Session musicians are those who play in the background and are not credited in records. This category is paid normally through lump-sums that remunerate the studio recording activities and come with buy-out contrasts transferring performers' exclusive rights to the record producer. Featured performers, instead, are paid on the grounds of royalties included in their contracts with record labels, although their remuneration can be based on advance payments. See Ana Ramalho and Lopez-Tarruella (n 370) 12.

[374] See, respectively, Art. 3(2)(c) and Art. 3(2)(d) of the Term Directive, as revised by Directive 2011/77: 'Member States shall ensure that phonogram producers are required on request to provide to performers who are entitled to the annual supplementary remuneration referred to in paragraph 2b any information which may be necessary in order to secure payment of that remuneration.' and 'Member States shall ensure that the right to obtain an annual supplementary remuneration as referred to in paragraph 2b is administered by collecting societies'

[375] See Art. 3(2)(c) of the 2006 Term Directive as amended by Art. 1(2)(c) of the Term Extension Directive.

[376] Mazziotti, 'Cultural Diversity and the EU Copyright Policy and Regulation' (n 368) 95.

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Articles 18-23 of the 2019 DSM Directive. However, as highlighted in a 2018 study on the effects of Directive 2011/77 requested by the European Commission, the implementation of this remuneration scheme raised issues in several EU Member States, the most relevant of which concerned the availability of the data which would make the remuneration right concretely enforceable.[377] On the one hand, performers' organisations lack information to identify the eligible rightholders. On the other hand, certain producers go as far as charging for access to their databases.[378] Moreover, some CMOs noticed the lack of redress mechanisms to remedy the record producers' failure to provide the information due under the new Article 3(2)(c) of the Term Directive.[379] As discussed in Chapter 4 of this Study, these issues inevitably influence the national implementations of Article 19 of the DSM Directive.

[377] Ramalho and Lopez-Tarruella (n 370) 26-28.
[378] ibid 27.
[379] ibid.

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3. Copyright exceptions, text-and-data mining, and AI

3.1. Exceptions and limitations to copyright

Designed to balance the rights of creators with the public interest, copyright exceptions allow for certain uses of protected works without the rightholder's permission. In a nutshell, they serve various objectives, including access and dissemination of information and knowledge, preservation of cultural heritage, or fostering creativity and freedom of expression of subsequent creators. Being at the core of a fair copyright system, where authors' rights and other fundamental rights can be balanced against each other, exceptions constitute a complex legal framework built under international agreements, EU directives, national laws and the case law of the CJEU.

Chapter 3 of this Study illustrates how copyright exceptions emerged and consolidated - as concepts - under international copyright law by identifying the main sources and Contracting Parties' obligations. After that, it describes the European copyright exceptions model and the way this area of copyright law unfolded throughout the EU legislative harmonisation process and the most important rulings in this domain. In several sections, the chapter compares this model to the open-ended 'fair use' doctrine in the US, which is traditionally praised for its flexibility and adaptability to new technologies and unprecedented uses of copyright works. The chapter also discusses the exceptions' essential goal to achieve a 'fair balance' between the protection of rightholders' interests and the pursuit of public policies, broadly defined, looking at the interpretation of these provisions by the CJEU as instruments ensuring the coexistence of fundamental rights that can easily come into conflict in digital settings. It then presents three special cases where this conflict is mitigated through specific provisions concerning private copying (remunerated through 'levies'), TDM activities and, in the 2024 EU AI Act, the use of copyright works by developers of AI systems.

3.1.1. International copyright law

The original version of the Berne Convention laid the foundation for an international system of exceptions and limitations. Namely, it included a mandatory exception for news reporting,[380] and an optional exception of quotation for educational and scientific use.[381] The Convention's approach evolved with successive revisions, expanding and clarifying its provisions on the matter. The 1928 Rome revision modified Article 9(2) to require indication of the source for newspaper articles reproduced without express authorisation under the existing exception on news reporting. The 1948 Brussels revision introduced an optional exception for using short extracts from literary and artistic works for reporting current events through photography, cinematography, or radio broadcasting.[382] Furthermore, and more significantly for the development of exceptions in international copyright law,

[380] Art. 7 of the 1886 Berne Convention.

[381] ibid Art. 8. This provision was slightly adjusted and renumbered as Art. 10 in the 1908 revision. It was again renumbered as Art. 10(2) in with the 1948 Brussels Act, which introduced the quotation exception for newspaper articles and periodicals in Art. 10(1) of the Berne Convention.

[382] Art. 10-*bis* of the 1948 Berne Convention.

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the 1948 Brussels Act introduced Article 10(1) of the Berne Convention, establishing a mandatory exception permitting "short quotations from newspaper articles and periodicals." This exception underwent a substantial expansion with the 1967 Stockholm which broadened the scope of permissible quotations to include all types of works, while removing the earlier limitation to "short" excerpts.[383] Notably, Article 10(1) has remained the sole mandatory exception under the Berne Convention.[384]

To counterbalance the right to reproduction, which was also introduced in the 1967 revision (see *supra*), the Stockholm Act introduced the so-called "three-step test" in Article 9(2). Drafted as a compromise between the continental-European model based on narrowly spelt exceptions and other systems being more permissive and flexible,[385] the three-step test is an umbrella standard for exceptions and limitations to the reproduction right that Contracting Parties are allowed to introduce in their national laws. This test permits exceptions that are *(i)* limited to special cases, *(ii)* do not conflict with the normal exploitation of the work, and *(iii)* do not unreasonably prejudice the legitimate interests of the author. Since its inception, the three-step test has been incorporated into the TRIPS Agreement (Article 13), the WCT (Article 10), the WPPT (Article 16), and the Beijing Treaty (Article 13(2)), extending rights besides the reproduction right.

Lastly, the 1971 revision of the Berne Convention introduced a new set of optional exceptions and limitations into the Appendixes of the Convention, only allowed to developing countries.[386] Namely, the 1971 revision permits compulsory licences to the right of translation[387] and compulsory licences to the right of reproduction.[388]

The general international copyright framework and the significant policy space for countries to legislate on this front reflect the existence (and pre-existence) of different approaches across jurisdictions. In this regard, from a European and North Atlantic perspective, the differences between the *droit d'auteur* model and the common law approaches remain tangible and full of policy and legal consequences, especially in a data-driven and AI-influenced digital economy. The doctrines of 'fair

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[383] This restriction to short excerpts proved impractical, as more extensive quotes may be necessary depending on the circumstances. See Ricketson and Ginsburg (n 74) 765.

[384] For a scholarly attempt to revitalise the role of the quotation exception under Art. 10(1) of the Berne Convention and elaborate a global and internationally binding doctrine of 'fair use', with the purpose of going beyond and radically reduce the restrictiveness of the three-step test, see Tanya Aplin and Lionel Bently, *Global Mandatory Fair Use: The Nature and Scope of the Right to Quote Copyright Works* (Cambridge University Press 2020).

[385] Giuseppe Mazziotti, *Copyright in the EU Digital Single Market* (Centre for European Policy Studies 2013) 78-81; Susan Isiko Strba, *International Copyright Law and Access to Education in Developing Countries: Exploring Multilateral Legal and Quasi-Legal Solutions* (M Nijhoff Pub 2012), 54.
See also Geiger, Gervais and Senftleben discussing that civil law countries, such as France and Germany, were supporting a closed list of specific exceptions: Christophe Geiger, Daniel Gervais and Martin Senftleben, 'The Three-Step Test Revisited: How to Use the Test's Flexibility in National Copyright Law' (2014) 29(3) American University International Law Review 581, 583-584.

[386] The 1971 revision of the Berne Convention did not add any new exceptions or limitations to copyright.

[387] Art. II of the Appendix of the 1971 Berne Convention.

[388] ibid Art. III.

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use' under US law[389] and 'fair dealing' in the UK[390] and Ireland are prominent examples of how copyright exceptions can pursue the public interest through legal mechanisms which contemplate a significant role of courts in assessing *ex post* the unauthorised use of protected works without the copyright holder's permission. Fair use, in particular, embodies an eminently flexible, open-ended legal standard or rule of reason where 'fairness' is understood as a kind of 'equity', 'flexibility' that allows courts to pursue the public interest by continually adapting the doctrine in new technical contexts.[391] In Europe, instead, the concept of public interest is not explicitly defined under copyright law. Exceptions are solidly based on a principle of strict interpretation and the international standard of the 'three-step test', which did not bind the US until its accession to the Berne Convention in 1989.

3.1.2. The European copyright exceptions model

The EU harmonisation of copyright exceptions and limitations started through directives adopted, specifically, for the legal protection of computer programs[392] and databases.[393] It was via Article 5 of the InfoSoc Directive that EU lawmakers agreed upon a list of exceptions and limitations applicable to all categories of works.[394] Nonetheless, the exceptions established in previous sector-specific directives shall remain unaffected and continue to apply alongside the new provisions.[395]

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[389] Cf. Sect. 107 of the U.S. Copyright Act. Initially created by courts and later codified in the U.S. Copyright Act of 1976, fair use operates retrospectively and flexibly, with judges being able to apply this doctrine on a case-by-case basis whenever they find unauthorised use of a copyrighted work 'fair' and, therefore, legitimate. To do so, US courts are bound by statutory criteria that function as guiding principles in the evaluation of potentially copyright infringing uses, namely: (i) the purpose and character of the use; (ii) the nature of the work; (iii) the amount or substantiality of the portion used; and (iv) the effect of the use on the potential market value of the work.

[390] 'Fair dealing' in the UK is distinct from the broader US 'fair use' doctrine. In the UK, fair dealing is more narrowly defined and is limited to specific purposes as set out under Sect. 29 and 30 of the CDPA.

[391] For instance, this happened in the landmark case of *Sony Corp. of America v Universal City Studios, Inc.*, See 464 U.S. 417 (1984), where the Supreme Court held that home recording of television shows for personal use was not copyright infringement because it served the public interest by enabling "time-shifting" without harming the potential market for the original works. Three decades afterwards, the U.S. Court of Appeals for the Second Circuit ruled in favour of Google, finding that large-scale digitisation of book collections leading to the Google Books project constituted fair use: see *Authors Guild v Google, Inc.*, 804 F.3d 202 (2d Cir. 2015), where the Court reached this conclusion on the grounds of the transformative character of Google's use; the limited display of snippets; the overall public benefit created a searchable digital database of millions of books; and the minimal harm caused to the market for the original works.

[392] The Software Directive includes exceptions for lawful acquirers of a computer program (Art. 5(1)), for the making of back-up copies (Art. 5(2)), for the observation, study or testing of the functioning of the program (Art. 5(3)), and for decompilation (Art. 6).

[393] The Database Directive sets out both mandatory and optional exceptions for the use of copyright-protected databases (Art. 6) and optional exceptions for databases protected by the sui generis right (Art. 9). These exceptions cover purposes such as private copying of non-electronic databases, illustration for teaching or scientific research, and uses related to public security, administrative processes, or judicial proceedings.

[394] The 1991 Software and 1996 Database Directives limit the exercise of copyright exceptions to the concept of 'lawful use'. In the Software Directive, Arts. 5 and 6 define beneficiaries as the 'licensee' or the 'person having a right to use a copy of a computer program', reflecting protection designed for individual use rather than public communication. Similarly, in the 1996 Database Directive, Arts. 6 and 9 refer to 'lawful users" as those authorised through agreements with rightholders to access and use the database. However, the InfoSoc Directive abandoned this link between copyright exceptions and lawful use, as Recital 33 states that a use should be considered lawful "where it is authorised by the rightholder or not restricted by law.' See Mazziotti, *Copyright in the EU Digital Single Market* (n 385) 86-87.

[395] InfoSoc Directive, Art. 1(2).

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This EU copyright exceptions model under the InfoSoc Directive built a complex framework aimed to balance the rights of copyright holders with the needs of users and the overall public interest. By providing the broadest harmonisation set of measures the EU has adopted so far to integrate national copyright systems, this directive acknowledges the importance of a fair balance of the interests of copyright owners with the interests of users and the public at large (cf. Recital 31). At its core lies Article 5, which provides one mandatory exception and an exhaustive catalogue of optional exceptions[396] and limitations classified in relation to the exclusive right they are designed to limit:

- The reprography exception, private copying, exceptions for specific acts of reproduction made by cultural heritage institutions, for ephemeral recordings made by broadcasting organisations, and for reproductions of broadcasts made by social institutions are provided against the scope of the reproduction right;[397]

- Exceptions for teaching and scientific research, for uses for the benefit of people with a disability; news reporting; quotation for purposes such as criticism or review; use for public security purposes and other public proceedings; political speeches, use during religious or official celebrations, use of works made to be located in public places, incidental inclusion of a work in other material; advertising the public exhibition or sale of artistic works; use for the purpose of caricature, parody or pastiche, demonstration or repair of equipment, building reconstruction, research or private study by dedicated terminals in libraries, and exceptions analogue uses of minor importance pre-dating the InfoSoc Directive ('grand-father clause') are designed to limit *both* the reproduction and communication to the public rights.[398]

While designed to harmonise copyright law across the EU, this system has been the subject of considerable debate. Critics argue that it lacks sufficient flexibility to adapt to technological changes and fails to provide adequate legal certainty, fostering fragmentation rather than harmonisation.[399] As advanced by scholars[400] and later confirmed by the CJEU,[401] this list is exhaustive so that EU Member States cannot introduce exceptions and limitations that are not listed under Articles 5(2-3). Article 5(4) InfoSoc Directive further allows Member States to provide similar exceptions to the right of distribution, to the extent justified by the purpose of the authorised act of reproduction. Finally, Article 5(5) InfoSoc Directive subjects the exceptions and limitations listed in Articles 5(1)-(4) to the three-step test, with the consequence of making the test - originally targeted at the Berne Convention's Contracting Parties - enforceable directly by courts, starting by the CJEU.

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[396] Recital 32 of the InfoSoc Directive.

[397] InfoSoc Directive, Art. 5(2).

[398] ibid Art. 5(3).

[399] Mazziotti, *Copyright in the EU Digital Single Market* (n 385) 79; Eleonora Rosati, *Copyright and the Court of Justice of the European Union* (1st edn, OUP 2019), 129. See also Sganga suggesting that EU legislators shall introduce more mandatory exceptions in Caterina Sganga, 'Is There Still a Policy Agenda for EU Copyright Law?' (2023) 54 IIC 1407, 1413.

[400] Mazziotti, *Copyright in the EU Digital Single Market* (n 385) 89.

[401] Case C-351/12 *OSA v Léčebné lázně Mariánské Lázně* [2014] ECLI:EU:C:2014:110, para 40; *Pelham I* (n 61) para 58. See an extensive discussion in Tito Rendas, *'Exceptions in EU Copyright Law: In Search of a Balance Between Flexibility and Legal Certainty*' (Kluwer Law International 2021) 158-167.

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Given this unambitious approach at the EU level, the fact that copyright exceptions and limitations are considered one of the main failures of the 2001 InfoSoc Directive and a main source of fragmentation in EU markets for creative works is unsurprising.[402] Moreover, it is evident that unharmonised aspects of commercially relevant exceptions, such as private copying levies, cause significant market distortions in the final price of consumer electronics on a cross-border basis. As a result of this failure, all the three directives adopted after the InfoSoc Directive and containing new exceptions that address specific areas and uses not covered by the InfoSoc Directive made such exceptions *mandatory* for EU Member States.[403]

3.1.3. 'Fair balance' in the enforcement of rights and exceptions: the relevant CJEU case law

Despite its reliance on a principle of strict interpretation and the international standard of the 'three-step test', the InfoSoc Directive acknowledges the importance of a fair balance of the interests of copyright owners with the conflicting interests of users and the public at large.[404] As emphasised above, the concept of public interest is not explicitly defined under EU copyright law. Yet, many of the exceptions and limitations embodied into Article 5 of the InfoSoc Directive are intended to ensure that copyright law does not unduly restrict fundamental rights.

The CJEU's case law has been crucial for the interpretation and practical implementation of these exceptions. Its rulings enhanced the exceptions' original harmonisation effect while increasingly considering the EU Charter of Fundamental Rights, even more after its constitutionalisation through the conclusion of the Treaty of Lisbon in 2007. Such a constitutional reform, together with the greater challenges that emerged in digital settings for a peaceful coexistence of copyright enforcement measures and exceptions aimed at protecting fundamental rights, caused a remarkable increase in the number of copyright issues being referred to the CJEU as requests for preliminary rulings.

From 2008 onwards, the CJEU has been increasingly involved in cases regarding online enforcement measures such as site-blocking orders, the implementation of copyright exceptions and the exercise of exclusive rights.[405] In these cases, the CJEU started relying on a 'fair balance'

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[402] See Andrea Renda and others, 'Ex-Post Impact Assessment study on the implementation, application and effects of Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society (InfoSoc) and of its related instruments' (CEPS 2015) 18.

[403] See Directive 2012/28/EU of the European Parliament and of the Council on certain permitted uses of orphan works (Orphan Works Directive) [2012] OJ L299/5; Directive (EU) 2017/1564 of the European Parliament and of the Council on certain permitted uses of certain works and other subject matter protected by copyright and related rights for the benefit of persons who are blind, visually impaired or otherwise print-disabled and amending Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society (Marrakesh Directive) [2017] OJ L242/6; and the DSM Directive.

[404] InfoSoc Directive, Recital 31.

[405] See for instance Case C-275/06 *Productores de Música de España (Promusicae) v Telefónica de España SAU* [2008] ECR I-271(hereafter *'Promusicae'*); Case C-70/10 *Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM)* [2011] ECR I-11959 (hereafter '*Scarlet Extended SA*'); Case C-314/12 *UPC Telekabel Wien GmbH v Constantin Film Verleih GmbH and Wega Filmproduktionsgesellschaft mbH* [2014] ECLI:EU:C:2014:192 (hereafter '*UPC Telekabel Wien*'); and Case C-360/10 *Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) v Netlog NV* [2012] ECLI:EU:C:2012:85 (hereafter '*SABAM v Netlog*'); see also Case C-145/10 *Eva-Maria Painer v Standard Verlags* [2011] ECLI:EU:C:2011:798; Case C-469/17 *Funke Medien v Bundesrepublik Deutschland* [2019] ECLI:EU:C:2019:623 (hereafter '*Funke Medien*'); and *Pelham I* (n 61);

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doctrine whose initial elaboration occurred in a ruling, *Promusicae*, where the Court emphasised the need to strike a balance between the enforcement of Spanish record producers' rights and the conflicting rights to privacy and personal data protection claimed by a telecom operator (Telefonica) willing to protect its customers.[406] When the EU Charter of Fundamental Rights became legally binding in 2009, the relevance of 'fair balance' gained an even higher relevance in the interpretation of EU copyright law.[407] The Court developed the doctrine's foundations in subsequent cases where it had to assess the compatibility with EU law of broadly conceived online copyright enforcement measures that, according to the Court's rulings, would have disproportionately compressed constitutionally relevant rights of telecom operators and social media platforms.[408]

From the ruling in *Eva-Maria Painer v Standard Verlags* onwards, the CJEU started implementing the fair balance doctrine in the domain of copyright exceptions.[409] Yet, the above-mentioned exhaustive character of the catalogue of EU exceptions and the constraints established by the EU version of the three-step test under the InfoSoc Directive have not allowed the CJEU to set out limits to the copyright scope that are not explicitly provided, through specific exceptions, under copyright law itself. From then onwards, the CJEU increasingly recognised that the primary purpose of copyright exceptions is to safeguard fundamental rights, particularly the freedoms of expression and information. In its *Deckmyn* ruling, the Court established that the parody exception constitutes an "autonomous concept of EU law",[410] which precludes restrictive national interpretations and mandates a balance between copyright protection and freedom of expression.[411] This interpretation effectively intertwined the rationale of the exception with users' fundamental rights, thereby rendering the parody exception de facto obligatory for Member States, notwithstanding its ostensibly optional nature under the InfoSoc Directive.[412]

At a later stage, the exceptions where the CJEU relied on the 'fair balance' doctrine concerned acts of quotation,[413] parody,[414] and news reporting.[415] Most notably, in a triad of rulings published all together in July 2019 (*Pelham I*,[416] *Funke Medien*,[417] and *Spiegel Online*)[418] the Court took the view

406 *Promusicae* (n 405) para 68.

407 Caterina Sganga, 'A Decade of Fair Balance Doctrine, and How to Fix It: Copyright versus Fundamental Rights before the CJEU from Promusicae to Funke Medien, Pelham and Spiegel Online' (2019) 41(11) EIPR 683, 684.

408 See, respectively, *Scarlet Extended SA* (n 405) paras 44-46, 53-54; *UPC Telekabel Wien* (n 405) paras 63-64; and *SABAM v Netlog* (n 405) paras 42-44, 51-52.

409 Sganga, 'A Decade of Fair Balance Doctrine, and How to Fix It: Copyright versus Fundamental Rights before the CJEU from Promusicae to Funke Medien, Pelham and Spiegel Online' (n 407) 684-685.

410 *Deckmyn* (n 319) para 17.

411 ibid para 27.

412 Sganga, 'A Decade of Fair Balance Doctrine, and How to Fix It: Copyright versus Fundamental Rights before the CJEU from Promusicae to Funke Medien, Pelham and Spiegel Online' (n 407) 689. This point was also raised for other copyright exceptions by Thom Snijders and Stijn van Deursen, 'The Road Not Taken – the CJEU Sheds Light on the Role of Fundamental Rights in the European Copyright Framework – a Case Note on the *Pelham*, *Spiegel Online* and *Funke Medien* Decisions' (2019) 50 IIC 1176, 1190.

413 *Eva-Maria Painer v Standard Verlags* (n 405); see also *Funke Medien* (n 405) and *Pelham I* (n 61).

414 *Deckmyn* (n 319).

415 *Funke Medien* (n 405).

416 *Pelham I* (n 61).

417 *Funke Medie*n (n 405).

418 *Spiegel Online* (n 322).

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that intellectual property rights should not be viewed as "absolute" rights and acknowledged that exceptions could be interpreted broadly so as to preserve their effectiveness and foster a fair balance of conflicting interests. In *Funke Medien* and *Spiegel Online*, the Court addressed cases where media outlets invoked their fundamental rights to use copyrighted material without the consent of rights holders. These disputes involved, respectively, a classified military report and a pseudonymised book excerpt by a politician, both of which had been published without authorisation. While these rulings underscored the need to interpret copyright exceptions expansively to align with fundamental rights, the Court reaffirmed that users' fundamental rights cannot be invoked to create new copyright exceptions beyond the exhaustive list established in the InfoSoc Directive.[419]

Pelham I is a specially relevant case for the purposes of this Study because it concerns the music business by discussing the legitimacy of unauthorised sampling of a protected sound recording by a follow-on producer. In examining the facts of the case, the Court raised a distinction between explicit and 'unrecognisable' samples, taking the puzzling view that only the 'recognisable' ones give rise, legally speaking, to acts of reproduction. While holding that "hidden" uses of protected recordings do not fall within the notion of 'reproduction', the ruling thus eliminated the need to consider the applicability of an exception such as 'quotation' for these samples. To be able to justify samples as quotations, according to this ruling, samplers shall use these takings with "the intention of entering into dialogue with the work from which the sample was taken".[420] Yet, the CJEU held that, when this dialogue between artists emerges and the sample is recognisable, this use does require prior authorisation by the owner of the sound recording. To sum up, *Pelham* ended up protecting and consolidating record producers' rights by conferring legitimacy to a well-established licensing practice in the music industry, which is based on the exercise of so-called sync rights. Certainly, as some scholars argued, the CJEU's conclusion ends up limiting artistic freedom of sample artists.[421] However, the ruling does so consistently with a EU model of exceptions where the Europeanisation of the three step test limits the judiciary's discretion in implementing exceptions more than the US fair use or UK fair dealing paradigms do. In this specific case, freeing samples would have conflicted with the normal exploitation of a sound recording, which includes the licensing of sync rights between record producers.

At the national level, *Pelham I* resulted in the abolition of the German (and Austrian) 'free use' exceptions.[422] The CJEU held, consistently with Recital 32 of the InfoSoc Directive and the prior EU case law,[423] that this exception conflicted with the closed-list principle of Article 5(2) and 5(3) of the

[419] ibid para 49.

[420] *Pelham I* (n 61) paras. 71-72.

[421] Bernd Justin Jütte and João Pedro Quintais, 'The *Pelham* Chronicles: Sampling, Copyright and Fundamental Rights' (2021) 16 Journal of Intellectual Property Law & Practice 213, 225.

[422] This previous 'free use' exception under § 24(1) of the German Copyright Act allowed elements of a pre-existing work to be incorporated into a new, independent one without the author's authorisation, provided the new work was sufficiently distinct from the original, thereby already implicitly encompassing uses such as caricature, parody, and pastiche. Exempted from this broad exception were musical works, specifically melodies, which enjoyed particular protection under the previous German copyright framework. In fact, the former § 24(2) of the German Copyright Act granted absolute protection to melodies, prohibiting their incorporation into new works as long as the melody is still recognisable, seemingly foreshadowing the reasoning later adopted by the CJEU in *Pelham I*.

[423] See, for instance, Case C-301/15 *Marc Soulier and Sara Doke v Premier ministre and Ministre de la Culture et de la Communication* [2016] ECLI:EU:C:2016:878, para 26; *Spiegel Online* (n 322) para 41.

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InfoSoc Directive.[424] In this respect, the timing of the *Pelham I* judgment from 2019 proved to be convenient for the German legislator, as it was required to implement the now-mandatory exceptions for caricature, parody, and pastiche mandated by Article 17(7)(b) of the DSM Directive for uses on social media platforms regardless. As several national legislators did,[425] the German legislator seized the opportunity to extend these exceptions to all online *and* offline uses of works.[426] This decision added a new dimension to the apparently never-ending dispute between producer Moses Pelham and the members of the band *Kraftwerk*.[427] In September 2023, the German Federal Court of Justice referred yet another question to the CJEU. With this referral - *Pelham II*[428] - the national court seeks to eventually clarify whether music sampling can be covered under the new pastiche exception, a point already affirmed by the explanatory memorandum accompanying the German draft bill on the transposition of the DSM Directive[429] and the previous instance.[430] Specifically, the CJEU is tasked with defining the term 'pastiche' and determining whether this presumably 'autonomous notion of EU law' functions as a broad 'catch-all clause'[431] for various uses of pre-existing works—essentially 'free use 2.0'—or whether it necessitates additional elements, such as artistic engagement with or stylistic imitation of another work. This decision holds significance for the music industry that extends beyond the legal assessment of human-made sound samplings, mash-ups, and remixes, which have become increasingly popular and easy to create in recent years. In light of legal scholarship advocating for the pastiche exception to justify not only outputs of genAI (see *infra*) but also its *training* for artistic purposes,[432] *Pelham II* will undoubtedly carry even more

[424] *Pelham I* (n 61) paras 56-63.

[425] Among the Member States that provide for unlimited exceptions for caricature, parody and pastiche in their national copyright laws are Austria (§§ 42f, 89b(4) of the Austrian Copyright Act), Belgium (Arts. XI.189(1), XI.190/10 of the Belgian CEL (as regards authors) and Arts. XI.217/1, XI.217/9 of the Belgian CEL (as regards performers)), Estonia (Art. 57^{9}(5) in conjunction with Art. 19(4) of the Estonian Copyright Act), France (Art. 122-5(4°) of the French CPI) and Portugal (Art. 175-F(2)(x) of the Portuguese CRRC).

[426] See § 51a of the German Copyright Act.

[427] For a brief overview of the chronology of the '*Metall auf Metall*' dispute, which has its roots in 1999, see Péter Mezei and others, 'Oops, I Sampled Again … the Meaning of "Pastiche" as an Autonomous Concept Under EU Copyright Law' (2024) 55 IIC 1225, 1227-1229.

[428] Case C-590/23, *Pelham II*, pending.

[429] German Federal Ministry of Justice and Consumer Protection, Draft Act on the Adaptation of Copyright Law to the Requirements of the Digital Single Market' (2 September 2020) 91 <https://www.bmj.de/SharedDocs/Downloads/DE/Gesetzgebung/RefE/RefE_Urheberrecht.pdf?__blob=publicationFile&v=3>.

[430] See Hanseatic Higher Regional Court, judgment of 28 April 2022 - 5 U 48/05 ('*Metall auf Metall III*'), which, however, requires an 'artistic engagement' with the pre-existing work. The court stated that this requirement is fulfilled in this case by the transfer of the extracted sound sequence into a new musical genre. Conversely, in its opinion on the pending *Pelham II* case, the European Copyright Society considers that such an engagement is not a requirement for the application of the pastiche exception. See European Copyright Society, Opinion of the European Copyright Society on CG and YN v Pelham GmbH and Others, Case C-590/23 (Pelham II) (6 November 2024) 8-9 <https://europeancopyrightsociety.org/wp-content/uploads/2024/11/ecs-opinion-pelham-ii-1.pdf>.

[431] Legal scholarship convincingly argues that this is unlikely to be the case, as it would conflict with the CJEU's established case law, which demonstrates a more "systematic approach" to copyright exceptions under Art. 5 of the InfoSoc Directive. See Péter Mezei and others (n 427) 1253.

[432] See Viktoria Kraetzig and Jannis Lennartz, 'AI Learning as Pastiche: Technical Reproduction as Artistic Imitation' (2024) 126(17) Gewerblicher Rechtsschutz und Urheberrecht 1258, 1258-1264.

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far-reaching repercussions for creators' rights the CJEU has to consider when defining the contours of this exception.

Going back to the principle of 'fair balance', the consolidation of this standard in the jurisprudence of the CJEU aligns with the EU Charter of Fundamental Rights, reinforcing the notion that copyright occupies an equivalent status to other human rights, especially following the constitutionalisation of the Charter through Article 6 of the TEU. However, this principle, and the idea of intellectual property—particularly copyright—being elevated to the same level as fundamental rights, has sparked criticism among legal scholars.[433] Senftleben, for instance, contends that the CJEU's approach has resulted in the excessive constitutional entrenchment of copyright within the EU legal framework—a phenomenon he terms "over constitutionalisation".[434] He argues that instead of facilitating a balanced assessment of competing fundamental rights, such as freedom of expression, mechanisms like the three-step test serve as restrictive barriers, further narrowing the scope of exceptions to intellectual property rights. Consequently, CJEU rulings tend to reinforce a legal framework that disproportionately favors rights holders while curtailing users' ability to assert their own fundamental rights. Senftleben criticises the principle of fair balance, suggesting that by confining the reconciliation of rights to the narrow boundaries of existing intellectual property frameworks, the CJEU has overlooked broader public policy considerations.[435] This, he argues, privileges copyright holders while undermining the significance of users' fundamental rights, resulting in a legal system that prioritises intellectual property protection at the expense of other essential freedoms.

In contrast, scholars such as Strowel adopt a divergent perspective, one that appears more compelling in light of the requirements of the EU Charter.[436] Strowel views the balancing of interests as essential, emphasising that resolving disputes involving conflicting rights of authors and users necessitates a case-specific evaluation of the interests at stake. To support this position, Strowel highlights CJEU decisions where intellectual property claims prevailed, consistent with the directives' mandate to ensure a high level of protection for copyright, even in cases involving competing fundamental rights such as freedom of expression or privacy.[437]

While these scholars differ in their evaluations, they share a recognition of the CJEU's explicit integration of fundamental rights into its copyright jurisprudence, which strengthens the characterisation of authors' rights as human rights. Their disagreement lies in the desirability of this outcome. For Senftleben, this development represents an unfortunate reality that systematically undermines users' rights. Strowel, by contrast, embraces it as consistent with Article 27(2) of the

[433] This academic debate gained significant momentum during and after the legislative process on Art. 17 of the DSM Directive (formerly Art. 13). See §5.1.2 for further discussion.
[434] Martin Senftleben, 'The Unproductive ''Overconstitutionalization'' of EU Copyright and Trademark Law – Fundamental Rights Rhetoric and Reality in CJEU Jurisprudence' (2024) 55 IIC 1471, 1476-1478.
[435] ibid 1479-1483.
[436] See Strowel, 'Copyright strengthened by the Court of Justice interpretation of Article 17(2) of the EU Charter of Fundamental Rights' (n 44) 40-52.
[437] ibid (drawing upon cases such as *Promusicae*; *GS Media*; Case C-161/17 *Land Nordrhein-Westfalen v Dirk Renckoff* [2018] ECLI:EU:C:2018:634; *Pelham I*).

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1948 Universal Declaration of Human Rights, which safeguards the moral and material interests of authors derived from their scientific, literary, or artistic works.[438]

To conclude on this point: it is evident that CJEU rulings aim to achieve fairness through harmonisation. Preliminary rulings are arguably the most effective and equitable institutional mechanism to prevent national courts and legislators from interpreting EU provisions in ways that sacrifice legal certainty or deviate from the normative benchmarks established in EU directives. In the specific domain of copyright, however, the fair balance principle transcends its harmonizing function. It serves to reestablish the fundamental rights dimension of authors' rights, consistent with their characterisation as personality rights in continental European traditions and the imperative to protect these rights against challenges posed by emerging AI technologies that increasingly call the concept of "authorship" into question.[439] This dimension, long eroded by the rise of the social media industry, which scaled its operations by exploiting creative works without adequate control, compensation, or credit for professional authors and performers, is partially restored by the fair balance principle. Moreover, this principle offers courts the flexibility needed to assess the legitimacy of unauthorised uses of protected works on a case-by-case basis.

3.2. Fair remuneration from private copying levies

3.2.1. Concept and lack of recognition under international law

'Private copying' is a genuinely continental-European copyright exception that comes together with a mechanism that allows individuals to reproduce copyright-protected works such as sound recordings and audiovisual works for personal, non-commercial purposes without infringing the rights of copyright holders. Technically, this copyright exception grants users who have acquired a copy of these works legitimately (so-called 'lawful users') the right to copy the works they have had access to. Although its scope varies across jurisdictions, private copying generally excludes activities with direct or indirect commercial implications. In the continental-European legal tradition, this exception is designed to work together with an obligation for users to financially compensate copyright holders for the financial loss they incur due to the inability to license or enforce their reproduction rights in private spaces.[440] This compensation typically takes the form (and the denomination of) 'levies'. From an economic point of view, levies are "taxes" imposed on blank media or recording devices classified under the relevant laws as capable of copying or storing copyright works for personal use. Levies are normally collected from manufacturers and importers of these

[438] ibid.

[439] See Sacha Garben, 'Fundamental rights in EU copyright harmonization: Balancing without a solid framework: *Funke Medien, Pelham, Spiegel Online*' (2020) 57(6) Common Market Law Review 1909, who observes that, within the extensive legal framework of the EU, there is no clear consensus regarding the specific objectives and scope of the various fundamental rights. This ambiguity suggests that the balancing of interests often aligns with the constitutional standards of individual Member States. For this reason, it becomes even more essential, in our view, to approach the process of copyright harmonisation with seriousness and to ensure its protection by both EU and national courts.

[440] Stavroula Karapapa, 'A Copyright Exception for Private Copying in the United Kingdom' (2013) 35(3) EIPR 129.

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goods, generating significant revenue for rightholders, particularly in the audiovisual and music sectors.[441]

Private copying levies emerged in response to technological advancements that enabled analog and digital reproductions, such as cassette recorders and CD burners. These devices made it practically impossible for copyright owners to control and licence their reproduction rights. The concept originated in Germany in 1964, when the German Federal Court of Justice held that prohibiting private copying was unenforceable and infringed on constitutional privacy rights.[442] This reasoning led to the establishment of Germany's first levy system under the 1965 Copyright Act whose logic spread across Europe shortly afterwards, spurred by unstoppable technological developments including the internet viewed as a large-scale copying machine.

The notion of private copying is unknown under international copyright law. However, legal scholars showed that the original German model of private copying level served as a model for the "three-step test" during the revision of the 1967 Berne Convention.[443] This is because the compensation provided by levies ensures that the unreasonable prejudice caused by this exception can be made 'reasonable' via the related compensation schemes.[444]

3.2.2. EU law

When it was introduced under EU law in 2001, the InfoSoc Directive harmonised the main elements of this exception and compensation scheme, which varied significantly from country to country, through the articulated provision under Article 5(2)(b). As nearly all exceptions under the 2001 directive, this provision shapes private copying as an optional exception. This means that EU Member States are free to exempt reproductions made by natural persons for non-commercial purposes from copyright's scope on condition that rightholders receive fair compensation. The directive also allows Member States to define the form, arrangements, and levels of fair compensation although they are obliged to assess the extent of the harm caused by private copying and consider whether technological protection measures, such as digital rights management ('DRM') systems, restrict copying. Ultimately, Article 5(2)(b) reflects the idea that private copying exceptions and the related levies are valid only when justified by market failure, with the consequence that technological protection measures and end-user licences can ultimately replace and override such permissions.[445]

Consistently the optional and "open" character of the compensation mechanisms envisaged under Article 5(2)(b), the implementation of private copying levies varies across EU countries, with some Member States opting for more comprehensive schemes while others have more limited

[441] Mazziotti, *Copyright in the EU Digital Single Market* (n 385), 96-98.
[442] German Federal Court of Justice, judgment of 29 May 1964 - Ib ZR 4/63 ('*Personalausweise*').
[443] P Bernt Hugenholtz, 'The Story of the Tape Recorder and the History of Copyright Levies' in Brad Sherman and Leanne Wiseman (eds), *Copyright and the Challenge of the New* (Kluwer Law International 2012) 179, 191-192. Note that for Hugenholtz this is not a remuneration right, but a fair compensation right. See 192-193.
[444] WIPO, Records of the Intellectual Property Conference of Stockholm - June 11 to July 14, 196: Volume 1 (1967) 740.
[445] Renda and others, 'The Implementation, Application and Effects of the EU Directive on Copyright in the Information Society' (n 170) 39-43 and 84-87.

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approaches. Unsurprisingly, the CJEU has played a crucial role in determining how the key concepts of this provision should have been interpreted at the EU level, and applied nationally, in order to reduce cross-border trade distortions. These result from an unbearable variety of defining 'fair compensation', designing financing methods for levy systems, determining when and where a levy should be applied and by whom, and identifying the specific types of recording devices and media being subject to levies and the professional or non-professional purpose for which these goods were acquired.[446]

The first and most important ruling of the CJEU in this field originated from the music industry and from a conflict that arose between collecting society SGAE and a manufacturer of blank media being subject to levies in Spain.[447] In this case the CJEU provided detailed guidelines for interpreting the notion of "fair compensation" as an autonomous concept of EU law.[448] This interpretation reflects the need for a consistent and harmonized approach to align with the objectives of the InfoSoc Directive, which seeks to prevent competition distortions within the internal market caused by divergent national laws.[449]

The Court defined 'fair compensation' as the amount required to remedy the harm suffered by the author as a consequence of private copying[450] and emphasised that such compensation should be calculated on the grounds of the economic harm caused to rightholders by such activities.[451] The *Padawan* ruling stressed that a necessary connection must exist between levies imposed on devices or media and their potential use for private copying.[452] A corollary of that decision is that imposing levies indiscriminately—without excluding equipment intended for professional (*i.e.*, non-personal) use—would conflict with Article 5(2)(b) and be invalid.[453] To address this, the CJEU case law mandates excluding certain users, such as legal entities, from levy systems. This shall be achieved, according to several rulings, through: (i) practical and efficient reimbursement schemes;[454] (ii)

[446] See Giuseppe Mazziotti, 'Private Copying' in Paul Torremans and others (eds), *Elgar Encyclopedia of Intellectual Property Law* (Edward Elgar 2025); for developments until 2019, see an extensive overview of the CJEU's jurisprudence in Rosati, *Copyright and the Court of Justice of the European Union* (n 399), 137-148; for developments until 2015, see also João Pedro Quintais, 'Private Copying and Downloading from Unlawful Sources' (2015) 46 IIC 66.

[447] Case C-467/08 *Padawan SL v Sociedad General de Autores y Editores de España (SGAE)* [2010] ECLI:EU:C:2010:620 (hereafter '*Padawan ruling*').

[448] ibid paras 33 and 37.

[449] ibid paras 35-36.

[450] ibid paras 40-41.

[451] ibid para 42.

[452] ibid para 51.

[453] ibid para 53.

[454] Case C-521/11 *Amazon.com International Sales Inc and Others v Austro-Mechana Gesellschaft zur Wahrnehmung mechanisch-musikalischer Urheberrechte mbH* (hereafter '*Amazon v Austro Mechana*') [2013] EU:C:2013:515, where the CJEU held that EU law does not preclude national law from applying levies indiscriminately insofar the law provides a reimbursement system that is practically justified, effective and not excessively burdensome.

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exemptions from levies granted upfront without requiring pre-registration of businesses;[455] and (iii) avoiding reliance on agreements between collecting societies and liable parties.[456]

The CJEU case law has shed light on crucial aspects of the private copying regime:

- First, as regards the scope of the implementation of levies, it clarified that the exception and the related levies apply only to reproductions from lawful sources, excluding those originating from unauthorised platforms like P2P networks;[457]
- Second, the Court also recognized the technological neutrality of the exception, extending its applicability to various media, including online storage services, while leaving unresolved questions about cloud-based services that enable simultaneous public sharing of works;[458]
- Third, the CJEU addressed issues regarding transparency and characterisation of the obligation to pay levies. On the first front, while re-stating a principle laid down in *Padawan*, *EGEDA and Others v Administración del Estado* held that levies must be linked to the intended use of the levied devices for private copying, excluding equipment used solely for professional purposes.[459] This approach reflects the principle that compensation for harm caused by private copying should be tied to the consumer responsible for the harm, as damage occurs where they reside. Furthermore, by emphasising that for cross-border sales within the EU, levies should be charged *only* in the consumer's country of residence, irrespective of the seller's location.[460] As regards the nature of this obligation, the CJEU clarified that the failure to pay fair compensation for private copying levy shall be considered as tort, delict or quasi-delict for the purposes of establishing jurisdiction under the Brussels I Regulation;[461]

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[455] Case C-463/12 *Copydan Båndkopi v. Nokia Danmark A/S* [2015] ECLI:EU:C:2015:144, where the CJEU clarified that the obligation of payment does not arise where the harm is minimal, while the EU Member States have discretion when deciding on the threshold.

[456] Case C-110/15 *Microsoft Mobile Sales International Oy v. SIAE* [2016] ECLI:EU:C:2016:717, where the CJEU, analysing the compatibility of Italian law with EU law, ruled that leaving exemptions from private copying levies to private negotiations between collecting societies and those liable for payment (e.g. hardware companies) violates EU law.

[457] See Case C-435/12 *ACI Adam BV and Others v. Stichting de Thuiskopie* [2014] EU:C:2014:254, where the CJEU ruled that for the purposes of private copying levy, the source of copy must be lawful. Furthermore, in joined cases C-457/11 to C-460/11 *Verwertungsgesellschaft Wort (VG Wort) v Kyocera and Others* [2013] EU:C:2013:426, the Court clarified that the possibility of applying technological measures under Art. 6 of the InfoSoc Directive cannot render the condition relating to fair compensation for private copying inapplicable; in case C-572/13 *Hewlett-Packard Belgium SPRL v Reprobel SCRL* [2015] EU:C:2015:750, it ruled that publishers are not among the beneficiaries of the private copying levy.

[458] Case C-433/20 *VCast & Austro-Mechana v Strato* [2021] ECLI:EU:C:2022:217. Moreover, in case C-426/21 *Ocilion IPTV Technologies GmbH v Seven.One Entertainment Group GmbH and Puls 4 TV GmbH & Co KG* [2023] EU:C:2023:559, the CJEU clarified that a system, where the network operators give access to recorded broadcasts to an indeterminate number of persons for commercial purpose, does not fall within the private copying exception.

[459] Case C-470/14 *EGEDA and Others v Administración del Estado and Others* [2016] ECLI:EU:C:2016:418, where the CJEU clarified that the costs of fair compensation shall be borne by the private copies' users, thus it may not be financed from the state budget, to which all taxpayers contribute.

[460] Case C-462/09 *Stichting de Thuiskopie v Opus Supplies Deutschland GmbH* (hereafter '*Stichting de Thuiskopie v Opus Supplies*') [2011] ECLI:EU:C:2011:397.

[461] See Case C-572/14 *Austro-Mechana Gesellschaft zur Wahrnehmung mechanisch-musikalischer Urheberrechte mbH v Amazon EU Sàrl* [2016] ECLI:EU:C:2016:286.

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- Fourth, on the levy administration front, the CJEU's case law clarifies that Member states may implement reimbursement schemes or grant exemptions for certain users,[462] provided these measures are effective and not excessively burdensome. In cross-border sales, levies must be applied in the consumer's country of residence, as this is where the harm to copyright holders occurs.[463]

To sum up: while national private copying levies system in EU Member States differ,[464] an analysis of selected jurisdictions highlights the significant potential of private copying levies as a revenue source for creators and rightholders worldwide.[465] At the same time, the system is opposed by device manufacturers who claim it is outdated and shall be reformed to fit the digital age.[466] More recently, rightholders have placed their focus on the applicability of private copying levies to offline streaming copies.[467] Namely the issue has been raised in front of the Dutch courts by Stichting de Thuiskopie, the Dutch body in charge of collecting and distributing private copyright levies, who sued device manufacturers such as Dell and Hewlett Packard over the issue.[468] While the lower instances sided with the defendants, the Dutch Supreme Court, unsure of how Article 5(2)(b) of the InfoSoc Directive shall be interpreted, sent a request for preliminary ruling to the CJEU.[469] As emphasised in the literature, the CJEU may reach the conclusion that offline streaming copies are indeed private copies and, thus, trigger a remuneration obligation.[470]

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[462] *Amazon v Austro Mechana* (n 454).

[463] *Stichting de Thuiskopie v Opus Supplies* (n 460). Moreover, in Case C-263/21 *Asociación Multisectorial de Empresas de la Electrónica, las Tecnologías de la Información y la Comunicación, de las Telecomunicaciones y de los Contenidos Digitales (AMETIC) v Administración del Estado and Others* [2022] ECLI:EU:C:2022:644, the CJEU upheld the legality of a system, such as the one operating in Spain, where a single entity controlled by rights management organisations is entrusted with handling exemptions and reimbursements for private copying compensation.

[464] Ireland, Cyprus, Malta and Estonia did not introduce the optional system under Art. 5(2)(b).

[465] CISAC, BIEM and Stichting de Thuiskopie, *Private Copying Global Study 2020* (2020), available at <https://www.cisac.org/Newsroom/news-releases/new-private-copying-global-study-shows-potential-better-remuneration>.

[466] DigitalEurope, 'The 60-year copyright levies saga: high time for reform' (DigitalEurope 2024), available at <https://cdn.digitaleurope.org/uploads/2024/11/The-case-for-copyright-levies-reform-Nov-2024-compressed.pdf>.

[467] *I.e.*, an option provided by such streaming services as Netflix or Spotify, whereby the user may download content to its device and visualise or reproduce it while being offline. The content in question would only be accessible offline for a limited period of time or for a limited amount of downloads, and would commonly be automatically deleted once the subscription expires.

[468] Martin Senftleben and Elena Izyumenko, 'Author Remuneration in the Streaming Age – Exploitation Rights and Fair Remuneration Rules in the EU' (2024) Joint PIJIP/TLS Research Paper Series 137 1, 45-46.

[469] Case C-496/24 *Stichting de Thuiskopie*, pending.

[470] Senftleben and Izyumenko (n 468) 47. To the contrary, see Strowel, back in 2020, arguing that offline streaming copies do not qualify as private copying under Art. 5(2)(b) of the InfoSoc Directive as: they are not copies for an unlimited amount of time and should be considered rentals instead; neither are they copies to which the user has full control, made from a copy that such user owns; these copies are subject to licensing terms and are already paid for; an additional remuneration would be excessive as payment is already provided under the licensing terms; effective technological measures are used to control these files and in particular to prevent the possibility to copy them at any time and to play them once the subscription ends. See Alain Strowel, 'Private Copying Levies Do Not Apply in the Case of Streaming' (2020) available at <https://www.bitkom.org/sites/default/files/2020-04/expert-opinion_streaming-and-private-copying-levies_strowel.pdf>.

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Collection and distribution of private copying levies

- Recording rights: Record producers' and performers' organisations handle the distribution of levies under national statutes which provide the details regarding the products subject to levies and the authority or entity that is entitled to collect them and then allocate them to producers and performers.[471]
- Publishing rights: Composers' and publishers' CMOs or, alternatively, a distinct affiliations of different CMOs, manage the levy collection and distribution according to national laws that often grant them the institutional task of collecting the levies for the whole music sector (i.e., including the recording rightholders).[472]

3.3. Text-and-data mining exceptions and their present and future role in the digital music industry

Achieving a genuinely equitable balance between competing fundamental rights would require full harmonisation of exceptions and limitations across the EU. This goal could be accomplished only through an exhaustive yet mandatory list of exceptions, broad enough to function as effective mechanisms of copyright pre-emption - where necessary.[473] When EU lawmakers adopted the DSM Directive in 2019, they explicitly incorporated the concept of 'fair balance' into several recitals referring to newly enacted copyright exceptions.[474] Moreover, having understood the negative consequences of merely optional exceptions, for both purposes of market integration and legal certainty, they made the new exceptions under Articles from 3 to 7 of the DSM Directive *mandatory* on an EU-wide basis. Among these provisions, the TDM[475] provisions under Articles 3 and 4 are the most relevant ones for the music industry considering the rise and broader availability of GenAI technologies, which have spurred policy debates on the complex relationship between copyright and data mining.

The recitals of the DSM Directive clarify that this regulatory intervention happened at a time when EU lawmakers - clearly - did not have the recent developments and copyright-related challenges posed by GenAI in mind. Recital 8 refers to 'data mining' as "the automated computational analysis of information in digital form, such as text, sounds, images or data"[476] enabled by new technologies.

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[471] Mazziotti, *Copyright in the EU Digital Single Market* (n 385).
[472] ibid.
[473] Giuseppe Mazziotti, 'Public Interest Defence' in Paul Torremans and others (eds), *Elgar Encyclopedia of Intellectual Property Law* (Edward Elgar 2025) 226.
[474] See Recital 6, which recalls that the exceptions provided under Arts. 3-4 (text and data mining), Art. 5 (digital and cross-border teaching services), and Art. 6 (acts of preservation by cultural heritage institutions) are designed to strike a fair balance between the rights and interests of authors and other rightholders on one side, and users on the other.
[475] Under Art. 2(2), 'text and data mining' means any automated analytical technique aimed at analysing text and data in digital form to generate information which includes but is not limited to patterns, trends and correlations.
[476] DSM Directive, Recital 8.

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This recital highlights that "text and data mining makes the processing of large amounts of information with a view to gaining new knowledge and discovering new trends possible".[477] The directive drafters immediately raised the issue of copyright-driven restrictions and uncertainties in this field as something to be targeted and resolved to the benefit of the research community and, in particular, universities and research organisations. In doing so, Recital 8 acknowledges that "*text and data mining can involve acts protected by copyright, by the sui generis database right or by both, in particular, the reproduction of works or other subject matter, the extraction of contents from a database or both which occur for example when the data are normalised in the process of text and data mining. Where no exception or limitation applies, an authorisation to undertake such acts is required from rightholders.*"[478] Furthermore, after recalling that data mining can also be carried out in relation to mere facts and copyright-free data, Recital 9 emphasises that a copyright exception for data mining is unnecessary in those instances that, legally speaking, do not involve acts of reproduction or "*[...] where the reproductions made fall under the mandatory exception for temporary acts of reproduction provided for in Article 5(1) of Directive 2001/29/EC, which should continue to apply to text and data mining techniques that do not involve the making of copies beyond the scope of that exception*".[479]

Consistently with the above-mentioned considerations, the DSM Directive introduced mandatory exceptions under Article 3 and 4 of the DSM Directive:

- The first aims at excluding reproductions and extractions of works and other protected subject matters (such as databases) from the copyright scope if they are performed by research organisations and cultural heritage institutions acting for the purposes of scientific research and having lawful access to these materials;[480]
- The second covers both for-profit and nonprofit activities performed by any subject willing to undertake TDM acts on protected works and subject-matters. However, Article 4 contains a paragraph that changes the whole meaning of the provision, especially from the perspective of AI uses. According to Article 4(3), this broad exception shall not apply if the rightholder has made an express reservation to oppose these acts in an appropriate manner, such as machine-readable means in the case of works and other protected materials made publicly available online. In the case of content made publicly available online, Recital 18 provides that these 'appropriate' reservations should only be made through machine-readable means, including metadata and a website's or service's terms and conditions.[481]

[477] ibid.
[478] ibid.
[479] ibid Recital 9.
[480] Art. 3 of the DSM Directive creates an exception to the rights provided for in Art. 5(a) and Art. 7(1) of the Database Directive, Art. 2 of the InfoSoc Directive, and Art. 15(1) of the DSM Directive.
[481] Recital 18, in its second paragraph, provides that '[o]ther uses should not be affected by the reservation of rights for the purposes of text and data mining. In other cases, it can be appropriate to reserve the rights by other means, such as contractual agreements or a unilateral declaration, rightholders should be able to apply measures to ensure that their reservations in this regard are respected. This exception or limitation should leave intact the mandatory exception for text and data mining for scientific research purposes provided for in this Directive, as well as the existing exception for temporary acts of reproduction provided for in Article 5(1) of Directive 2001/29/EC.'

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As we will see, a correct definition of the scope of these exceptions plays an important role in drawing a line between lawful uses of copyright materials for purposes of data extraction, processing and further creative endeavours - especially if performed with the help of GenAI technologies - and uses that, to be legitimate, require a rightholder's permission based on data made available to the follow-on users. This distinction is at the core of the ongoing debates that characterise the use of musical works and sound recordings in AI-powered activities performed for research or commercial ends.

3.3.1. The research exception under Article 3 of the DSM Directive

A quick comparison between the national transpositions of the exception under Article 3 DSM Directive is useful to spot potential divergences across different jurisdictions on the criteria that allow permission-free computational analysis of existing copyright works. Unsurprisingly, a clear trend in national transpositions is the replication of the two main requirements of the exception: *(i)* the purposes of scientific research that research organisations and cultural heritage institutions shall pursue to be free from copyright restrictions; and *(ii)* their 'lawful access' to the materials the researchers intend to use.

On both these fronts, however, one can observe significant divergences across the 27 national implementations, evidently limiting the exception's harmonising effect. One of the most complex and questionable transpositions in terms of activities that this exception makes legitimate is certainly Ireland's. Having introduced a TDM exception for research purposes into its national law as early as December 2019 —well before implementing the DSM Directive in November 2021[482]— the Irish framework stands out for its open-ended approach in identifying the exception's beneficiaries.[483] Specifically, Irish law allows any "person who has lawful access" to the work or subject matter to rely on this exception if she or he carries out web crawling for non-commercial research purposes.[484] This approach clearly contradicts the research-specific dimension of Article 3 of the DSM Directive, under which a broad exception is granted to a relatively limited group of users without giving rightholders the possibility of opting out (as Article 4 does, instead).[485] To counterbalance the exceptionally broad scope of the web-crawling exception, Irish law introduces obligations for users of data-scraping tools that are not contemplated in the EU law. First, §53A(1)(b) of the Irish Copyright and Related Rights Act imposes an obligation to provide "sufficient acknowledgment" of the works and of the related authors when such works are used in any (unauthorised) reproductions. Second, §53A(3C) grants rightholders, *inter alia*, the right to be proactively informed about the use of their works within TDM research activities.[486] Arguably, these protections for rightholders' interests are

[482] European Union (Copyright and Related Rights in the Digital Single Market) Regulations 2021 (S.I. No. 567/2021) of 19 November 2021 (hereafter the 'Irish Regulations').
[483] See §14, 'Text and Data Mining for Non-Commercial Research' of the Irish Copyright and Other Intellectual Property Provisions Act 2019, amending §53A of the Irish Copyright and Related Rights Act 2000.
[484] §53A(1)(a) of the Irish Copyright and Related Rights Act 2000, as amended in 2019.
[485] Interestingly, the Spanish transposition of Art. 3 of the DSM Directive suggests otherwise. Due to its not very thought-through decision to transpose Arts. 3 and 4 into the same national provision, it could be interpreted in a way that rightholders can also reserve their right before TDM activities under Art. 3 of the DSM Directive. See Arts. 67(3) and 67(4) of the Royal Decree Law 24/2021. This point is also raised by Teresa Nobre, 'A first look at the Spanish proposal to introduce ECL for AI training' (*Communia,* 10 December 2024) <https://communia-association.org/2024/12/10/a-first-look-at-the-spanish-proposal-to-introduce-ecl-for-ai-training/>.
[486] §53A(1)(b) of the Irish Copyright and Related Rights Act 2000, as amended in 2019.

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weak and hard or impossible to enforce, particularly in cases involving large-scale scraping activities, even more so if performed by unauthorised third parties making copyright works publicly accessible on the internet.[487]

As regards the personal scope of application and the identification of the researchers specifically entitled to freely perform TDM activities, the transpositions of Article 3 reveal a rather uniform approach, despite small divergences.[488] This rather successful implementation is also due to the fact that this EU law provision draws upon a structural limitation in the enjoyment of technology-related exceptions that has been a well-accepted principle in the domain of EU copyright exceptions since the adoption of the Software Directive in 1991: the requirement of 'lawful access' to the materials covered by an exception.[489] In this specific case, 'lawful access' to the materials being used for TDM purposes pursues the goal of a fair balance of (conflicting) interests, ensuring that the relevant rightholders can still exploit their works by licensing access to their content libraries, even in the music sector, if we consider the vast libraries of music publishers and record labels. Despite this approach, from the publication of the Commission's proposal onwards, this structural limitation in the range of beneficiaries has encountered criticism for potentially undermining the provision's effectiveness, especially with regard to copyright materials being freely accessible online and not

[487] § 53A(3C) of the Irish Copyright and Related Rights Act 2000 as amended by § 3 of the Irish Regulations. Interestingly, Italy's and Slovenia's transpositions grant researchers the possibility of making available to the public, under certain conditions, the results incorporating the scraped content. Italian law, under Art. 70-ter(1) of the ICA, allows the communication to the public of the reproduced content 'when expressed in new original works'. According to § 57a(5) of the Slovenian Copyright Act, the publication of research results, including scraped materials, is permissible 'provided that the extent of text and data mining is limited to the intended purpose, aligns with fair practice, does not conflict with the normal use of the work, and does not unreasonably prejudice the legitimate interests of the author.'

[488] While several Member States adhered closely to the wording of Art. 3 of the DSM Directive in this respect, others slightly deviated from the EU law provision. Among the Member States that opted for a *verbatim* implementation of Art. 3's scope of beneficiaries are, for instance, Estonia (§ 191(1) of the Estonian Copyright Act), Finland (§ 13b(2) of the Finnish Copyright Act), France (Art. L.122-5-2 of the French CPI), and Greece (Art. 21A of the Greek Copyright Act). Austria and Germany, for instance, aimed for a deviation from the EU law model, which arguably has a less detrimental impact on rightholders by extending Art. 3's scope to individual researchers and selected third parties participating in an institution's research activities. See § 42h(1) of the Austrian Copyright Act and § 60d(3) No. 2 of the German Copyright Act. This exclusion of individual researchers has been explicitly criticised by Christophe Geiger, Giancarlo Frosio and Oleksandr Bulayenko, 'Text and Data Mining in the Proposed Copyright Reform: Making the EU Ready for an Age of Big Data?' (2018) 49 IIC 814, 836.

[489] The concept of 'lawful access' allows users to benefit from copyright exceptions provided they have legally obtained access to the protected works. Introduced by the Software Directive in the context of computer programs, which conditioned exceptions on users being 'lawful acquirers' (Art. 5), this principle was later extended to other areas. The Database Directive applied it to databases, using the term 'lawful user' (Arts. 6 and 9), defined in Recital 34 as users authorised by agreement with the rightholder. These definitions conditioned exceptions on lawful acquisition or adherence to licensing terms. The InfoSoc Directive further broadened the principle, introducing the term 'legal access' (Art. 6), allowing exceptions only when access was legally obtained. Recital 33 clarifies that lawful use includes use authorised by the rightholder or not restricted by law. Unlike the earlier directives, the InfoSoc Directive strikes a more balanced approach by prioritising legal definitions of exceptions over contractual terms set by rightholders: see Mazziotti, *EU Digital Copyright Law and the End-User* (n 86) 86-87. The DSM Directive reaffirms the requirement of 'lawful access' for benefiting from certain exceptions, such as those for TDM. According to Recital 14, 'lawful access' includes access through open access policies, subscriptions, contractual arrangements, or other lawful means, including freely available online content.

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subject to the express acceptance of licensing terms or terms and conditions.[490] In the music sector, especially when it comes to copyright materials under the control of composers, music publishers and record producers, it is obvious that Article 3 and its transpositions entail a *licensed* access for music sheets, recordings and other materials to be used for computational analysis in establishments such as universities, music academies and schools and other educational or research organisations. It is evident that the exception at issue intends to protect the rightholders' interests especially in research and teaching contexts where their works are exceptionally valuable and constitute the core of those organisations' activities. For works and materials that fell in the public domain or can be considered 'orphan' or 'out-of-commerce' - instead - it is obvious that TDM activities are free to express all their potential under the specific conditions laid down in the related EU directives and their national transpositions.

3.3.2. The emergence and significance of Article 4

The other exception provided in the domain of TDM activities - Article 4 - is the result of significant revisions in the final stages of the EU law-making process.[491] In fact, the European Commission's Proposal from September 2016 originally included only the first mentioned TDM exception for research organisations and cultural heritage institutions.[492] This specific proposal addressed the situation at a time several Member States had either already adopted a national TDM exception for almost exclusively non-commercial research purposes or at least proposed such a legislative initiative, thus triggering the EU legislator's push for harmonisation in this particular area.[493] While some scholars welcomed this Proposal's provision for its effort to prevent market fragmentation and support research relying on big data, a purely non-commercial and research-specific exception faced criticism primarily due to the narrow scope of its beneficiaries.[494] Tackling these concerns, the Council set the stage for what is now Article 4 of the DSM Directive, when it adopted its position on the Commission's Proposal in May 2018. Specifically, the Council members agreed to include a further TDM exception, not limited in terms of the range of beneficiaries and applicable, potentially, to *all* types of uses.[495] However, this exception, unlike the original Article 3, was designed to be merely *optional* for the Member States. Following the same approach, the European Parliament also

[490] See, for instance, Geiger, Frosio and Bulayenko (n 488) 836; Eleonora Rosati, 'An EU Text and Data Mining Exception for the Few: Would It Make Sense?' (2018) 13 JIPLP 429; Nicolas Jondet, 'L'exception pour le data mining dans le projet de directive sur le droit d'auteur: Pourquoi l'Union européenne doit aller plus loin que les législations des États membres' (2018) 67 Propriétés Intellectuelles 25, 33.

[491] Thomas Margoni and Martin Kretschmer, 'A Deeper Look into the EU Text and Data Mining Exceptions: Harmonisation, Data Ownership, and the Future of Technology' (2022) 71(8) GRUR International 685, 686.

[492] European Commission, Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market (14 September 2016), Art. 3.

[493] UK copyright law, for instance, has provided for a TDM exception for non-commercial research purposes since 2014 (Sect. 29A of the CDPA). The Estonian TDM exception (§ 19(3) of the Estonian Copyright Act as of 1 January 2017), which was adopted by the Estonian parliament on 15 June 2016, applied to *all* non-commercial uses. In January 2016, the French parliament proposed a TDM exception for non-commercial research purposes: see Assemblée Nationale, Draft Law for a Digital Republic (26 January 2016), Art. 18-*bis*. Moreover, the Irish government drafted a bill in August 2016 that included a TDM exemption for non-commercial research purposes as well. However, it had put this national initiative on hold due to the emerging discussion at EU level. See Jondet (n 490) 33.

[494] See, for instance, Geiger, Frosio and Bulayenko (n 488) 825-827.

[495] Council of the European Union, Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market - Agreed negotiating mandate 9134/18 (25 May 2018), Art. 3a.

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incorporated an equally optional general TDM exception into their amendments to the Proposal in September of the same year, before entering the trilogue negotiations.[496] Unexpectedly, in the final text of the DSM Directive adopted on 17 April 2019, the TDM exception under Article 4 became mandatory, targeting *all* beneficiaries and purposes alike. This final outcome aligns with the EU lawmaker's previously outlined rationale of avoiding purely optional copyright exceptions, which would have impeded a uniform balancing of fundamental rights across Member States.

As highlighted above, Article 4 covers both for-profit and nonprofit purposes and allows any subject to undertake TDM acts on protected works and subject-matters. However, the provision grants rightholders the right to expressly oppose these activities by placing a reservation in an appropriate manner.[497] This opt-out option is inherently vital for music rightholders, as it allows them to prevent their compositions and sound recordings from being scraped and commercially exploited. However, inconsistencies in the transposition of Article 4(3) of the DSM Directive result in a variety of criteria for a valid rights' reservation across EU Member States. Italian copyright law, for instance, is particularly vague as it broadly mandates an "expressed reservation [...] of the copyright or related rights" without imposing any additional conditions.[498] Other Member States, including Austria, Greece, and Malta, closely followed the blueprint set by Article 4(3) of the DSM Directive, *suggesting* a machine-readable opt-out when the scraped work or subject matter is made publicly available online.[499] Stricter than a mere suggestion, German and Polish law explicitly mandates a machine-readable rights reservation for every copyright protected content accessible on the internet.[500] Finally, the Slovenian transposition goes even further, meticulously specifying that a valid opt-out shall rely on "internationally accepted standardised machine-readable means" that, unfortunately, have not materialised yet.[501] This specific transposition highlights one of the key issues surrounding the requested rights' reservation under Article 4 of the DSM Directive: there is no international standard for this novel, yet crucial, form of exercise of copyright and related rights, even in the music sector. It is therefore uncertain whether - to meet the 'reservation' requirement in a national court's assessment - rightholders can just publish their terms and conditions in plain text form or they shall implement their opt-outs only via a *robots.txt* file.[502]

On the specific front of rights reservation, in September 2024, the ruling of the Hamburg Regional Court in the *LAION* case, which concerned the legitimacy of creating an AI training dataset through TDM, took the view that the term 'machine-readability' is a dynamic concept.[503] The German court

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[496] European Parliament, Amendments adopted by the European Parliament on 12 September 2018 on the proposal for a directive of the European Parliament and of the Council on copyright in the Digital Single Market (COM(2016)0593 – C8-0383/2016 – 2016/0280(COD)) Amendment 65.

[497] DSM Directive, Art. 4(3).

[498] Art. 70-quater(1) of the ICA.

[499] See § 43h(6) of the Austrian Copyright Act; Article 21B of the Greek Copyright Act and § 5 of the Maltese Copyright and related rights in the Digital Single Market Regulations.

[500] See § 44b(3) of the German Copyright Act; Article 26^2(2) of the Polish Copyright Act, which requires that 'the reservations must be made in a machine-readable format [...], along with metadata'.

[501] Article 57 of the Slovenian Copyright Act.

[502] See on the issue of a lack of standardisation in the context of rights reservation, Paul Keller and Zuzanna Warso, 'Defining best practices for opting out of ML training' (2023) Open Future Policy Brief #5 1 <https://openfuture.eu/wp-content/uploads/2023/09/Best-_practices_for_optout_ML_training.pdf>.

[503] See Hamburg Regional Court, judgment of 27 September 2024 - 310 O 227/23. An unofficial English translation of the ruling is available at <https://www.itm.nrw/wp-content/uploads/2024/09/2495651-en.pdf>.

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held that its interpretation should reflect current technological capabilities, considering also whether web crawlers are able to accurately detect, for instance, rights reservations expressed in mere natural language.[504] Ultimately, this leaves composers, performers, and record labels grappling with ongoing legal uncertainties on how to effectively protect their compositions and sound recordings from TDM, particularly from commercial scraping activities by large tech companies.

Compounding this issue, TDM exceptions are shaped under the DSM Directive as *free* (*i.e.*, uncompensated) uses. Recital 17 expressly provides that Member States should not introduce compensation for rightholders for uses under "the text and data mining exceptions introduced by this Directive". However, this reference to both exceptions is inaccurate or at least confusing because only the exception for research purposes, under Article 3, is expected to cause "minimal harm" to rightholders.[505] Since the other exception under Article 4 can be significantly limited, in terms of scope, by rightholders' reservation, those text and data mining activities can be properly made subject to licensing terms and to the payment of a related fee. As we will see, the legislative acknowledgement of the rightholders' power to oppose (and actively licence) these acts is at the core of the current debate on the enforceability of copyright in data and other materials used for the training of AI models.[506]

3.4. Copyright-related issues raised by AI and the provisions of the EU AI Act

Despite the introduction of the above-mentioned exceptions, scholars raised the issue concerning the narrow scope of legitimate text and data mining activities in terms of innovation policy, persuasively arguing that legal restrictions ultimately boost the development of biased AI systems trained on old and therefore less accurate data.[507] Yet, this seems to be mostly a theoretical and abstract concern, at least at this stage of development of AI systems, if one considers that most of these technology developers and service providers fully ignored the constraints posed by copyright law, even in a jurisdiction such as the US where the fair use doctrine ensures broader room for manoeuvre with the digitisation and commercial exploitation of pre-existing materials. This could be observed long before AI emerged as a challenge to creators.

In 2002, Google began its collaboration with libraries to digitise the books in their collections—around 20 million in total. This initiative not only provided these institutions with digital versions of these books but also allowed Google to retain the scans, using them to create a publicly accessible, full-text searchable database that displays book snippets matching users' search terms, a service known as 'Google Books.' This practice sparked a legal dispute initiated by Authors Guild, representing writers in the US, which accused Google of copyright infringement for scanning the authors' books without prior authorisation and making short excerpts of these books available without compensating the writers.[508] Ultimately, the New York City Court of Appeals ruled in favor of Google, determining

[504] ibid paras 100-107.
[505] DSM Directive, Recital 17.
[506] See EU AI Act 2024, Art. 53(1).
[507] Margoni and Kretschmer (n 491).
[508] *Authors Guild, Inc. v. Google Inc.* (n 391).

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that its practice satisfied all the criteria for the fair use exception under US copyright law.[509] The court concluded that, despite the commercial nature of Google's activities, its use of the physical books was transformative and did not serve as a substitute for the scanned physical books.[510] As such, it held that Google's activities did not negatively impact the market for these literary works.[511]

From the outset, clear parallels can be drawn between Google's mass digitization project and AI training: much like Google's initiative, AI companies replicate vast datasets to build digital repositories, which are then processed within systems that ultimately power commercial services heavily reliant on this input data. However, the scale of copyrighted works used in AI development and its far-reaching implications for a wide range of rightholders surpasses that of Google's comparatively(!) small-scale project. As confirmed by OpenAI's executives in multiple media appearances, interviews and public statements after the successful launch of services such as ChatGPT, Dall-E, and others, the company has already used, analysed and 'ingested' exceptional large volumes of copyright works and other materials for the training of their Large Language Models ('LLMs') and other generative systems based on computational data analysis and semantic predictions.

In this regard, there seems to be a historic, technical and legal continuity - a sort of *file rouge* spanning nearly three decades - between the emergence and exponential growth of P2P networking in mid - and late 1990s, social media platforms - which initially scaled up, also because of broad copyright liability exemptions, as of 2005 - and the development of AI technologies, especially since the release of GPAI models. Similarly to what happened with file-sharing and then social networking, the rapid development of GPAI models raised, once again, the issue of whether and how creators' rights should be enforced against the deployment of dual use technologies placed at the disposal of potentially unlimited numbers of Internet users ('dual' because they can have both infringing and non-infringing uses).

3.4.1. Copyright challenges in the use of musical works and sound recordings for GenAI

Even in the music industry, creators are increasingly concerned about the use of their copyright works to train such models without any authorisations and, as a result, without receiving any remuneration. In Germany, for instance, this basic concern has already prompted the German collective society for composers and music publishers, GEMA, to sue two providers of GenAI systems for the unlicensed use of protected musical works from its repertoire, seeking fair remuneration for its members. The first lawsuit, filed by GEMA in November 2024, is against OpenAI, which operates ChatGPT, as well as its Ireland-based European subsidiary, OpenAI Ltd.[512] The second legal action, initiated in January 2025, targets the US-based AI startup Suno, whose AI

[509] The factors for the assessment of whether a use falls under the fair use exception of Art. 107 of the US Copyright Act are (i) the purpose and character of the use (ii) the nature of the copyrighted work, (iii) the amount and substantiality of the portion taken, and (iv) the effect of the use upon the potential market.
[510] *Authors Guild, Inc. v. Google Inc.* (n 391) 46 para 6.
[511] ibid.
[512] The lawsuit *GEMA v OpenAI* is currently pending before the Munich Regional Court I under the case number 42 O 14139/24.

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application enables users to generate audio content through text prompts.[513] These lawsuits filed by GEMA serve as prime illustrations of the pressing legal questions surrounding whether the current EU copyright framework can keep pace with new challenges GenAI provides for music-rightholders. In essence, the ongoing scholarly and policy debates center on the two endpoints of GenAI: the initial training of AI systems using data scraped from sheer uncountable websites and content libraries ("input phase") and the generation of the final AI-produced content in response to user prompts ("output phase").

3.4.1.1. The input phase

During the input phase, developers of GenAI, including OpenAI and Suno, feed their AI systems with vast amounts of data to train their algorithms, enabling them to mathematically predict and eventually generate outputs that align with user prompts as accurately as possible. OpenAI and Suno compile these massive datasets by scraping publicly accessible websites and social media platforms, a process that inherently involves the reproduction of copyright-protected works and subject matter. In this process, OpenAI and Suno may also capture compositions from GEMA's musical works repertoire, embedded in freely accessible (but not necessarily free-to-use, legally speaking) sound recordings. It is evident that these companies are neither willing nor practically capable of obtaining prior paid licences from *all* rightholders before carrying out such large-scale web crawling operations. Hence, OpenAI's and Suno's only legal pathway hinges on the applicability of copyright exceptions and limitations.

From an EU law perspective, the input phase of the AI training process consists of acts of computational analysis that can easily fall within the scope of application of the above-mentioned TDM exceptions under Articles 3 and 4 of the DSM Directive. Yet, the applicability of these exceptions to this critical stage of the AI lifecycle remains a key point of contention in the scholarly debate. In favour of AI companies, some scholars argue that crawling copyright-protected materials for AI training falls within the scope of 'text and data mining' and, therefore, potentially, under one of the applicable exceptions. These scholars base their position on the wording of Article 2(2) of the DSM Directive, which provides for a broad definition of 'text and data morning', encompassing also the training of GenAI systems.[514] On the opposing side, critics of this first view argue that, in 2019, the EU legislator did not anticipate today's AI-training models when introducing Articles 3 and 4. As this sudden technological shift only gained significant momentum toward the end of 2021, more than two years after the DSM Directive's adoption, these critics argue that the EU lawmakers did not intend to target and legalize the broad range of acts that are prodromic to the launch and large-scale supply of Gen-AI technologies.[515]

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[513] The lawsuit *GEMA v Suno* is currently pending before the Munich Regional Court I under the case number 42 O 763/25.

[514] In favour of applying the TDM exceptions to AI training are, for instance, Philipp Hacker, 'A Legal Framework for AI Training Data - From First Principles to the Artificial Intelligence Act' (2021) 13(2) Law, Innovation and Technology 257, 277-278; Clemens Danda, 'Generative AI and EU Copyright Law: Exploring Exceptions and the Derivative Works Concept' (2023) 9(2) Compliance Elliance Journal 35, 36-38; Adam Buick, 'Copyright and AI training data—transparency to the rescue?' (12 December 2024) JIPLP <https://doi.org/10.1093/jiplp/jpae102>.

[515] See, for instance, Tim W Dornis, 'The Training of Generative AI Is Not Text and Data Mining' (2025) 2 EIPR 22. This is also the reason why the Polish draft bill for the transposition of the DSM Directive into national law explicitly excluded AI training from the scope of both TDM exceptions. See Polish Ministry of of Culture

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This consideration is particularly important for the application of Article 4, whose exception covering acts undertaken for commercial purposes - as in the case of OpenAI and Suno - still gives rightholders the possibility of reserving their rights and licensing those activities. Therefore, even if this exception applied to the activities targeted by GEMA, OpenAI and Suno would not be able to benefit from it because they would still be required to respect music copyright owners' rights reservations under Article 4(3) of the DSM Directive. Moreover, since these exceptions do not have retrospective effects, they cannot legalise web-crawling activities performed by AI companies *before* the formal adoption of the Directive in the various Member States. In this regard, it is worth recalling that GEMA, acting on behalf of its members, has formally published an opt-out clause on its website, explicitly excluding its repertoire from all forms of text and data mining, with a particular emphasis on AI training.[516] This aspect, however, brings back the unresolved issue of the lack of a standardized framework for rights reservations, raising uncertainty about the criteria GEMA and the individual music rightholders must meet for an opt-out to be legally effective.

3.4.1.2. The output phase

As regards the output phase**,** considering the complexities and opaqueness of AI's internal generative processes, their compliance with existing copyright laws depends essentially on whether GenAI's output can be classified as a 'derivative work', namely, a modification, adaptation or other alteration of an existing copyright work.[517] In the absence of a harmonised concept of 'derivative work' at the EU level, the main question to address is the distinction between derivative and entirely new works that do not depend on previous creations and are not permitted under a copyright exception allowing a certain transformative use. These are works in which only the user of a GenAI system, acting as an author by prompting and instructing the machine, would hold exclusive rights in so far as her work meets the originality requirement because of the free creative choices made by the author-user. It goes without saying that, to settle disputes arising between creators and follow-on users authoring their works via AI technologies, the case law on the legitimacy of transformative uses and plagiarism will play an important role in various jurisdictions.

An approach to assess whether an AI-prompted creative output qualifies as an independent (copyrightable) work is whether it maintains a "sufficient distance" from pre-existing works. In the case of *GEMA v Suno*, a "sufficient distance" would imply that, reminiscent of the CJEU's reasoning in *Pelham I*, the original composition must not be aurally recognizable in the output generated through the AI generative process.[518] Therefore, the output would function more as a tribute to or imitation of the (unprotected) style of the original composition, rather than being a derivative of that

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and National Heritage, Draft on amending the Act on Copyright and Related Rights and certain other acts (14 February 2024) 8 accessible only in Polish at <https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU19940240083/U/D19940083Lj.pdf>.

[516] For the reservation of rights declared by GEMA on behalf of its members pursuant to Art. 4(3) of the DSM Directive, see <https://www.gema.de/documents/d/guest/tdm-reservation-2023-12-pdf>.

[517] As discussed in the previous chapter, Art. 2(3) of the Berne Convention affords copyright protection to derivative works themselves. Nevertheless, the author of the original work, upon which the follow-on work derivative is based, retains the exclusive right to control the work derived from it.

[518] ibid. Interestingly, GEMA published audio output and corresponding song lyrics generated by Suno on its website, juxtaposing them with the original composition to highlight their striking resemblance. See <https://www.gema.de/en/news/ai-and-music/ai-lawsuit/audio-samples-suno>.

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work.[519] Yet, the inevitable vagueness and subjectivity of this criterion would lead to inconsistent rulings and a blurred line between non-infringing and infringing AI-assisted outputs.

3.4.1.3. Possible content licensing and remuneration schemes

A solution to mitigate the legal uncertainties inevitably raised by the unprecedented transformative uses enabled by AI technologies would be that of permitting these activities *ex ante.* Classically, this can be achieved either through licensing models under the control of the creative industries and the related rightholders, including music creators, or through statutory licences containing copyright exemptions covering the ensuing works - except for identical or similar reproductions and works whose distance is clearly "insufficient" and would grossly infringe on the existing rights of reproduction and to control derivative works.

As things stand, in the absence of a legislative intervention, the only alternative to copyright infringement for GenAI companies is the clearance of TDM activities if the copyright holders reserve their rights on the grounds of Article 4 of the DSM Directive. For instance, for the overwhelming majority of amateur works that unskilled users/authors might end up producing through GenAI, *voluntary* licensing schemes granted to AI companies by rightholders might look like, at least in part, the licences granted by certain European CMOs to social media platforms to clear synch rights in musical compositions and, thus, licence the pairing of music with photos and videos generated and uploaded by their users. These collective licences could concern both input and the output phase activities.

Several scholars have envisaged (maybe too precipitously?) that statutory remuneration schemes shall aim at compensating rightholders whose works are used in the input phase.[520] A first central point of contention in this kind of scheme is where to anchor a potential rightholders' compensation right within the AI lifecycle— at the input or the output stage (both of which are relevant, if the purpose of these schemes is legalising the whole AI-driven process). At the input stage, a technically feasible approach would be to adapt the rights reservation mechanism under Article 4(3) of the DSM Directive. In this regard, a robot.txt protocol could be configured as a machine-readable licensing tool, allowing rightholders to grant GenAI companies permission to scrape and use their works and subject matter for training, on the condition of receiving remuneration.[521] At the output stage, what comes into play in the existing EU legislation is the obligation Article 50(2) of the EU AI Act creates for providers of AI systems - including GPAI systems that generate synthetic audio, image, video or text content - to ensure that the outputs of the AI system are marked in a machine-readable format and detectable as artificially generated or manipulated.[522] If properly enforced together with licensing

[519] See Daniel J Gervais, 'AI Derivatives: The Application to the Derivative Work Right to Literary and Artistic Productions of AI Machines' (2022) 53 Seton Hall Law Review 1112, 1128-1030. The author provides a number of different scenarios to illustrate when an AI output is more likely to be considered a derivative work than an independent creation.

[520] See, for instance, Martin Senftleben, 'Generative AI and Author Remuneration' (2023) 54 IIC 1535; Sabine Jacques and Matthew Flynn, 'Protecting Human Creativity in AI-Generated Music with the Introduction of an AI-Royalty Fund' (2024) 73(12) GRUR International 1137; João P Quintais, 'Generative AI, Copyright and the AI Act' (1 November 2024) v. 2.0 24-25, available at <https://ssrn.com/abstract=4912701>.

[521] Senftleben, 'Generative AI and Author Remuneration' (n 520) 1546.

[522] Art. 50(2) of the AI Act specifies that: 'Providers shall ensure their technical solutions are effective, interoperable, robust and reliable as far as this is technically feasible, taking into account the specificities and

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or remuneration schemes, this obligation can give a boost to the exercise of attribution rights and other creators' rights especially in the output and 'final rendering' phase.

In a sector characterized by the co-existence of multiple layers of copyright protection such as the publishing and recording branches of the music industry, 'fair' remuneration of the related rightholders seems hard or impossible, especially at GenAI's input stage. That is because of the same *ex ante* obstacles music rightholders and their CMOs face when licensing rights in musical works and sound recordings within social media platforms characterised by poor and non-audited usage reports.[523] As highlighted below (see §8.5), both licensing and statutory remuneration solutions are currently impaired by the lack of an interoperable data infrastructure to be shared between online exploiters (including AI developers), on one hand, and music rightholders and CMOs, on the other, and being able to properly identify the works being exploited, the related (multiple) rightholders and to foster an equitable distribution of revenues based on reliable usage reports or estimates. On this specific point, the argument that statutory remuneration schemes would be preferable, if compared to licensing, does not seem persuasive because - irrespectively of how the remuneration is collected - then the main dilemma lies in how to allocate revenues and to implement 'fair remuneration' policies.

3.4.2. Legal battles in the US and their impact on music rightholders in the EU

As the success and fast-growing profits of these companies are objectively built upon the work, knowledge and efforts attributable to authors and other humans whose work is protected by both economic and moral rights, an increasingly relevant number of them and their representatives are suing AI companies for unlawfully using their protected materials without permission.[524]

From a chronological perspective, the most prominent cases started in the US and in the news publishing business. In *The New York Times v OpenAI and Microsoft*, filed in December 2023, one of the most influential newspapers in the world accuses the two tech giants of having used (and still using) its paywalled news articles to train ChatGPT without prior authorisation, resulting in ChatGPT allegedly generating verbatim excerpts from these pieces.[525] Beyond this pivotal case, over the past two years, representatives from various creative sectors have initiated legal actions against major AI companies, sparking a cascade of legal disputes. Within the music sector, the most significant lawsuits to date are the cases brought by the Recording Industry Association of America ('RIAA') against Suno and Unio, with the latter offering an AI-powered music generator similar to Suno. The RIAA filed this twin suit on behalf of its members, most prominently the three major record labels—

limitations of various types of content, the costs of implementation and the generally acknowledged state of the art, as may be reflected in relevant technical standards.'

[523] See §8.4 of this Study for a comprehensive analysis of the transparency issues currently faced by music rightholders in relation to social media platforms and other online exploiters. See also Jacques and Flynn (n 520) 1141, where the authors argue against linking the remuneration of rightholders to the input stage due to 'data management, processing and payment distribution, and [the establishment] of an efficient clearance system'.

[524] A comprehensive database of legal proceedings involving artificial intelligence can be accessed at <https://blogs.gwu.edu/law-eti/ai-litigation-database/>. To view a list of lawsuits related to copyright infringement, select 'copyright infringement' in the 'cause of action' filter.

[525] Tom Gerken, 'New York Times sues Microsoft and OpenAI for 'billions' (*BBC,* 27 December 2023) <https://www.bbc.com/news/technology-67826601>.

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Sony Music Entertainment, Warner Records, and UMG Recordings (Universal). Akin to GEMA's lawsuit in Germany, though this time not focused on musical compositions, the labels allege that both AI startups unlawfully incorporate sound recordings from their repertoire into AI training datasets.[526] With statutory damages reaching up to $150,000 *per sound recording*, these lawsuits demonstrate the considerable economic stakes involved for the music industry in the wake of GenAI development.[527] As a third and final example, Getty Images has extended its legal action against Stability AI to the US, following the filing of a parallel lawsuit in the UK. Both lawsuits lodged by this leading distributor of stock images relate to the unauthorised use of 12 million photographs in the training of Stability AI's text-to-image tool Stable Diffusion, claiming that Stability AI unlawfully used copyrighted material on a massive scale.[528] The first ruling among these cases currently pending before US courts will establish a significant precedent, as the court's ruling will address the central argument advanced by OpenAI and other AI developers, namely, whether the fair use doctrine under Section 107 of the US Copyright Act can cover and make the web scraping of copyright materials for the purpose of AI training legitimate.

Despite the clear distinction - legally and territorially - between 'fair use' in the US and the TDM exceptions in the EU Member States, a possible fair use finding at the end of the most important lawsuits started in the US would have a significant impact even in Europe. That is because, by relying on this conclusion, AI companies could opportunistically concentrate their unauthorised data-ingestion and computational analysis activities in the US and then just make their GenAI products available in the EU. This situation would be fairly similar to what happened when Google digitised a large volume of copyright books in the US, with the cooperation of US libraries, and then made its Google Books product accessible in Europe without digitising any books where this activity would have raised serious copyright infringement concerns. As a matter of private international law (cf. *lex loci protectionis* under Article 8 of the Rome II Regulation),[529] the reproduction of works through web scraping of EU-based copyright holders' works for AI training purposes performed in the US territory would ultimately make US law applicable at the expense of Articles 3 and 4 of the DSM Directive.[530] A further significant consequence would be that, by applying the fair use defence to these AI uses, creators' *ex ante* reservations of rights under Article 4(3) of the DSM Directive would be rendered ineffective, as such reservations hold no relevance under US law.[531] However, this concern may become obsolete with entry into force of the 2024 AI Act.

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[526] Daniel Tencer, 'Major Record Companies Sue AI Music Generators Suno, Udio for 'Mass Infringement' of Copyright' (*Music Business Worldwide,* 24 June 2024) <https://www.musicbusinessworldwide.com/major-record-companies-sue-ai-music-generators-suno-udio-for-mass-infringement-of-copyright/>.

[527] Natalie Sherman, 'World's biggest music labels sue over AI copyright' (*BBC,* 25 June 2024) <https://www.bbc.com/news/articles/ckrrr8yelzvo>.

[528] James Vincent, 'Getty Images sues AI art generator Stable Diffusion in the US for copyright infringement' (*The Verge,* 6 February 2023) <https://www.theverge.com/2023/2/6/23587393/ai-art-copyright-lawsuit-getty-images-stable-diffusion>.

[529] Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations.

[530] Malte Stieper and Michael Denga, 'The international reach of EU copyright through the AI Act' (2024) 194 Beiträge zum Transnationalen Wirtschaftsrecht 5, 11.

[531] ibid.

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3.4.3. The AI Act and its copyright-related provisions

The Act's copyright provisions were included only in the final text of the Act after intense debates over striking a fair balance between promoting AI innovation and protecting intellectual property while ensuring that human creators retain their copyright and related rights.[532] These provisions, particularly Article 53(1)(c) and Article 53(1)(d), contained in Chapter 5 and applicable as of 2 August 2025,[533] essentially consist of creators' rights to information and data transparency as regards the use of their works in the above-mentioned 'input phase'. The codification of these rights became politically urgent for the creative industries as of the public release of the first large-scale GenAI tool: ChatGPT.

3.4.3.1. Mandatory copyright policy - Article 53(1)(c) AI Act

Arguably, the potentially most impactful copyright-related provision in the AI Act is Article 53(1)(c), which appears to resolve at least certain important issues (while leaving others open to interpretation). As a general, at first glance reasonable, obligation, this provision requires providers of GenAI models to "put in place a policy to comply with Union law on copyright and related rights." This copyright policy shall include how GenAI providers intend to respect the copyright holders' opt-out clause under Article 4(3) of the DSM Directive using "state-of-the-art" technologies. The territorial scope and the mandatory character of this requirement is clarified and reinforced by Recital 106 of the AI Act. This recital makes clear that this obligation exists regardless of the jurisdiction where copyright-relevant acts involved in the training of GPAI models take place. By imposing such a policy, the AI Act not only addresses the consistent disregard shown by AI companies toward copyright holders, which, as highlighted above, has escalated into a large number of lawsuits, even in the music sector. This approach also appears to tackle the previously outlined situation under private international law where the applicability of the law of the place of the infringement could inadvertently encourage and reward AI companies which perform unauthorised TDM activities in countries with less restrictive copyright regimes.

Despite these laudable efforts, as persuasively pointed out in the relevant literature, the meaning of the term "Union law on copyright and related rights" under Article 53(1)(c) remains ambiguous.[534] As broadly evidenced in Chapter 2 of this Study, unlike other areas of intellectual property law, copyright law is governed by directives aimed at harmonising national laws rather than regulations creating EU-wide uniform rules. This results in 27 separate transpositions of each directive, which leave copyright regimes in each Member State intact and formally distinct. Therefore, the concept of "Union law of copyright" is certainly inaccurate and needs to be properly understood. Scholars argued that Article 53(1)(c) should be read as requiring EU copyright directives, such as the DSM Directive, to serve as binding guidelines for all providers of GenAI models, insofar as they fully harmonise national laws.[535] This would ultimately require OpenAI and other US-based providers of GenAI models to

[532] See Council of the European Union, General Approach in Legislative Procedure 2021/0106(COD) (6 December 2022) Council Document 15698/22, Recital 12c and Arts. 3(1b) and 4a-4c.
[533] EU AI Act, Art. 113(b).
[534] See on this aspect, Alexander Peukert, 'Copyright in the Artificial Intelligence Act - A Primer' (2024) 73(6) GRUR International 497, 507. Notably, the recitals of the EU AI Act also refer to the notion of "Union copyright law". For instance, Recital 109 stipulates that the EU AI Act "does not affect the enforcement of copyright rules as provided for under Union law".
[535] ibid.

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respect rightholders' opt-outs from TDM under Article 4(3) of the DSM Directive, denying any justifications based on a defence - the US fair use doctrine - which is inapplicable in the EU. While this Study does not seek to contribute to this debate in depth, it is evident that the precipitated way the EU sought to build an interface between copyright protection and AI shows alarming inconsistencies and a structural regulatory misalignment between innovation law and the protection of legacy creative industries.

3.4.3.2. Transparency obligations - Article 53(1)(d) AI Act

The second copyright-related provision of the AI Act, Article 53(1)(d), is notably less ambiguous in its legal implications. Designed to enhance transparency in relation to GenAI, a technology often described as a "black box", this provision mandates that all providers of GenAI models publish a 'sufficiently detailed summary' of the materials used to train their models. The importance of such a provision became increasingly clear during the negotiation process of the AI Act. In 2023, influential trade associations such as the International Federation of the Phonographic Industry ('IFPI') and the Independent Music Publishers and Labels Association ('IMPALA') underscored the importance of robust transparency rules and urged the EU lawmakers to impose a mandate requiring AI providers to document the data used in model training.[536] Indeed, If these mandatory summaries provided by GenAI model providers proved to be truly 'sufficiently detailed,' they could become vital tools for creators in effectively asserting their rights over compositions and sound recordings included in AI training datasets.[537] Specifically, these documentations could enable rightholders to verify whether the provider of a GenAI model is operating within the limits of the TDM exception under Article 4 of the DSM Directive: i) only scraping lawfully accessible material, and ii) respecting the declared rights reservation under Article 4(3).[538] This would be a crucial asset in potential future copyright infringement cases against GenAI companies. For this purpose, as noted in Recital 108 of the AI Act, GenAI providers would be obliged to disclose the precise data collections they scrape as part of their ongoing AI training efforts.[539] Yet, given tech companies' longstanding reluctance to comply with statutory transparency obligations under copyright law—often citing the protection of trade secrets (cf. §8.5.2 below)—it remains to be critically examined whether GenAI providers will comply with Article 53(1)(d) of the AI Act. With the AI Act imposing substantial fines—up to 3% of a GenAI provider's total global turnover or €15 million, whichever is higher—there is at least a strong incentive for providers of GenAI models to comply with this obligation.[540]

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[536] IFPI, 'European creators and right holders call for meaningful transparency obligations on AI systems to ensure the lawful use of copyright-protected content' (*IFPI*, 19 July 2023) <https://www.ifpi.org/european-creators-and-rightholders-call-for-meaningful-transparency-obligations-on-ai-systems-to-ensure-the-lawful-use-of-copyright-protected-content/>.

[537] Recital 108 of the EU AI Act specifically emphasises that "this summary should be generally comprehensive in its scope instead of technically detailed to facilitate parties with legitimate interests, including copyright holders, to exercise and enforce their rights under Union law".

[538] Zuzanna Warso, Maximilian Gahntz and Paul Keller, 'Sufficiently detailed? A proposal for implementing the AI Act's transparency requirements for GPAI' (June 2024) 3 <https://openfuture.eu/wp-content/uploads/2024/06/240618AIAtransparency_template_requirements-2.pdf>.

[539] ibid 8. Recital 107 of the Act states that these summaries shall include, for instance, "listing the main data collections or sets that went into training the model, such as large private or public databases or data archives, and by providing a narrative explanation about other data sources used".

[540] See EU AI Act, Art. 101(1).

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3.4.3.3. Shortcoming in the AI Office's second draft of the GenAI Code of Practice

Notwithstanding the overall commendable objectives set out in Articles 53(1)(c) and 53(1)(d) of the AI Act, a soft law initiative by the newly established AI Office (cf. Article 56 of the AI Act) appears to undermine them. The second draft of the 'General-Purpose AI Code of Practice,' intended as a guiding framework for GenAI companies, not only weakens the obligations imposed by the AI Act but also erodes fundamental principles of the DSM Directive.[541] First, it directly contradicts the core requirement of Article 4(1) of the DSM Directive, which permits TDM *only* when there is "lawful access" to a copyright work. Instead, the AI Office's draft merely requires GenAI providers to make "reasonable and proportionate efforts" to ensure such access. This divergence not only undermines the clear and unequivocal standards set by the DSM Directive but also dilutes the level of accountability for copyright compliance.[542] Second, the draft foresees that its signatories should "at least" respect rights reservations explicitly expressed through a robots.txt protocol.[543] As a result, an opt-out declared in text form on a website, as done by GEMA for instance, would not hold any legal weight. Therefore, the draft in its current version places only minimal obligations on companies like OpenAI and Suno. Instead, it shifts the responsibility onto music rightholders, requiring them to take further steps to protect their works. In essence, although the AI Office sought to strike a balance between fostering innovation by ensuring competitiveness with the US, and protecting the interests of copyright holders, this draft clearly overlooks the most vulnerable stakeholders involved in the evolving GenAI debate.

[541] AI Office, 'Second Draft General-Purpose AI Code of Practice' (19 December 2024) <https://digital-strategy.ec.europa.eu/en/library/second-draft-general-purpose-ai-code-practice-published-written-independent-experts>.
[542] ibid 22.
[543] ibid 23.

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4. EU copyright contract law in the DSM Directive

As explored in the previous chapters, the legal protections available to lyricists, composers, performers and producers in the EU regulatory framework highlight the critical role that copyright law plays in fostering a fair music ecosystem. One of the key instruments in achieving this was the 2019/790 Digital Single Market Directive (DSM Directive).[544] Historically, the DSM Directive sought to address the inequalities between industries and individual rightholders that the digital economy and new technologies have exacerbated. Specifically, Chapter 3 of the Directive, titled 'Fair remuneration in exploitation contracts of authors and performers', constitutes an attempt to foster fairness by reducing financial and information gaps that exist within industries, such as the music and audiovisual sectors, where authors and performers normally assign their rights to companies that concretely exploit such rights on the market.[545]

To promote fair remuneration, Article 18 specifically mandates that authors and performers shall receive "appropriate and proportionate remuneration" for the use of their works, a significant attempt to balance the power between creators and exploiters of copyrighted works. Therefore, Chapter 4 of this Study will examine the origins and consequences of this provision of the DSM Directive in the context of the 10 EU Member States under analysis. §4.1 starts by outlining the origin, evolution and political debates that accompanied Article 18, from its proposal to its final form. The chapter then shifts to the practical application of Article 18 of the DSM Directive by exploring its transposition into Member States' domestic legal systems (§4.2). This section will delve into each national system's interpretation of "appropriate" and "proportionate" remuneration, identifying national mechanisms implemented to promote fair remuneration as a consequence of the DSM Directive's transposition. The section also considers the recent statutory rights introduced to achieve fair remuneration of authors and performers. Finally, §4.3 will provide a general comparative overview of national transpositions of other provisions of Chapter 3 of the DSM Directive.

4.1. Genesis and political value of Article 18 and Chapter 3 of the DSM Directive

The DSM Directive is directed at the traditional intermediaries in the digital cultural industries - music publishers, record labels, and film and TV producers - who licence their respective works, on an exclusive or non-exclusive basis, to maximize their profits in several markets after acquiring as many rights as possible from individual creators. As argued in the literature,[546] Chapter 3 of the DSM

[544] DSM Directive.

[545] This objective can also be inferred from the recitals of the DSM Directive, in particular Recitals 3, 61 and 72-81.

[546] Giulia Priora, 'Catching sight of a glimmer of light: Fair remuneration and the emerging distributive rationale in the reform of EU Copyright Law' (2019) 10(3) JIPITEC 330; para 13; Ananay Aguilar, 'The New Copyright Directive: Fair remuneration in exploitation contracts of authors and performers – Part 1, Articles 18 and 19'

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Directive acknowledges that contracts are seldom signed between parties with equal bargaining power. Therefore, it recognises the importance of implementing measures to prevent the more powerful party from taking advantage of this imbalance, which is essential for fostering a healthy creative ecosystem.[547]

It would be difficult to understand the relevance and the potentially exceptional impact of this Chapter and of its Article 18 on national laws without reflecting upon their genesis and on the reasons that persuaded the EU lawmakers to pass this reform in May 2019. Clearly, Chapter 3 of the DSM Directive sets out a new framework - at least at EU level - for the contractual relationship between individual creators and their contractual counterparts.[548] This law stems from the acknowledgement of the systemic weaker bargaining power of creators when they negotiate their individual contracts.[549] As we will see, this aspect is relevant also to correct the data imbalances which exist between the various actors within the digital music industry. Accordingly, this section will cover the genesis and the political value of these provisions, starting with an analysis of the various perspectives and political debates that influenced the initial DSM Directive proposal, and then exploring how these discussions ultimately shaped its Chapter 3's final wording and inclusion of Article 18 in the text.

4.1.1. The proposal: differing views and surrounding political debates

Although the underlying goal of reducing information asymmetries was clear from the beginning of the EU policy making process, the mechanism through which EU law could strengthen the bargaining power of individual creators in their contractual relationships was highly debated. In the European Commission's Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market,[550] tabled in September 2016, Chapter 3 of the Directive consisted of only three Articles (formerly, Articles 14 to 16). These provisions were the result of a lengthy consultation process with stakeholders on the review of the existing EU copyright rules.[551] During this public consultation, which took place in 2014, authors and performers, especially in music and audio-visual sectors, reported to face issues with contractual terms, including unfair buy-out contracts, global transfer of rights, and a lack of transparency in reporting by publishers and

(*Kluwer Copyright Blog*, 15 July 2019) <https://copyrightblog.kluweriplaw.com/2019/07/15/the-new-copyright-directive-fair-remuneration-in-exploitation-contracts-of-authors-and-performers-part-1-articles-18-and-19/>.

[547] Aguilar, 'The New Copyright Directive: Fair remuneration in exploitation contracts of authors and performers – Part 1, Articles 18 and 19' (n 546) ('Chapter 3 recognises that contracts are rarely signed between individuals with level bargaining power and that measures to stop the stronger side from taking advantage of this situation are necessary for the development of a healthy creative ecosystem').

[548] Yannos Paramythiotis, 'Fairness in Copyright Contract Law: Remuneration for Authors and Performers Under the Copyright in the Digital Single Market Directive' in Tatiana-Eleni Synodinou and others (eds), *EU Internet Law in the Digital Single Market* (Springer 2021), 79.

[549] See Recitals 72 and 75 of the DSM Directive; European Commission, 'Impact Assessment on the Modernisation of EU Copyright Rules from 14 September 2016 (COM(2016) 593' 174-175 <https://digital-strategy.ec.europa.eu/en/library/impact-assessment-modernisation-eu-copyright-rules>.

[550] European Commission, 'Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market 2016' COM/2016/0593 final.

[551] ibid 6.

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producers.[552] They advocated for an intervention by the EU to prohibit certain clauses, grant renegotiation rights, set term limits on contracts, and enforce transparency.[553] Online exploitation was said to further complicate fair remuneration, leading some to propose unwaivable remuneration rights managed by CMOs.[554]

Between the end of the consultation process and the publication of the directive proposal (2014-2016), the European copyright debate was fuelled by several initiatives that ended up influencing the preparatory work for what is today's Chapter 3. Two of them, in our view, are particularly remarkable. The first was the launch of the Fair Internet for Performers Campaign ('FIPC') in May 2015 by four international organisations[555] representing 500,000 musicians, actors and dancers. When the campaign entered the copyright reform process, discussions about fair remuneration for authors and performers were finally gaining attention.[556] The second initiative was the European Parliament's early engagement in the copyright reform debate, highlighted by the appointment of Felix Reda—a former Pirate Party MEP and member of the Legal Affairs Committee (JURI)—as rapporteur for a report on implementing the InfoSoc Directive.[557] It is important to note that both these initiatives provided the copyright reform debate with different ideas and input, diverging significantly on such a politically crucial front as the legal and economic protection of performers in digital music markets.

On the first front, the FIPC sought to influence the European Commission and, at a later stage, the European Parliament by advocating the introduction of an EU-wide statutory right to fair remuneration to be granted to *all* music performers, covering acts of making available to the public when their recorded performances are streamed by digital service providers ('DSPs') such as Spotify, Apple Music, Deezer and the like.[558] The proposed new right, according to the FIPC, should have been shaped as an *additional* right to be administered collectively by performers' organisations on a mandatory basis, in order to secure a fair level of remuneration for national communities of performers. This is particularly for those performers who, contractually, do not receive royalties from record producers - *i.e.,* the so-called 'session musicians,' to be distinguished from 'featured performers.'

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[552] Directorate General Internal Market and Services, 'Report on the Responses to the Public Consultation on the Review of the EU Copyright Rules' (July 2014) 77-82, especially 79, available at <https://digital-strategy.ec.europa.eu/en/library/modernisation-eu-copyright-rules-useful-documents>.

[553] ibid 79.

[554] ibid 79-80.

[555] Namely, the AEPO-Artis, the European branch of the International Federation of Actors (EuroFIA), the International Federation of Musicians (FIM), and the International Artist Organisation of Music (IAO).

[556] See Ananay Aguilar, 'We want Artists to be Fully and Fairly Paid for their Work' (2018) 9 JIPITEC 162, para 7.

[557] After Felix Reda was appointed by the Parliament to report on the implementation of the InfoSoc Directive, stakeholders from the creative industries manifested their dissent, fearing that the Juncker Commission's industry- and business-oriented action plan regarding copyright law's modernisation could have been radically rejected by a Parliament's policy prioritising consumers' and users' interests, thereby undermining the interests of creators, and neglecting the needs of cultural industries professionals, once again. Gerhard Pfennig, 'Julia Redas Berichtsentwurf zur Urheberrechtsentwicklung und Junckers Mission Letter an Günther Oettinger' (*Initiative Urheberrecht*, 21 January 2015) <https://urheber.info/diskurs/2015-01-21-eu-urheberrecht-oettinger-und-reda-auf-der-suche>.

[558] For further information, see the campaign's description on FIPC's own website: <https://fair-internet.eu/description/>.

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On the second front, Reda's draft report from January 2015 highlighted the need to develop a legal context that improved the bargaining power of authors and performers in contracts with other rights holders and intermediaries.[559] In particular, the draft report acknowledged that, because of creators' weak bargaining power, developing a legal context that improved their negotiating position in their contractual relationships would have been necessary.[560] This draft also recommended pro-competitive measures, such as net neutrality and the promotion of open formats, with a view to supporting fair remuneration for creators and lower entry barriers for competing service providers.[561] In the final report adopted by the Parliament in July 2015, the word 'fair' appears a total of 12 times, ten of which explicitly refer to fair remuneration or compensation.[562] Although the report called for improvements to the contractual position of authors and performers in relation to other rightholders and intermediaries, its final version, as approved by the Parliament, stressed the importance of freedom of contract in the music sector.[563] To this end, the final report eventually incorporated a proposal under which, after the lapsing of a reasonable time from the transfer of rights from authors and performers to third parties, those rights would revert to their original holders in case of non-use of their works.[564]

The fact that the above-mentioned two initiatives had a common ethos and a similar policy goal as regards the transfer and exploitation of authors' and performers' rights did not prevent them from colliding on the specific front of the remuneration due to music performers. It is worth stressing that the FIPC tried its best to influence the European Parliament during the drafting and the debate on the Reda report.[565] However, to the disappointment of the campaigners, an oral amendment aimed to introduce a non-waivable remuneration right for performers covering online music exploitations

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[559] European Parliament (Rapporteur Felix Reda), 'Draft Report on the Implementation of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society (2014/2256(INI))' (2015). The Draft is available at <https://www.europarl.europa.eu/doceo/document/JURI-PR-546580_EN.pdf>.
As exemplified by a CISAC's letter to Rapporteur Reda from April 2015, the reaction of the creative to this Draft Report was exceptionally negative and strong:
<https://www.cisac.org/Newsroom/news-releases/creators-react-mep-redas-draft-report-copyright-calling-fairer-digital>.

[560] ibid 10.

[561] ibid 10-11.

[562] European Parliament, 'Report on the Implementation of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society - A8-0209/2015' (24 June 2015).

[563] ibid para 25.

[564] ibid.

[565] For instance, MEP Dietmar Köster, Group of the Progressive Alliance of Socialists and Democrats, hosted a 'Fair Internet' event where MEPs from different political groups discussed the fair remuneration of performers in the digital environment. Even more importantly, former MEP Mary Honeyball, a British member of the Labour Party in the United Kingdom and member of the Group of the Progressive Alliance of Socialists and Democrats in the European Parliament, proposed an amendment to the Reda report, calling for the introduction of a non-waivable right to remuneration subject to collective management for performers vis-a-vis legal download and streaming services. However, this amendment was rejected by the Parliament: see
<https://www.europarl.europa.eu/doceo/document/PV-8-2015-07-09-ITM-012-09_EN.html>.

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was prevented from being put to vote by MEPs from the Liberals and the Greens.[566] Despite the aforementioned failure, the FIPC remained persistent in its endeavor to influence the EU lawmakers from the publication of the Reda report onwards.[567]

Ultimately, what both campaigners and some members of the European Parliament sought to address was the performers' lack of bargaining power. This inherently weak contractual power is, historically, the reason why in earlier EU directives aiming to harmonise national copyright laws, performers were granted non-waivable statutory rights to an equitable remuneration for the broadcasting, communication to the public and rental of phonograms incorporating their works.[568] The same rationale motivated EU lawmakers to reserve to music performers a quota of 20% of the supplementary remuneration earned by record producers when deciding to extend the term of protection of fixations of performances and of sound recordings from 50 to 70 years from the first lawful publication or communication to the public of a phonogram.[569]

This approach aimed at protecting the weaker parties within the music industry did not find a high resonance in the European Parliament mainly because, in the 2014-2019 legislature, the Parliament was characterised by a conservative majority, which firmly believed in the preservation of the principle of freedom of contract in the digital economy.[570] Interestingly, on the opposite edge of the Parliament's political spectrum, a group like the Greens, which included Pirate Party's Felix Reda, did not support the proposal of a non-waivable statutory right for performers because of the intent to ensure creators' freedom to share their creations for free.[571] An unwaivable statutory remuneration right would have deprived performers of their freedom to embrace open access policies by adopting free licences such as 'Creative Commons', a result that the highly influential copyright reform rapporteur did not perceive as being 'fair'.[572]

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[566] On the rejection of Mary Honeyball's above-mentioned amendment, see also Fair Internet for Performers Campaign, 'Reda report adopted by EU Parliament' (*Fair Internet for Performers Campaign Press Release,* 9 July 2015) <https://fair-internet.eu/press-release-vote-on-reda-report/>.

[567] The coalition never stopped lobbying various political groups, especially the members of various parliamentary committees such the JURI, CULT and IMCO, who would soon be working on the upcoming proposal for the reform of EU Copyright legislation. Even after the tabling of the Commission's proposal, the FIPC continued to attend and host events and meetings with MEPs, most notably with MEP Axel Voss, who would soon be rapporteur on the review of the Copyright Directive in the European Parliament. During the Parliament's hearings on the directive proposal, the campaigners persistently reacted to the opinions of the ITRE and CULT committees as well as to the amendments made by the JURI committee. All these attempts are carefully documented on the FIPC's website: <https://fair-internet.eu/>.

[568] See Arts. 5 and 8(2) of the 2006 Rental and Lending Rights Directive.

[569] Art. 1(2)(c) of the Term Extension Directive.

[570] The composition of the 2014-2019 European Parliament can be found here: <https://results.elections.europa.eu/en/european-results/2014-2019/constitutive-session/>. These numbers show that there was a conservative majority with the convergence of votes from the Group of the European People's Party (Christian Democrats, EPP), the European Conservatives and Reformists Group (ECR), and the Group of the Alliance of Liberals and Democrats for Europe (ALDE) which eventually made the Parliament opt for a more liberal solution in the attempt to protect the interests of weaker parties.

[571] Aguilar, 'We want Artists to be Fully and Fairly Paid for their Work' (n 556) para 63.

[572] ibid para 64.

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In this political climate, the European Commission's Impact Assessment,[573] which accompanied the DSM Directive proposal, responded to the 2014 Public Consultation and other documents produced by campaigners[574] by acknowledging that there was a natural imbalance, in terms of bargaining power, in the contractual relationships favoring the counterparty of the creator, partly due to the existing information asymmetry.[575] Yet, as emphasised in §5.4 of its Assessment, the Commission did not buy the main argument of the FIPC campaigners and the idea that better remuneration for very vulnerable rightholders like music performers would have necessitated the introduction of a statutory non-waivable right.[576] Rather, the Commission's Assessment showed faith in an EU-wide transparency principle to regulate authors' and performers' contractual relationships, having specific regard to the type of exploitation of their works and performances and the amounts owed, as a structural remedy addressing information asymmetries and strengthening their bargaining power without making an exception to freedom of contract. This was ultimately the reasoning behind the proposal and legislative adoption of the transparency obligations laid down in Articles 14 to 16 of the proposal (*i.e.*, Articles 19 to 21 of the Directive), as well as behind the rejection of a remuneration right for music streaming exploitations.[577]

4.1.2. The final text: the addition of Article 18

The tool chosen by the European Commission to respond to the above-mentioned "natural" imbalance and to foster fairness in allocating rights and revenues was the imposition of transparency obligations on the contractual counterparts of creators or their successors in title (former Article 14) as well as a remuneration adjustment (former Article 15) and a dispute resolution mechanism (former Article 16). Although Chapter 3 came, from the outset, in its original version, with a title focused on the goal of fair remuneration ('Fair remuneration in contracts of authors and performers'), there was no explicit mention in the Proposal of a general principle of proportionate and appropriate remuneration and of specific obligations for Member States to make this principle effective in their jurisdictions. Such a codification materialised only through a Parliament amendment in September

[573] European Commission, 'Impact Assessment on the Modernisation of EU Copyright Rules from 14 September 2016' (COM(2016) 593 <https://digital-strategy.ec.europa.eu/en/library/impact-assessment-modernisation-eu-copyright-rules>.

[574] The Impact Assessment refers to the "Declaration towards a modern, more European copyright framework and the necessity of fair contracts for creators" by the Authors' Group, an umbrella organisation of the ECSA, EFJ, EWC, FERA and FSE; the Paying Artist Campaign launched in the UK by visual artists, or the "Fair terms for creators" campaign coordinated by the Creators Rights Alliance, <https://www.fairtermsforcreators.org/>.

[575] European Commission, 'Impact Assessment on the Modernisation of EU Copyright Rules from 14 September 2016' (n 573), 175.

[576] ibid 179. The Commission explicitly acknowledged the fact that there are stakeholders who believe that transparency obligations on their own are not sufficient, calling for further intervention on unfair contracts or the introduction of an unwaivable remuneration right. The Fair Internet for Performers campaign was named once, in footnote 557 of the same page.

[577] European Commission, 'Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market 2016' (n 550), 5-6; Recitals 61, 72 and 75 DSM Directive.

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2018[578] that introduced the current provision of Article 18 within the structural framework of the Commission's Proposal.[579]

In the DSM Directive's final version, Article 18(1) obliges Member States to ensure that authors and performers receive appropriate and proportionate remuneration where they licence or transfer their exclusive rights for the exploitation of their works. Article 18(2) specifies that this result can be achieved at national level by both contractual and non-contractual mechanisms. Nevertheless, since the Directive provides no further explanation or definition of 'appropriate and proportionate', it is up to each Member State to specify the most relevant criteria in defining these concepts.[580] Given that, in practice, fair remuneration cannot exist without access to accurate data, the whole Chapter 3 is based on the assumption that data is a technical necessity for creators to be able to negotiate their profit-share, and to be able to estimate what constitutes 'fair remuneration'.[581]

Given the reliance of the law on national implementations of Article 18's mechanism, the following section draws upon the way 10 Member States taken into consideration in the Fair MusE project (Austria, Belgium, Denmark, Estonia, France, Germany, Greece, Italy, Portugal and Spain) have implemented Chapter 3 of the DSM Directive. In doing so, it highlights the differences between national transpositions and the potential effectiveness (or lack thereof) of such mechanisms to strengthen the bargaining power of rightholders.

4.1.3. First steps in the application of the DSM Directive over time

Before delving into the details of Article 18's national transpositions, it is worth recalling that the CJEU has already received several requests for preliminary rulings regarding the DSM Directive as a whole.[582] These requests emerged before or shortly after the conclusion of its long national implementation, with Poland being the last Member State to implement it in September 2024— more than three years past the deadline. Among these requests, one concerning specifically Chapter 3 of

[578] European Parliament, 'Amendments adopted by the European Parliament on 12 September 2018 on the proposal for a directive of the European Parliament and of the Council on copyright in the Digital Single Market' COM(2016)0593 – C8-0383/2016 – 2016/0280(COD <https://www.europarl.europa.eu/doceo/document/TA-8-2018-0337_EN.html>.

[579] On 20 June 2018, the Legal Affairs Committee found a common position with regards to the Commission's Proposal. This was at first rejected by the Parliament on 5th July 2018, but finally approved on 12 September 2018.

[580] Ludovico Bossi, 'An Interpretation of Articles 18-23 of Directive (EU) 2019/790: Open Issues in Contractual Copyright and Related Rights Law' (2023) 72(6) GRUR International 527. Recital 61 references the need for rightholders to obtain appropriate remuneration for the uses of their work and subject matter, even more so in the world of online content-sharing services. In practice, the truth is that fair remuneration cannot exist without access to accurate data.

[581] This consideration is also reflected in Recital 75 ("[T]he sharing of adequate and accurate information by their contractual counterparts or their successors in title is important for the transparency and balance in the system governing the remuneration of authors and performers.").

[582] As of February 2025, these pending cases include: C-575/23 *ONB and Others*, which this subsection explores; C-797/23 *Meta Platforms Ireland*, concerning the press publisher's right under Article 15; C-579/24 *Austro-Mechana and AKM* deals with the question whether OCSSPs not only perform an act of communication to the public under Art. 17(1) but also reproduce works and subject matter (Art. 2 of the InfoSoc Directive) when users upload content to their platform; C-663/24 *Streamz and Others* will shed light on the legitimacy of the statutory remuneration right for authors and performers vis-a-vis social media and streaming services introduced by the Belgian lawmaker (see §4.2.3.3).

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the DSM Directive deserves attention here considering its possible relevance for an EU-wide uniform definition of the notion of 'fair remuneration' of authors and performers.[583]

The national litigation behind this request involves the Belgian National Orchestra ('ONB') musicians and the ONB itself, centering on a disagreement over the remuneration of the orchestral members for the transfer of their performer rights. In the past, the exploitation of the orchestra members' rights were negotiated on a case-by-case basis. Between 2016 and 2020, however, the ONB and the musicians' labor unions sought to establish a collective agreement, marking a shift from this practice. Following failed negotiations, the ONB autonomously requested the Belgian government to issue a Royal Decree to determine the remuneration for the musicians. The Royal Decree concerning the related rights of the ONB's artistic staff was eventually adopted and published on June 4, 2021,[584] three days *prior* to the DSM Directive's application date.[585] In two clauses, this decree mandated that ONB musicians transfer their communication to the public, reproduction, and distribution rights for all future performances to the ONB in exchange for a set remuneration. ONB musicians challenged the Royal Decree before Belgium's Supreme Administrative Court (Conseil d'Etat). They argued that this statutory obligation to transfer their intellectual property rights for a lump-sum payment runs contrary to various legal provisions, including Articles 18-23 of the DSM Directive. The ONB countered that, due to the musicians' status akin to that of civil servants, copyright contract law was inapplicable. Instead, their related rights should be governed by statutes such as the Royal Decree.

Belgium's Supreme Administrative Court thus sought clarification from the CJEU regarding two key issues. The first one concerns whether Chapter 3 of the DSM Directive applies to the transfer of related rights of music performers employed in the public sector through a regulatory act. The second one regards the retroactive applicability of the DSM Directive to a Royal Decree enacted prior to June 7, 2021. This is the most interesting one - at least in the early implementations of Chapter 3's rights - since it will help draw a binding line between the pre- and post-DSM Directive eras for composers' and performers' rights. The question derives from Article 26(2) of the DSM Directive, which clarifies that its provisions "shall apply without prejudice to any acts concluded and rights acquired before 7 June 2021". Consequently, the CJEU must assess whether the Royal Decree issued by the Belgian government falls under this provision, which would render Chapter 3 of the DSM Directive inapplicable to it.

On 24 October 2024, AG Szpunar issued his opinion. As for the first question, the AG reaffirmed that performers' rights are, above all, exclusive rights rather than solely remuneration rights. Hence, the scope of Articles 18–23 must be interpreted *broadly*, encompassing all licenses or transfers of rights by authors and performers. Excluding an entire group of performers from these provisions' protection would compromise their effectiveness without any legitimate justification. Therefore, the AG suggested that, *ratione personae,* Articles 18-23 apply to all categories of performers, including

[583] Case C-575/23 *ONB and Others* (hereafter 'AG Opinion in *ONB and Others*') [2024] ECLI:EU:C:2024:923, Opinion of AG Szpunar.
[584] Arrêté royal relatif aux droits voisins du personnel artistique de l'Orchestre national de Belgique, Moniteur belge du 4 June 2021, available in French and Dutch at <https://etaamb.openjustice.be/fr/nl/arrete-royal-du-01-juin-2021_n2021042025.html>.
[585] See Art. 26(1) of the DSM Directive, which provides that "the Directive shall apply in respect of all works and other subject matter protected by national law in the field of copyright on or after 7 June 2021".

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those who are employed or hold a civil servant status.[586] In a similar vein, AG Szpunar assessed the second question, asserting that Article 26(2) should be interpreted in a way that does not diminish the positive impact of Chapter 3's provisions on rightholders' remuneration. Since the Decree in question mandates the transfer of rights for *all* future performances of the ONB's musicians, it would entirely deprive these performers of the legal benefits provided by Articles 18-23.[587] As a result, the AG concluded that the DSM Directive's provisions on fair remuneration shall apply to all performances by the orchestra's musicians occurring after 7 June 2021, even if the relevant rights were transferred before that date.[588]

If the CJEU follows the AG's guidance, authors and performers, including non-featured performers, will obtain additional leverage to claim fair remuneration for their works and subject matters. In the meantime, the Belgian legislator, without waiting for the CJEU's response, amended the law that transposed the DSM Directive, specifying that all provisions under this Law are applicable also to the contracts that were concluded before the Law entered into force.[589]

4.2. Article 18's transpositions in 10 different EU Member States

As seen in §4.1, the evolution of Article 18 of the DSM Directive was complex, and so was its transposition into the domestic legal systems of Member States. National laws and their implementation mechanisms have varied significantly among Member States, reflecting different legal traditions, market practices, and policy priorities. From the 10 Member States under our analysis, rare were the countries which fully transposed Chapter 3 the DSM Directive before the deadline for transposition (*i.e.*, 7 June 2021).[590] This illustrates the complexity of integrating the Directive's provisions into existing legal frameworks and the challenges of achieving political consensus on sensitive issues related to copyright and remuneration. While some Member States already had an equivalent of Article 18's right to adequate and proportionate remuneration for authors in their national laws, needing only to add a provision extending the scope of this right to performers,[591] other Member States added completely new provisions to their national copyright

[586] AG Opinion in *ONB and Others* (no 583) paras 60-67.
[587] ibid paras 55-56.
[588] ibid para 57.
[589] Art. 993 of the Law of 19 June 2022 transposing 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, as amended by the Law of 9 February 2024.
[590] This is the case of France and Germany, which transposed Chapter 3 of the DSM Directive, respectively, through Order No. 2021-580 of 12 May 2021 transposing Art. 2(6) and Arts. 17 to 23 of the DSM Directive (for France) and through the Act on the Adaptation of Copyright Law to the Requirements of the Digital Single Market of 20 May 2021, amending the existing Act on Copyright and Related Rights, and the Act on the Copyright Liability of Online Content Sharing Service Providers of 31 May 2021 (for Germany).
[591] See for example France, which added Art. L.212-3(II) (a *verbatim* transposition of Recital 73 of the DSM Directive) to the French CPI through its transposition law Ordinance No. 2021-580 of 12 May 2021.

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laws.[592] As we will see, others even introduced new remuneration rights, some of which are currently being challenged at a constitutional level.[593]

§4.2 therefore examines these transpositions, emphasising national deviations in both the definitions and in the specific mechanisms implemented to achieve fair remuneration. More specifically, this section highlights the broader implications of the domestic approaches taken to reduce the music industry's abovementioned value gaps. The first subsection explores how the selected Member States interpret and apply the concepts of 'appropriate' and 'proportionate' remuneration within their legal frameworks, considering both legislative measures and soft law approaches that guide these definitions. After this, we analyse the mechanisms embedded in national laws to achieve fair remuneration, including: *i)* how Member States reconcile the principles of contractual freedom and fair balance of rights and interests with the implementation of Article 18 of the DSM Directive; *ii)* how the contract law-based mechanisms outlined in Articles 20, 21, and 22 of the DSM Directive can further improve the remuneration of authors and performers; *iii)* how legitimate lump-sum payments to authors and performers are in the context of fair remuneration; and *iv)* how collective agreements stipulated by authors' and performers' collecting societies are an important part of the fair remuneration equation, particularly given the extended collective licensing embedded in Articles 8 and 12 of the DSM Directive. Finally, the last section provides an in-depth look at recent statutory developments in remuneration rights within specific Member States. This includes Germany's approach to authors and performers' remuneration rights vis-à-vis OCSSPs; Belgium's strategy for ensuring fair remuneration for authors and performers in the context of both OCSSPs and streaming services; Spain's provisions on performers' remuneration rights for the making available right online; and France's noteworthy legislative and policy measures.

4.2.1. How do EU member states define 'appropriate' and 'proportionate' remuneration? National provisions and their criteria

In their national transpositions, most Member States adopted terms which closely mirror the wording of Article 18, emphasising the need for both appropriate and proportionate remuneration when authors and performers licence or transfer their exclusive rights. Nevertheless, deviations materialised. For instance, Estonian law articulates the right to appropriate and proportional remuneration with specific exceptions prescribed by the same law.[594] Furthermore, France, while

[592] See for example Portugal, which added Art. 44-A to the Portuguese CRRC through its transposition Law Decree No 47/2023 Amending the CRRC of 19 June 2023.

[593] This includes Belgium, which added Arts. XI.228/10 and XI.228/11 to the Belgian CEL through its Loi Transposant la Directive (transposing law) of 19 June 2022. These provisions are currently being challenged before the Belgian Constitutional Court and are even the subject of a pending preliminary ruling procedure before the CJEU. Furthermore, there is Germany, which added three new statutory remuneration rights vis-à-vis OCSSPs: a general one for the making available on the platform (§ 4(3) of the German Act on the Copyright Liability of Online Content Sharing Service Providers, UrhDaG), another one for uses presumably lawful by law (§ 12(3) UrhDaG; particularly the use of short excerpts of a work for user-generated content), and a third for users' activities covered by parody, caricature or pastiche (§ 5(3) UrhDaG). All of these provisions were recently challenged at the Federal Constitutional Court due the violation of contractual freedom. For a more in-depth analysis of these new statutory remuneration rights, see §4.2.3.2 and §4.2.3.3.

[594] § 14(1) of the Estonian Copyright Act (RT I 1992, 49, 615) states that an author has the right to obtain appropriate and proportional remuneration for the use of the author's work by other persons "except in the cases prescribed by this Act.", which contemplates several copyright exceptions. These cases are detailed in § 19 ('Free use of works for scientific, educational, informational and judicial purposes'). For example, authors'

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merely maintaining its existing provision on equitable remuneration for authors from 1994, did not initially add the term "adequate" when transposing Chapter 3.[595] It was only after the French administrative Supreme Court partially annulled the French decree transposing parts of the DSM Directive in November 2022,[596] citing the lack of a guarantee of "adequate" remuneration, that the legislator amended the law to comply with the wording of Article 18.[597] At a first glance, German law presents a similar problem: since 2002, it has required "appropriate" remuneration but - to date - does not explicitly include the proportionality criterion.[598] The German legislator argues that this aspect of Article 18 is sufficiently addressed by limiting the option of lump-sum payments.[599] Nevertheless, German courts have long held that authors must receive a fair share of revenues generated by the exploitation of their work.[600] Therefore, because of this legal tradition enshrined in the national case law, the seemingly incomplete transposition seems not to have detrimental consequences for musicians in practice. Greece has taken a different approach by specifying remuneration as a specific percentage based on gross income or expenses (which can be combined) earned by the activity of the contractual counterparty and derived from the exploitation of the work.[601]

Where Member States differed even further was in their approaches to identifying criteria to define 'appropriate' and 'proportionate' remuneration. The appropriateness of the remuneration paid to rightholders is not a new requirement under EU law. It was already prescribed in the CRM Directive regarding the licensing fees negotiated by CMOs. Article 16(2) of this Directive provides binding criteria for CMOs to calculate such remuneration, indicating that licensing fees shall reflect the

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authorisation and remuneration are not needed for the purpose of "making summaries of and quotations from a work which has already been lawfully made available to the public, provided that its extent does not exceed that justified by the purpose and the idea of the work as a whole which is being summarised or quoted is conveyed correctly" (§ 19(1)). The same applies, in such cases, to the consent and remuneration of performers in § 68(1).

595 Strangely enough, this was not the case of the right for performers, which followed closely the wording of Art. 18 (Art. L.212-3-II of the CPI, as modified in Order No. 2021-580 of 12 May 2021, transposing Article 2(6) and Arts. 17 to 23 of the DSM Directive). For authors, instead, the previous version of Art. L.131-4 of the CPI, which was already in the law since 1994, remained mentioning the requirement of 'proportionate' remuneration, neglecting 'adequate' remuneration ("Assignment shall comprise a proportional participation by the author in the revenue from sale or exploitation of the work").

596 Conseil d'Etat, decision from 15 November 2022, no. 454477.

597 The inclusion of the expression "adequate remuneration" in the current version of the first paragraph of Art. L.131-4 CPI was introduced through the amendment of this provision by Art. 62 of Law No. 2024-449 of 21 May 2024 aimed at securing and regulating the digital space. In addition, pursuant to Art. 64(V) of Law No 2024-449 of 21 May 2024, Art. 62 of the same law, amending Art. L.131-4 of the CPI, entered into force on 17 February 2024.

598 § 32(1) of the German Copyright Act Act (which has been in force since 2002): "The author is entitled to the contractually agreed remuneration [...]. If the amount of the remuneration has not been determined, equitable remuneration is deemed to have been agreed. If the agreed remuneration is not equitable, the author may require the other party to consent to a modification of the agreement so that the author is granted equitable remuneration".

599 German Bundestag, 'Entwurf eines Gesetzes zur Anpassung des Urheberrechts an die Erfordernisse des digitalen Binnenmarktes' (9 March 2021) BT-Drs. 19/27426 ('German Explanatory Memorandum') 50 <https://dserver.bundestag.de/btd/19/274/1927426.pdf>. See *infra*, §4.2.2.2.

600 German Federal Court of Justice, judgment of 7 October 2009 - I ZR 38/07 ('*Talking to Addison*') <https://openjur.de/u/71662.html>.

601 Art. 32(1) of the Greek Law. It is noted that the approach of associating remuneration with a percentage, calculated on the basis of gross income, gross expenses or the combination of the two, predates the Greek transposition of Article 18 DSM Directive.

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economic value of the use of the rights in trade, having considered the nature and scope of the use of the work and the economic value of the service provided by the CMO.[602] This means that, even before the adoption of the DSM Directive, EU law made a significant attempt to help individual rightholders obtain adequate and proportionate remuneration from their works. It is not a coincidence that a first step towards the DSM Directive and its fair remuneration goal was undertaken at the time the EU was harmonising the national laws applicable to the functioning of CMOs, which are traditionally expected to foster fairness through the collectivisation of the negotiation and rights clearance process.[603]

Although Article 18 of the DSM Directive includes neither a definition of 'appropriate'[604] nor 'proportionate', the reference made in Recital 73 of the Directive to the actual or potential economic value of the licensed or transferred rights provides guidance and is consistent with the above-mentioned criteria laid down under Article 16 of the CRM Directive. This Recital indicates that such remuneration shall take into account both the author's and the performer's contribution to the overall work, and all other circumstances of the case, including market practices and actual exploitation of the work.

Accordingly, some Member States implemented their definitions for 'appropriate' and 'proportionate' remuneration by taking one or several elements mentioned in Recital 73. Definitions of 'appropriate' are more commonly present in national provisions than those of 'proportionate' remuneration, with 'appropriate' being often defined with reference to what is customary in business practices. This is the case, for example, in Austria[605] and in Germany.[606] The legislation in these Member States provides a set of criteria to define 'appropriate' which includes factors taken directly from the Directive: for instance, the practice and uses of the market and the specific creative sector, per Recital 73, as well as the individual contribution to the work or subject-matter, as contemplated in Article 18(2). In Germany, there has been a significant amount of case law on 'appropriate remuneration', an example being the Federal Court's clarification that remuneration may be considered inappropriate even if it is customary - for instance - in industries where the usual remuneration of authors is unreasonably low.[607] This judicial oversight prevents an exploitation of

[602] Art. 16(2) of the CRM Directive. To this end, the CRM Directive contains duties of transparency and information, for both collecting societies and the exploiters of rights (cf. Art. 16(1)) regarding the data and the objective and non-discriminatory criteria that determine the level of remuneration.
[603] ibid. See also §4.1 of this Study.
[604] Note how in the preparation of the final text of the Directive, the Parliament's proposal to introduce this self-standing right (Amendment 80 of 2018) included 'fair' instead of 'appropriate' remuneration. However, the final text of Art. 18 of the Directive was approved with a reference to 'appropriate remuneration' instead. See European Parliament, 'Amendment 80, Parliament's Report on the Proposal for a Directive of the European Parliament and of the Council on Copyright in the Digital Single Market (COM(2016)0593 – C8-0383/2016 – 2016/0280(COD)), adopted by the European Parliament on 12 September 2018 (Ordinary Legislative Procedure: First Reading)' (2018).
[605] § 37b(3) of the Austrian Copyright Act: "Remuneration is appropriate if it corresponds to what is customary and fair in business transactions at the time the contract is concluded, taking into account all circumstances for the options for use granted".
[606] See § 32(2) of the German Copyright Act (already before the Directive): "[...] Any other remuneration is deemed to be equitable if at the time the agreement is concluded it corresponds to what is customary and fair in business relations, given the nature and extent of the possibility of use granted, in particular the duration, frequency, extent and time of use, and considering all circumstances. [...]"
[607] German Federal Court of Justice, judgment of 13 December 2001, I ZR 44/99 ('*Musikfragmente*').

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established business norms that would hinder fair remuneration of authors and performers. It is thus welcome to reduce the value gaps that exist between the revenues of social media platforms, music streaming services, record labels and music publishers, and the income earned by composers and performers.

Italy also defined adequate and proportionate remuneration, taking into account the revenues derived from the exploitation of the work and sector-specific practices.[608] Whenever an agreement on adequate and proportionate remuneration is not reached, the Italian Communications Authority will decide accordingly.[609] Only Greece determined appropriate and proportionate remuneration in the form of a specific percentage. Nevertheless, Greek law requires this percentage to take into account the gross income or expenses derived from the exploitation of the work.[610] Furthermore, fair remuneration can still be calculated into a specific amount in certain cases: when the basis for calculating the percentage is practically impossible to determine or to monitor the implementation thereof; when the costs required for the calculation and monitoring are disproportionate to the remuneration to be received; or when the nature or conditions of the exploitation make the application of the percentage impossible.

This "diversity" of definitions illustrates a divergence in how Member States balance both the freedom left by the absence of a definition of 'appropriate' and 'proportionate' in the Directive, and the specificity needed in transposing these concepts to ensure fair remuneration. In fact, there are Member States which have not specified the definition of 'appropriate' or 'proportionate' in their national laws, but have done so only through soft law instruments. The Danish Government, for instance, explains that remuneration is appropriate if it is at the level of a market standard (*i.e.*, the standard set in an agreement between parties with equal power), and it is proportionate when taking into account the profits generated by the exploitation of the work and the original rightholder's contribution to the work or other subject-matter.[611] Similarly, in Estonia's Explanatory Memorandum,

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[608] Art. 107(2) of the ICA: "[...] an adequate and proportionate remuneration to the value of the rights licensed or transferred, as well as commensurate with the revenues deriving from their exploitation, also taking into account, as relevant, the particularity of the reference sector and of the existence of collective bargaining agreements (...)".

[609] Art. 46-bis of the ICA (authors) and Art. 84 of the ICA (performers); see also the Italian Parliament, Non-binding Decision No 138, 'Remuneration paid by streaming platforms by artists and performers' (2023) available in Italian at <https://www.senato.it/leg/19/BGT/Schede/ProcANL/ProcANLscheda49308.htm>, which includes guiding criteria for the quantification of adequate and proportionate remuneration - Art. 46-bis of the ICA (authors) and Art. 84 of the ICA (performers).

[610] Art. 32 of the Greek Law: "[...] he shall receive an appropriate and proportionate remuneration which is determined into a specific percentage. The basis for the calculation of the percentage is all, without exception, the gross income or expenses, or the combined gross income and expenses, realized by the activity of the counterparty and derived from the exploitation of the work. Exceptionally, the remuneration may be calculated at a certain amount, the amount of which must be appropriate and proportionate, in the following cases: a) the basis for calculating the percentage of the remuneration is practically impossible to be determined or there is a lack of the means for the monitoring the implementation of the percentage, b) the costs required for the calculation and monitoring are disproportionate to the remuneration to be received, c) the nature or conditions of the exploitation make the application of the percentage impossible, in particular when the author's contribution is not an essential element of the whole of the intellectual creation or when the use of the work has a secondary character in relation to the object of exploitation."

[611] Danish Government, Comments on the Proposal for Amendment of the Copyright Law L 125 (L125 Forslag til lov om ændring af lov om ophavsret) available at:

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fairness of remuneration depends on the income generated by the work/performance, and what the share of the author/performer is.[612] However, as in other Member States, when fairness of remuneration for music authors and performers is not specified in the law, general contract law (and related terms, such as 'good faith') applies.[613]

Finally, the fact that the provision of Article 18 can be legitimately overridden by contractual arrangements creates a potential loophole that can undermine Chapter 3's objective of fair remuneration in exploitation contracts of authors and performers. The non-mandatory character of this principle derives from the absence of a reference to Article 18 in the text of Article 23, according to which Articles 19, 20 and 21 shall be considered *mandatory*. At the time of the adoption of the Directive, this was consistent with the goal of allowing authors and performers the embracing of open access licences, such as Creative Commons, as explained in the previous section. However, it has been argued that Article 18, being a principle, is an *ex ante* contractual measure and should, therefore, never be subject to contractual override.[614] Countries like Greece, Germany, and Italy followed this reasoning, taking steps to ensure the right to appropriate and proportionate remuneration cannot be waived, strengthening the protection of authors and performers.[615] This approach reflects a more paternalistic legal philosophy, emphasising the protection of weaker parties in contractual relationships perfectly compatible with the aims of the DSM Directive.[616]

4.2.2. National law mechanisms to foster fair remuneration

4.2.2.1. Contractual freedom and fair balance of rights and interests

The second paragraph of Article 18 gives Member States the freedom to use different mechanisms to foster appropriate and proportionate remuneration. In building such mechanisms, the provision requires Member States to consider the goal of a fair balance of rights and interests and the principle of contractual freedom.

The principle of a 'fair balance' of rights and interests is a foundation of several music-related rights that have been harmonised at EU level. Although in the DSM Directive this principle appears mostly

<https://www.ft.dk/samling/20222/lovforslag/l125/20222_l125_som_fremsat.htm> - 'Danish Government Explanations', 2.9.1.3. (p. 33).

612 Estonian Parliament, Explanatory memorandum of the draft law on amending the Copyright Act (transposition of copyright directives) 368 SE. First reading of the bill, available at <https://www.riigikogu.ee/tegevus/eelnoud/eelnou/d3d07943-9d1c-4ebe-94a4-8ae1ebdf7a68> - 'Estonian Explanatory Memorandum', 13.

613 See for example Estonia's Law of Obligations Act, RT I 2001 81, 487 (consolidated version 2019).

614 This argument is developed in Raquel Xalabarder, 'The Principle of Appropriate and Proportionate Remuneration for Authors and Performers in Article 18 Copyright in the Digital Single Market Directive. Statutory residual remuneration rights for its effective national implementation' (2020) 4 InDret 1, 18. Furthermore, one should keep in mind the principle of direct effect of EU law, according to which Directive provisions can have direct effect when unconditional and sufficiently clear and precise whenever a Member State did not transpose the Directive in time. See Case C-41/74 *Yvonne van Duyn v Home Office* [1974] ECLI:EU:C:1974:133.

615 According to Art. 32(1) of the Greek Law, these rights cannot be waived; § 32b of the German Copyright Act states its compulsory application; Art. 107(2) of the ICA makes any agreements contrary to this paragraph void.

616 See Recital 72 of the DSM Directive.

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connected to copyright's exceptions and limitations,[617] 'fair balance' reflects the need to ensure that the interests and fundamental rights of authors and performers, as well as those of other copyright holders, and the interests and fundamental rights of users, are kept in harmony.[618] As emphasised by the CJEU, the fundamental rights of users, including the right of freedom of expression, must be balanced against copyright and related rights, since the protection of intellectual property is also a fundamental right per Article 17(2) of the EU Charter.[619]

In turn, the principle of contractual freedom,reflects the freedom to conduct a business enshrined in Article 16 of the EU Charter and, as such, cannot be excessively compressed at national level without touching upon a fundamental right. The introduction of the provisions of Chapter 3 of the DSM Directive occurred when national contract laws, especially in a sensitive field like copyright, reflected different national approaches to 'fairness' and freedom of contract. That can be one of the reasons why most Member States under analysis have included no further considerations on both these principles in their national laws, attempting to minimise any major national copyright contract law reform. An exception to this trend is found in Portugal, which explicitly mentions a fair balance of rights and interests in its copyright law amendment.[620]

Other Member States refer to these principles in soft law instruments. This is the case of the Danish Government's Explanations to the 2023 Amendment Bill,[621] referring to the fair balance of rights and interests between authors and performers, on the one hand, and licensees, on the other.[622] Similarly, the Estonian Explanatory Memorandum acknowledges that the Estonian approach is based on contractual freedom.[623] Furthermore, in August 2023, the Italian Parliament issued a non-binding decision no 138 titled "Remuneration paid by streaming platforms by artists and performers."[624] In this decision, the Parliament invited itself to specify the criteria for the quantification of "adequate and proportionate remuneration," as well as to identify ways to promote advertising and transparency of information generated by streaming activity.

Ultimately, the fact that the principles of contractual freedom and fair balance of rights and interests are nominally included only in the laws of a very few Member States should not be misunderstood.

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[617] See Recital 3 of the DSM Directive: "The exceptions and limitations provided for in this Directive seek to achieve a fair balance between the rights and interests of authors and other rightholders, on the one hand, and of users on the other"; similarly, Recital 31 of the InfoSoc Directive holds that "A fair balance of rights and interests between the different categories of rightholders, as well as between the different categories of rightholders and users of protected subject-matter must be safeguarded. The existing exceptions and limitations to the rights as set out by the Member States have to be reassessed in the light of the new electronic environment(...)".

[618] See *Painer* (n 51) and *Deckmyn (*n 319*)*.

[619] See *Pelham I* (n 61), paras 32 and 34; EU Charter of Fundamental Rights (hereafter 'EU Charter'), 2000 OJ C 364/01 (consolidated version 2012).

[620] Portugal introduced both the fair balance of rights and interests and contractual freedom as general copyright contract law principles in its national provision. See Art. 44-A(2) of the Portuguese CCRC.

[621] Danish Law no. 680 of 6 June 2023.

[622] Danish Government Explanations (n 611), 2.9. (p. 32).

[623] Estonian Explanatory Memorandum (n 612), 12.

[624] Italian Parliament, Non-binding Decision No 138, 'Remuneration paid by streaming platforms by artists and performers' (Affare assegnato n. 138 su "I compensi corrisposti agli artisti delle piattaforme in streaming") (2023) available in Italian at <https://www.senato.it/leg/19/BGT/Schede/ProcANL/ProcANLscheda49308.htm>.

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As shown in the next few sections, these principles underpin all national implementations through *(i)* provisions on the legitimacy of lump-sum payments to authors and performers, and *(ii)* the function and relevance of collective agreements stipulated by authors' and performers' collecting societies.

4.2.2.2. Legitimacy of lump-sum payments

Connected to the goal of achieving a fair balance of rights and interests is the goal of reducing the weaker bargaining position of authors and performers. During the 2014 public consultation on the review of EU copyright rules, the representatives of authors and performers accordingly argued that "their weaker bargaining position in the market often leads to unfair contractual terms in their initial contracts"[625], and lobbied for new EU rules on this. As acknowledged in Recital 72 of the DSM Directive, authors and performers are usually the weaker party in contractual agreements. This is even more obvious for so-called 'session musicians', whose contracts do not contemplate the payment of royalties from record producers.

In the absence of legal provisions restricting freedom of contract or without collective bargaining aimed to help weaker parties negotiate their deals, authors and performers are free to assign their exclusive rights to publishers, producers, or other contractual counterparts in exchange for a single payment: a lump-sum.[626] Lump-sums are amounts of money that are paid at one time only (as opposed to in several instalments).[627] In the DSM Directive, Recital 73 merely acknowledges that "a lump-sum payment can also constitute proportionate remuneration but it should not be the rule." Therefore, Member States have the freedom to identify specific cases where national laws can allow or prevent the practice of lump-sum payments, considering the specificities of each creative sector.

The results of our desk research show that most Member States under examination implicitly consider lump-sums compatible with proportionate remuneration. However, in several EU jurisdictions, these payments are allowed only under certain conditions to fulfil the right to fair remuneration. These mechanisms vary from taking into account the value of the rights and the author's contribution - which is the case of Austria[628] - to being allowed only when the exploitation revenue is difficult to estimate, the use of the work is incidental to the main activity or material object, or when the work is not essential within a collective creation - as provided under Spanish copyright law.[629]

Showing an even more radical and creator-protective approach, some Member States, like Italy and Germany, relegate lump-sum payments to apply in extremely limited cases.[630] Italian law, for

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[625] Directorate General Internal Market and Services Directorate, 'Intellectual Property, Report on the Responses to the Public Consultation on the Review of the EU Copyright Rules' (July 2014) 78-79, available at <https://ec.europa.eu/digital-single-market/en/news/modernisation-eu-copyright-rules-useful-documents>.

[626] Xalabarder (n 614) 1-51.

[627] Collins Dictionary, 'Lump-sum Payment' (*Collins English Dictionary*, online ed) <https://www.collinsdictionary.com/dictionary/english/lump-sum-payment>.

[628] § 37b(2) of the Austrian Copyright Act.

[629] Art. 46(2) of the Spanish Ley 1/1996, de 12 de abril, de Propiedad Intelectual, Boletín Oficial del Estado No. 97, 22 April 1996 (hereafter 'TRLPI').

[630] Elisa Vittone and Sasha Dalia Manzo, 'Notes on the transposition in Italy of the principle of 'appropriate and proportionate remuneration' with reference to the film and audiovisual sector' (2022) 17(7) JIPLP 569.

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example, only permits lump-sums whenever authors' and performers' contributions to a work or performance are incidental and whenever the costs of the calculation are disproportionate.[631] German law permits lump-sums only if they can ensure the author's adequate participation in the expected revenue and if a lump-sum is justified by sector-related specificities.[632] However, as remarked in the German literature, this justification can be difficult to assess from the outset, as a rightholder cannot reliably predict if the work will only be used to such an extent that the agreed lump-sum is reasonable until the expiration of the copyright.[633] Furthermore, if appropriate remuneration must take into account the nature and scope of the rights granted, including duration, frequency and extent of the rights (as it does in Germany's § 32(2) of the Copyright Act), a lump-sum payment may be insufficient when the transfer of rights is unlimited in time and scope.[634] Other Member States that provide specific, although less pervasive, conditions for lump-sum payment mechanisms are France and Greece. French law allows lump-sums at the author's or performer's request,[635] whereas Greek law, in spite of the established rule that appropriate and proportionate remuneration shall be determined into a specific percentage, exceptionally allows parties under specific circumstances to freely decide on the level of remuneration as a lump-sum (rather than a percentage), as long as it is appropriate and proportionate.[636]

Despite certain restrictions placed under national laws on the use of lump-sum payments, most Member States tend to consider them legitimate and, thus, *fair* to authors and performers. This is surprising if one considers that the appropriateness of these payments as an effective mechanism to foster fair remuneration of artists is highly debated. In the music sector, full contractual 'buy-outs' are often the norm[637] - particularly for performers.[638] Such a potential conflict is even more evident if we interpret Article 18's explicit reference to *proportionate* remuneration as being inherently against lump-sums, despite the permission embodied in Recital 73.

It is noteworthy that in a Resolution on the online distribution of audiovisual works in 2012, the EU Parliament had already taken an official position on the fact that buy-out contracts are at odds with the goal to foster proportionate remuneration for authors and performers and, as a result, should be banned.[639] Still, banning buy-outs does not necessarily mean banning all instances where the transfers of all exploitation rights or where lump-sum payments are needed since, sometimes, this practice can be required for the exploitation of a work or performance.[640] As a matter of fact, lump-

631 Art. 107(2) of the ICA.
632 § 32(2) of the German Copyright Act.
633 Nikolaus Reber, 'Neujustierung der urhebervertragsrechtlichen Regelungen (§§ 32 ff. UrhG) durch das Gesetz zur Anpassung des Urheberrechts an die Erfordernisse des digitalen Binnenmarktes vom 31.5.2021' (2021) Zeitschrift für Urheber- und Medienrecht 893, 894.
634 Agnès Lucas-Schloetter, 'A European Copyright Contract Law: A Plea for Harmonization' (2017) 48 IIC 897, 898.
635 Art. L.131-4(3) of the French CPI.
636 Art. 32 of the Greek Law.
637 Xalabarder (n 614) 1-51.
638 Performers' rights are usually acquired by the record producers and managed together with their own rights.
639 European Parliament Resolution of 11 September 2012 on the Online Distribution of Audiovisual Works in the European Union 2011/2313(INI) (2013) OJ C 353E, number 46.
640 Xalabarder (n 614) 15.

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sum payments can even be preferable when a proportionate share of the revenues would lead to smaller profit for authors and performers, and they can have the benefit of simplicity and predictability in certain contractual scenarios. At the end of the day, from an economic perspective, buy-out contracts and lump-sum payments fully transfer exploitation risks from individual creators to publishers.

To conclude, while the general acceptance of lump-sum payments underscores a pragmatic approach to intellectual property in creative industries, it raises concerns about the potential for undervaluing and under-compensating long-term exploitation rights, particularly in rapidly evolving digital markets.

4.2.2.3. Function and relevance of collective agreements

Finally, as stated in Recital 73, Member States are free to implement the principle of appropriate and proportionate remuneration through different existing or newly introduced mechanisms which can include collective bargaining**,** provided they are in conformity with applicable EU law. Historically, collective agreements refer to the negotiation process between unions and employers on several aspects of employment contracts, such as their terms and conditions, or even the rights and responsibilities of trade unions.[641] Therefore, collective agreements presuppose collective *bargaining*, which is a notion stemming from labour law according to which workers, employers, and their respective organisations are entitled to negotiate and conclude collective agreements at suitable levels (as well as, if there are conflicting interests, to take collective action to protect their interests).[642] Europe has seen a shift towards a reliance on the possibilities of collective bargaining to set better conditions of work and employment, including (and particularly) in the context of fair or minimum wages.[643] It is thus unsurprising that collective bargaining is envisioned as a way to implement Chapter 3 of the DSM Directive, particularly Article 18, considering also the relevance of collective management in sectors, such as the music industry, where CMOs representing composers, publishers and music performers have historically played the role of unions in protecting the value of creative labour.

It can be argued that sector-specific collective bargaining is well-suited to determine particular standards of remuneration, including whenever lump-sum payments might be appropriate.[644] At the same time, not every party will be equally willing to negotiate such standards - particularly publishers and producers, who are less willing to negotiate common standards of remuneration due to being in a stronger contractual position vis-à-vis authors and performers.[645] From our comparative law analysis, we found that the majority of Member States explicitly equate fair remuneration with amounts agreed in collective agreements. For instance, in Austria, remuneration is fair if collectively

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[641] 'Collective bargaining' (Eurofund - European Industrial Relations Dictionary, 4 September 2017) <https://www.eurofound.europa.eu/en/european-industrial-relations-dictionary/collective-bargaining>.
[642] EU Charter, Article 28 'Right of collective bargaining and action'; see also the Community Charter of the Fundamental Social Rights of Workers (1989) OJ C120/1, Art. 12.
[643] Eurofund Working Paper WPEF20022, 'Industrial relations Collective agreements and bargaining coverage in the EU: A mapping of types, regulations and first findings from the European Company Survey 2019' available at <https://www.eurofound.europa.eu/system/files/2020-10/wpef20022.pdf>.
[644] Xalabarder (n 614) 21.
[645] Lucas-Schloetter (n 634) 898.

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agreed.[646] Denmark's Government's Explanations equally reference how collectively agreed remuneration will be factored into the assessment of appropriate and proportionate remuneration.[647] Furthermore, remuneration is automatically presumed fair if collectively agreed in Belgium (where the King can even make the agreement on the remuneration amount mandatory), France and Germany.[648] In fact, in Germany, the Federal Court of Justice stated that the tariffs of the collecting societies (like GEMA) can be used to determine the appropriateness of remuneration.[649] According to Section 36 of the German Copyright Act, joint remuneration agreements are concluded between associations of authors and performers and associations of exploiters that take into account the specificities of the sector, in particular the structure and size of the users and which currently exist for literature, literary translations, scripts and between creators in the film industry and Netflix.[650] There were no such agreements in the German music industry until the spring of 2023, when the VUT ('Verband unabhängiger Musikunternehmer*innen', representing labels, producers, publishers and artists who market themselves) and PRO MUSIK (representing performers) started negotiations on a joint remuneration agreement for music streaming revenues.[651]

The importance of reliability on CMOs' practices is prevalent throughout other sections of the DSM Directive. For instance, regarding the contract adjustment mechanism, Recital 78 of the Directive indicates that the assessment on whether the agreed remuneration has become disproportionately low should consider (*inter alia*) whether the contract is based on a collective bargaining agreement. Moreover, this recital contains an indication that collective representatives of authors and performers shall be allowed to assist individual rightholders in relation to requests for contractual adjustments, especially when it comes to authors' and performers' attempts to bring such claims before a court or other competent authority. Finally, to emphasise the crucial role of collective organisations in enhancing fairness of remuneration, Recital 78 recalls that these adjustment mechanisms should not apply to contracts concluded by entities defined in Article 3(a) and (b) of the CRM Directive - *i.e.*, CMOs and IMEs.[652]

It is thus undeniable that collective bargaining is a crucial mechanism to ensure appropriate and proportionate remuneration of authors and performers. Nevertheless, this cannot be the only mechanism to achieve such a result, given the disparities that exist in terms of bargaining power across different creative sectors, the economies of different EU Member States, and the various CMOs and IMEs operating in their territories. Furthermore, one shall also consider the structural

[646] § 37b(4) of the German Copyright Act.
[647] Danish Government Explanations (n 611), 2.9.1.3.
[648] Arts. XI.167/5 and XI.205/5 of the Belgian CEL; Art. L.132-25-2 of the French CPI; § 32(2) of the German Copyright Act.
[649] German Federal Court of Justice, judgment of 13 December 2001, I ZR 44/99.
[650] See, for example, the German trade union ver.di which negotiates common remuneration rules for authors. For further information, see <https://kunst-kultur.verdi.de/schwerpunkte/urheberrecht/verguetungsregeln#:~:text=Gemeinsame%20Vergütungsregeln&text=GVR%20sind%20also%20kollektive%20Verträge,sind%20damit%20Tarifverträgen%20nicht%20unähnlich>.
[651] No results of the negotiations have been published yet.
See Deutsches Musikinformationszentrum, 'VUT und Pro Musik fordern faire Vergütungsregeln beim Streaming' (*miz news*, 31 March 2023) <https://miz.org/de/nachrichten/vut-und-pro-musik-fordern-faire-verguetungsregeln-beim-streaming>.
[652] Recital 78 of the DSM Directive.

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differences that exist between the position of authors and that of performers within the CMOs that represent their interests. Historically, CMOs help authors contractually retain certain exclusive rights for them to assign them to their CMOs for collective management. This is the case of musical compositions, which is the broadest and most important type of work licensed through collective management. In this domain, CMOs historically helped music composers and lyricists split their mechanical and public performance rights with music publishers on fair grounds (typically: 50-50%).

On the performers' side, instead, it is common practice that performers transfer *all* their rights to record and film producers at the time of a sound recording or audiovisual production in exchange for contractually agreed remuneration. Such remuneration can consist in royalty-based payments, normally preceded by advance payments, and in lump-sum payments, whose amount can be determined or influenced by collective agreements negotiated by performers' labour unions.[653] In the music industry, specifically, this different way to remunerate performers gives rise to a well-known distinction between so-called 'featured' performers, paid through royalties, and 'session musicians', who normally receive one-off payment at the time of studio recording sessions.[654] Given this standard way to transfer all their rights at the time of production, in both the music and audiovisual industries, the activities of performers' CMOs is confined to the realm of statutory remuneration rights, which are broadly harmonised at the EU level through Directive provisions on private copying levies,[655] rental and lending rights,[656] and secondary uses of sound recordings and audiovisual works in radio and TV broadcasting.[657]

4.2.2.4. Extended collective licences

The above-mentioned reliance on collective agreements is aligned with the trends in EU law that strengthened the role of CMOs as of the adoption of CRM Directive. By obliging Member States to introduce broadly harmonised corporate governance rules, the 2014 CRM Directive eventually made these entities more transparent, efficient and accountable. On a different front, the Directive placed CMOs in a competitive relationship as regards the multi-territorial licensing of online music rights regarding distinct repertoires. It also obliges all European CMOs to be technically well equipped, especially in terms of data infrastructures, to serve the interests of their members. Five years afterwards, the DSM Directive broadened the role of these entities in the DSM by giving Member States the possibility of introducing in their legal systems statute-based licensing schemes, traditionally called 'extended collective licences' ('ECLs'). This is a legislative tool and special kind of copyright licence of Scandinavian origin that gives the most representative CMOs, on the grounds of a legislative provision, the power to represent not only their members, but also other rightholders with regard to a specific type of right and commercial exploitation, granting them the possibility of 'opting out'.

The DSM Directive contemplates ECLs in Articles 8 and 12. On the one hand, Article 8 constitutes a specific, mandatory provision for the use of out-of-commerce works by cultural heritage

653 Xalabarder (n 614) 4-5.
654 Term Extension Directive, Recital 9.
655 Art. 5(2)(b) of the InfoSoc Directive.
656 Art. 5 of the 2006 Rental and Lending Rights Directive.
657 ibid.

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institutions.[658] This obligation for Member States reflects Recital 23's intent to avoid individual, burdensome and impractical negotiations with rightholders and to guarantee legal certainty. This provision has a genuine pro-harmonisation purpose insofar as it obliges all Member States to use this rights clearance mechanism for out-of-commerce works and to introduce copyright exceptions for the legitimate non-commercial dissemination of these works by cultural heritage entities. Article 8 explicitly acknowledges the difficulty of clearing rights in works that are no longer commercially exploited through a mechanism that is based on collective societies' *representativeness*. The intermediation of collecting societies based on a mandatory legislative provision is so crucial that Article 12(3) obliges Member States to provide a specific exception - to replace the ECL mechanism at issue - if no collecting society exists in their jurisdictions for a certain type of work.

On the other hand, Article 12 has a broader dimension in its attempt to create an unprecedented legal basis for the application, although with purely territorial effects, of these licences by Member States in an open and undetermined number of uses. Therefore, Article 12 gives Member States the general freedom to utilise ECLs in multiple instances, as long as seeking rightholders' authorisations individually would be too onerous and impractical (Article 12(2)).[659] Furthermore, Article 12(3) sets out standards that Member States must fulfil, including the need for sufficient representativeness of the CMOs in question in relation to specific and well-defined types of work or subject matter, and the possibility for rightholders to opt out from the extended licensing mechanism created in a certain territory.[660]

These EU law provisions increasingly confirm the importance of a well-functioning collective rights management system to enhance fair remuneration of authors and performers in a variety of exploitations. There is a clear and strong link, in this regard, between the 2014 CRM Directive and the 2019 DSM Directive's introduction of ECLs. It seems obvious that these flexibilities and the territorial dimension of each ECL scheme adopted under national laws constitutes a compromise between the harmonisation purposes of both the above-mentioned Directives and the principle of subsidiarity in a field of cultural policy where Member States retain discretion and significant legislative power.

On these grounds, Member States have broadly relied on this general freedom when transposing the DSM Directive within their jurisdictions. Several countries took advantage of Article 12 of the DSM Directive to extend the application of ECLs to rights which go beyond the licensing of out-of-commerce works. Northern European Member States, such as Denmark, provide for a range of

[658] This provision complements the Orphan Works Directive, which provides a framework for the use of orphan works by specific organisations, particularly cultural heritage institutions, to support the EU's cultural policy and the free dissemination of knowledge.

[659] See also Recital 47 of the DSM Directive, which specifies that "... mechanisms of collective licensing with an extended effect are only applied in well-defined areas of use, in which obtaining authorisation from rightholders on an individual basis is typically onerous and impractical to a degree that makes the required licensing transaction, namely one involving a licence that covers all rightholders concerned, unlikely to occur due to the nature of the use or of the types of works or other subject matter concerned".

[660] Member States benefit from considerable flexibility in determining the requirements of CMOs' 'representativeness', as detailed in Recital 33, and can even require, for instance, a joint agreement between several CMOs that are representative of a certain work or subject matter.

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general and specific ECLs in the music sector, consistent with its history and legal tradition.[661] Interestingly, this is now also the case of continental-European Member States which, traditionally, did not envisage ECLs in their legal systems. Italy is a remarkable example in this regard because its transposition of the DSM Directive made a very broad cluster of rights subject to ECLs. These rights include rental rights (Article 18-bis of the ICA), remuneration rights of audiovisual authors for communication to the public (Article 46-bis), remuneration rights for secondary uses of sound recordings via radio and TV of performers and record producers (Articles 73 and 73-bis), the exclusive and remuneration rights of performers (respectively, under Articles 80 and 84 of the ICA).[662] Moreover, Portugal's transposition showed an unprecedented reliance on ECLs by making several rights subject to these licences, the broadest category of use being the authors' and producers' right of communication to the public of works incorporated in commercial phonograms or videograms.[663] This contrasts strongly with the German scenario, which explicitly prohibits exclusive rights from being granted ECLs, as collecting societies must grant licences to each rightholder who requests them.[664] Portugal also followed the example of Italy and France in making the performers' right to remuneration for secondary uses of sound recordings via radio and TV subject to ECLs.[665]

Austrian law provides further, interesting examples, such as the implementation of ECLs to manage the public performance and reproduction rights in business premises (such as catering and commercial establishments);[666] for the right to equitable remuneration regarding digital uses of published works in teaching and learning;[667] and for the distribution of musical works with or without lyrics.[668] Other Member States, such as Estonia and Greece, introduced ECLs for several rights

[661] § 50 paras 1 and 2 of the Danish Ophavsretsloven. For the list of ECLs approved by the Danish Ministry of Culture, see 'Agreement licence approvals' available at <https://kum.dk/kulturomraader/aftalelicensgodkendelser>.

[662] Art. 180-ter(1) of the ICA.

[663] Arts. 149(4) and 184(4) of the Portuguese CCRC. Several music business experts and Portuguese law practitioners have expressed frustration over the lack of clarity in this legislative transposition. During a workshop organized by Fair MusE in collaboration with Abreu Advogados in Lisbon on 14 May 2024, these experts unanimously agreed that this provision was merely intended to consolidate the existing role of national CMOs in managing authors' and producers' broadcasting rights—without affecting other forms of communication to the public or the rights in musical works and sound recordings.

[664] § 34 of the German Copyright Act.

[665] Cf. Art. 178(2) of the Portuguese CCRC. In France, the Supreme Court interpreted that the remuneration rights to secondary uses of phonograms by radio and TV broadcasters shall also be exercised through extended collective management. French Cassation Court No 18-21.211, 11 December 2019, ECLI:FR:CCASS:2019:C101021. An English translation of the ruling is available at <https://doi.org/10.1007/s40319-020-00947-6>. See Oleksandr Bulayenko, 'MusicMatic – the French Supreme Court's Decision on Creative Commons Plus (CC+) Commercial Licensing and Mandatory Collective Management of the Right to Remuneration for Communication to the Public of Commercial Phonograms' (2020) 51 IIC 668.

[666] See § 18(2) and (3) of the Austrian Copyright Act. This ECL was authorised for AKM: see Austrian Supervisory Authority for Collecting Societies, Decision of 8 March 2023, AVW 9.110/23-002, available at <https://www.justiz.gv.at/file/2c94848a542b5c160156e0dc89ce24c7.de.0/avw%209.110_23-002.pdf>.

[667] § 42g(4) of the Austrian Copyright Act. This ECL was authorised for Austro-Mechana: see Austrian Supervisory Authority for Collecting Societies, Decision of 13 March 2023, AVW 9.110/23-002, available at <https://www.justiz.gv.at/file/2c94848a542b5c160156e0dc89ce24c7.de.0/avw%209.111_23-012.pdf>.

[668] ibid.

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consistently with the principle of the 'very well-defined types of use'.[669] Only Belgium and Spain decided not to transpose Article 12 into their laws, implementing only the mandatory provision of Article 8 for out-of-commerce works.

To conclude: while it may be difficult to trace a common approach to the rights made subject to ECLs among the examined Member States, it is undeniable that ECL schemes help achieve Article 18's goal of fair remuneration, as they offer legal certainty for users and facilitate the remuneration of rightholders who may not be members of a CMO.[670]

As regards the identification of the collective bodies being entitled to conclude ECLs, both Article 8(1)(a) and Article 12(3)(a) provide that a CMO must, on the basis of its mandate, be sufficiently representative of rightholders in the relevant type of work or subject matter and of the rights being cleared for each relevant Member State. Recital 48 details the relevant factors that determine representativeness, including: *i)* the category of rights managed by the organisation; *ii)* the ability of the organisation to manage the rights effectively; *iii)* the creative sector in which it operates; and *iv)* whether the organisation covers a significant number of rightholders in the relevant type of works or other subject matter who have given a mandate allowing the licensing of the relevant type of use. Nevertheless, as detailed in Recital 33, Member States enjoy a certain flexibility in defining 'representativeness'. The requirement for representativeness should be adaptable to protect the interests of rightholders and facilitate efficient collective licensing.[671]

These characteristics of the EU law framework have led to several different approaches among EU Member States. Some, such as Austria, defined only that a supervisory authority (in this case, the Austrian Supervisory Authority for Collecting Societies) can authorise CMOs to deploy ECLs.[672] Such CMOs must, however, manage the rights concerned for the relevant area in a substantial part of the inventory of works or other subject-matter used domestically.[673] Others, such as Denmark, stated in their national laws that agreements with a CMO that cover a significant portion of the creators of that specific type of work mean that the CMO in question can invoke ECLs for areas approved by the Danish Ministry of Culture).[674] Certain Member States were more specific in detailing the criteria that a CMO (or IME) must fulfil to be able to be considered 'representative' for the purposes of ECLs. In France, for instance, it is the Ministry of Culture that must approve whether a CMO can act with extended licensing competences,[675] and the criteria it follows to do so are detailed in the law.[676]

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669 For Estonia, see § 571(2) clause 1 of the Estonian Copyright Act; for Greece, see Art. 7A of the Greek Law.

670 European Commission Staff Working Document, 'Report on the use of collective licensing mechanisms with an extended effect under Article 12(6) of Directive 2019/790/EU on copyright and related rights in the Digital Single Market' (2021) SWD(2021) 337 final.

671 European Copyright Society, 'Comment of the European Copyright Society on the Implementation of the Extended Collective Licensing Rules (Arts. 8 and 12) of the Directive (EU) 2019/790 on Copyright in the Digital Single Market' (2020) 11(2) JIPITEC 101.

672 §25b of the Austrian Verwertungsgesellschaftengesetz ('VerwGesG').

673 ibid.

674 § 50 para 1 of the Danish Copyright Act.

675 Art. L.324-8-1(1) of the French CPI.

676 This criteria includes: the importance of the CMO's repertoire and the diversity of its associates; the professional qualification of its management; the human and material resources that the CMO proposes to implement to ensure the management of the rights concerned; the equitable nature of the distribution principles

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Similarly, in May 2024, the Italian Communications Authority (AGCOM) issued an administrative regulation on the protection of copyright and related rights that defines 'representativeness' of CMOs for the purposes of ECLs and contains specific criteria to evaluate this requirement.[677] It thus becomes clear from the requirements of Article 12 and their national transpositions that ECLs still have their limits in terms of effective implementation for diverse types of works being made available, especially in the online environment. One of these limits is that the requirement of 'representativeness' can be stringent and difficult to satisfy on a country-by-country basis. As argued in the literature, it is hard to find single CMOs that can be sufficiently representative for the diverse types of works being made available, particularly on content-sharing platforms.[678]

4.2.3. Old and new statutory rights to remuneration

As stressed in §4.1.1 above, the Fair Internet for Performers Campaign's attempt to strengthen performers' bargaining power through the introduction of a statutory remuneration right for online exploitations did not materialise. However, it is remarkable that several Member States went beyond the contract law-based mechanisms embodied in Articles 20, 21 and 22 of the DSM Directive to introduce new and unwaivable remuneration rights for online content exploitations managed by collective rights management organisations.[679]

4.2.3.1. The Spanish remuneration right for performers

Spain was a pioneer in this field in Europe if one considers that, historically, it introduced additional remuneration rights for performers covering online exploitations of sound recordings and audiovisual works in 2006.[680] The pre-existence of this right in an important Member State, and in a large digital economy, is significant because it shows how "old" this policy option to enhance fair remuneration for traditionally weak rightholders is. At that time, Spain was still transposing and implementing the InfoSoc Directive, which includes the broad provision of Article 3, concerning the right to communication to the public, broadly defined also for purposes of digital distribution. As a result of this 2006 reform, Spanish law considers the performer's right to make works available online for on-demand services - falling under the definition and scope of Article 3 - a *separate,* exclusive right,

provided for in order to distribute the sums between the beneficiaries - as well as whether or not they are members of the organisation. See Art. L.324-8-3 of the French CPI.

[677] Italian Communications Authority (AGCOM) Regulation adopted through Resolution No. 95/24/CONS on May 15, 2024, available at <https://www.agcom.it/provvedimenti/delibera-95-24-cons> (on representativeness: <https://www.agcom.it/sites/default/files/media/allegato/2024/Regime%20transitorio%20calcolo%20rappresentativit%C3%A0%20OGC%20dref.pdf>).

[678] João P Quintais, 'The New Copyright in the Digital Single Market Directive: A Critical Look' (2020) 42 (1) EIPR 28.

[679] Directorate General Internal Market and Services, 'Report on the Responses to the Public Consultation on the Review of the EU Copyright Rules' (July 2014) <https://digital-strategy.ec.europa.eu/en/library/modernisation-eu-copyright-rules-useful-documents>, 79-80.

[680] Art. 20(2)(i) and Art. 108(3) of the TRLPI, as amended by Law 23/2006 of 7 July 2006 amending the TRLPI. This provision grants performers whose work is embodied in phonograms and audiovisual recordings a right to a residual equitable remuneration right for the making available (also online) of their works. See AEPO-ARTIS, 'Performers' Rights in International and European Legislation: Situation and Elements for Improvement' (*AEPO-ARTIS* 2018) 68 <https://www.aepo-artis.org/wp-content/uploads/2022/07/AEPO-ARTIS-Study-2018-Performers-Rights-in-International-and-European-_20181161711.pdf>.

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which constitutes a specific type of communication to the public.[681] Due to the presumption that performers transfer such rights to producers at the time of a sound recording or audiovisual production, through contracts concluded with phonogram or film producers,[682] the Spanish provision ensures that performers maintain an unwaivable right to remuneration even after their pre-production arrangements.[683] In *ATS 7230/2017*, the Spanish Supreme Court ruled that the InfoSoc Directive lays down a minimal level of protection and allows EU Member States to strengthen protection through additional rights; the Spanish remuneration right is thus compatible with EU law.[684] The Spanish Supreme Court refused to request a preliminary ruling to the CJEU on the matter, confirming the decision of lower instances.[685]

4.2.3.2. The German approach vis-à-vis OCSSPs

Going back to the recent transposition of the DSM Directive, Germany followed Spain, to a certain extent, by codifying remuneration rights as a result of its own transposition of both Article 18 and Article 17 of the DSM Directive. This transposition introduced: 1) a right for authors and performers to obtain appropriate remuneration *directly* from OCSSPs, even if these rightholders have already licensed or transferred their rights to make their works available to the public to a third party;[686] 2) a provision stating that OCSSPs must also grant all authors and holders of neighbouring rights fair remuneration if users are allowed to upload content to the platform under the exceptions of pastiche, parody and caricature[687]; and 3) the rightholders' claim for remuneration from OCSSPs if the service provider is obliged to leave UGC uploaded due to a presumably lawful use.[688] These three remuneration rights vis-à-vis OCSSPs can only be enforced by collecting societies for 'practicability reasons'.[689] As emphasised above, adding three specific remuneration rights against OCSSPs aligns with Germany's attempt to ensure a balanced approach to Article 17 of the DSM Directive, as its implementation includes privileges for social media users to protect their fundamental rights. However, although these safeguards seem to be consistent with Article 17(7) and the Commission's Guidance, they disadvantage authors and rightholders. This is because, without such remuneration rights, rightholders would not receive any compensation for the uploading of unlicensed works if the

[681] Art. 20(2)(i) of the TRLPI.

[682] Art. 108(2) of the TRLPI.

[683] AEPO-ARTIS (n 132) 69. AEPO-ARTIS has been significantly vocal in taking this right as a blueprint of rights they want to extend to the whole EU, stressing the importance of harmonising equitable remuneration rights in the EU to ensure performers receive fair compensation for making available their works in on-demand platforms.

[684] Spain, Supreme Court, judgment of 12.07.2017, ATS 7230/2017, *AIE v Buongiorno My Alert*.

[685] Spain, Madrid Appeal Court (Sec. 28), judgment of 2.03.2015, n.64/2015, *AIE v Buongiorno My Alert*; Xalabarder (n 614) 41.

[686] § 4(3) in conjunction with § 21(2) of the UrhDaG; however, this only applies if the third party is no CMO or digital distributor - § 4(3) of the UrhDaG.

[687] § 5(1) and (2) of the UrhDaG. Notably, there is no remuneration right for authors and rightholders when the making available of a work falls under the citation or review exception. However, as argued in German legal scholarship, in practice, distinguishing between a parody or pastiche (which are remunerated) and a citation (which is not remunerated) can be challenging, see Dieter Frey and Carl M Rudolph, 'Das Urheberrechts-Diensteanbieter-Gesetz – ein Überblick' (2021) Zeitschrift für IT-Recht und Recht der Digitalisierung 671, 674.

[688] Presumably lawful uses in §§ 9-11 of the UrhDaG. See § 12 of the UrhDaG.

[689] German Explanatory Memorandum (n 599) 45.

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content fell under a copyright exception or could not be automatically blocked due to a presumption of lawful use.

As evidenced in the Explanatory Memorandum that accompanied the draft implementation act, the German Federal Government took the view that the copyright contract law provisions embodied in Chapter 3 of the DSM Directive alone could not automatically ensure fair remuneration for authors and rightholders in complex online exploitation scenarios.[690] Furthermore, as argued in the above-mentioned Memorandum, the general remuneration right against OCSSPs would not *excessively* affect social media platforms, financially. The German Government's argument, essentially, was that these service providers can factor this twofold remuneration regime when they negotiate the main licensing fees with the rights licensors, reserving a portion of the total fees to the individual artists.[691]

However, the reality of industries such as the music sector is more complex than the one the German Government depicted in its Memorandum with genuinely good intent. These new remuneration rights imposed by German law on top of the rights authors and performers transfer to (or share with) music publishers, also via their collecting societies, and record companies, might eventually weaken the bargaining power of the main rights licensors, restricting their contractual freedom against exceptionally strong counterparties. It is well known, and it is the main reason for the introduction of Article 17 in the 2019 DSM Directive, that the ecosystem built by dominant social media companies has been historically reluctant to pay fair remuneration for the works these services exploit commercially. It is unlikely that, suddenly, because of this new law, social media companies can become so fair as to factor these additional remuneration rights in the calculation of the overall amounts they offer to content licensors - even less so only in Germany. It is understandable, then, that members of the *Bundesverband Musikindustrie* (BVMI),[692] which represents record producers and music companies in Germany, filed a constitutional complaint with the Federal Constitutional Court in 2022, arguing these three remuneration rights violate the principle of contractual freedom.

4.2.3.3. Belgium's new remuneration rights referred to the CJEU

Belgium provides another relevant example, similar to that of Germany, but with a broader scope of application since remuneration rights are designed to apply not only against OCSSPs, but *also* against music streaming services. First, as a result of the transposition of Article 17 of the DSM Directive, Belgian law introduced a new right to remuneration for authors and performers against OCSSPs for acts of communication to the public, even when the rightholders have already transferred the same right to a third party.[693] Simultaneously, this authors' and performers' direct remuneration mechanism is extended by law to streaming services, clearly aiming to improve the

[690] ibid.

[691] ibid 133-134. More specifically, the purpose of this German legislation was to enable rightholders who typically receive only a lump-sum, such as session performers, to receive a fair share for the exploitation of the work by social media platforms.

[692] The Bundesverband Musikindustrie (BVMI), the German national association of IFPI, is an organisation representing the interests of record producers and music companies in Germany in the legal form of a registered association based in Berlin. For further information, see the BVMI's own website: <https://www.musikindustrie.de/>.

[693] Art. XI.228/4 of the Belgian CEL.

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position of individual rightholders.[694] This right is subject to mandatory collective management unless otherwise foreseen by a collective agreement.[695]

Unsurprisingly, the introduction by Belgium of such a new and unharmonised remuneration right has sparked debate among various stakeholders in the music industry. Actions for annulment against the relevant Belgian CEL provisions which transposed the DSM Directive have been brought before the Belgian Constitutional Court by Meta, Google and other parties.[696] As emphasised by leading Belgian scholars, since most performers still assign their exclusive rights to producers, it seems crucial for their fair remuneration to rely on a direct right which cannot be transferred.[697] On the other hand, streaming services and OCSSPs complain that, due to this remuneration right, they now need to 'pay twice' for the same licence, as their 'revenue pie' does not increase but a new additional right must now be paid for.[698] As for the unwaivable remuneration right for uses by streaming platforms, the claimants also argued that it does not have a direct legal basis in the DSM Directive. On the 26th of September of 2024, the Belgian Constitutional Court chose to refer the case to the CJEU, submitting 13 questions for a preliminary ruling.[699] In these, various legal concerns of the Belgian law are identified regarding its compatibility with EU law, namely the failure to notify the European Commission in advance; its allegedly 'disproportionate' restrictions on business autonomy that go against fundamental rights, including the freedom of contract and the freedom to conduct business;[700] its inconsistency with various EU Directives; and its mandatory collective management requirements.[701]

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[694] This remuneration right is based on Art. 18(2) of the DSM Directive and originates from two new provisions embodied into the CEL through Arts. 60–62 of the Belgian Loi Transposant la Directive (2022). These provisions (Art. XI.228/10 and Art. XI.228/11 CEL) create a non-transferable and non-waivable remuneration right for acts of communication to the public by streaming services (as defined in Art. XI.228/10). The beneficiaries of these rights are authors and performers who have transferred or licensed their rights to a producer or a publisher. See statements made by Belgian minister Pierre-Yves Dermagne, Chamber of Representatives of Belgium, Verbatim record of the plenary session of 16 June 2022, p.36, available at <https://www.lachambre.be/doc/PCRI/pdf/55/ip186.pdf>. See also Frank Gotzen, 'The Belgian approach to direct remuneration of authors and performers in the case of transmission via digital platforms' (2023) 4 RIDA 163, 168.

[695] Art. XI.228/11 of the CEL.

[696] As announced in the Belgian Official Journal (Moniteur Belge) of 01/03/2023.

[697] Gotzen (n 694) 163, 170; Xalabarder (n 614), 17.
For an opposite view, see Rosati suggesting that Belgian additional remuneration rights are incompatible with EU law as Art. 18 of the DSM Directive does not entitle EU Member States to introduce new rights. In view of Rosati, holding otherwise would be contrary to the history, wording, and context of Art. 18, as well as the rationale of both that provision and the DSM Directive more generally, including to reduce fragmentation in the single market for copyright or other protected content.
Eleonora Rosati, 'Assessment of the Belgian additional remuneration rights for authors and performers (articles 54 and 62 of the law of 19 June 2022) in light of EU law' (2024) EIPR 46(3), 142–148.

[698] Gotzen (n 694) 166. This view was also expressed very clearly by Spotify in its interviews with Fair MusE.

[699] Belgian Constitutional Court, Arrêt n° 98/2024 du 26 Septembre 2024 (Numéros du rôle 7922, 7924, 7925, 7926 et 7927) BE:GHCC:2024:ARR.098 available at <https://www.const-court.be/public/f/2024/2024-098f.pdf>. Notably, the three first questions of the request for preliminary ruling concern the Belgian implementation of press publishers' rights.

[700] ibid. Notably, the Belgian government submits, in its response to the lawsuit, that rather than seeking a genuine constitutional challenge, claimants rely on fundamental rights to be able to seek interpretation from the CJEU.

[701] ibid.

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4.2.3.4. France's minimum remuneration for performers

Finally, the model implemented by France to improve the remuneration of performers for online exploitations deserves a special mention. Unlike the above-mentioned Member States, French law did not introduce a separate right but codified specific provisions on performers' rights aimed at guaranteeing minimum level of remuneration for these rightholders.[702] The French CPI establishes a guaranteed minimum remuneration for performers based, proportionately, on the criterion of the number of streams of their performances (*i.e.*, 'streaming broadcasts').[703] To this end, the law broadly relies on collective bargaining, assigning to professional organisations (including Unions and CMOs) representing performers and phonogram producers the task of setting criteria to determine the exact minimum remuneration guaranteed by the law.[704] Although this measure was not linked to the transposition of Article 18 of the DSM Directive, this mechanism is a clear consequence of the principle to pay appropriate and proportionate remuneration to performers.[705] The first agreement of such kind was concluded in May of 2022, between music performers, including both featured artists and accompanying artists, and producers.[706] Shortly afterwards, the agreement entered into force by a decree of the French Ministry of Culture,[707] guaranteeing a minimum advance payment by phonogram producers for 'streaming broadcasts' - although recoverable and compensable.[708]

4.2.4. Final remarks

As this Section has shown, the national transpositions of Article 18 of the DSM Directive reveal varied approaches and mechanisms to foster fair remuneration for authors and performers. While national laws broadly embrace the overarching principle of appropriate and proportionate remuneration, the practical implementations among Member States vary significantly. Collective agreements and specific legal mechanisms such as restrictions on lumpsums can offer structured

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[702] Art. L.212-14 of the French CPI, as introduced by Law No. 2016-1321 of 7 October 2016.

[703] ibid.

[704] This minimum remuneration guarantee is proportional to the economic value of the rights under the conditions provided for in II of Art. L.212-3 of the French CPI but can also be fixed at a flat rate in the cases provided in that Article.

[705] This interpretation can be derived from the French Explanatory Memorandum of Law No. 2021-580 of 12 May 2021 (*Exposé des Motifs*), where it says that *in light of* the principle of appropriate and proportional remuneration for performers enshrined in Art. 18 of the Directive, Art. 12 of that Law (mandating that authors and performers receive clear and detailed information about the revenues generated from the exploitation of their works, also in digital environments) aims to ensure the effective implementation of the minimum remuneration guarantee provided for in Art. L.212-14 of the French CPI for performers for streaming their performances. The French Explanatory Memorandum is available at <https://www.legifrance.gouv.fr/dossierlegislatif/JORFDOLE000043970246/?detailType=EXPOSE_MOTIFS&detailId=>.

[706] French agreement of 12 May 2022 on the guarantee of minimum remuneration for performers in relation to streaming, available in French at <https://mediateurdelamusique.fr/wp-content/uploads/sites/6/2022/05/Accord-GRM_signé_12052022-min-avec-compression.pdf>.

[707] French Ministry of Culture (Rima Abdul Mala) decree of 29 June 2022, entered into force on 1 July 2022. See *Arrêté du 29 juin 2022 pris en application de l'article L. 212-14 du code de la propriété intellectuelle et rendant obligatoire l'accord du 12 mai 2022 relatif à la garantie de rémunération minimale*, available in French at <https://www.legifrance.gouv.fr/loda/id/JORFTEXT000045997320/>.

[708] 'France: Agreement establishing a remuneration for streaming' (*FIM*, 26 June 2022) <https://www.fim-musicians.org/french-streaming-agreement-2022/>.

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and reliable solutions, although at a merely local level. The effectiveness of these national solutions remains contingent on practical enforcement and the ability of individual creators or their collective organisations to utilise these frameworks. Balancing contractual freedom with sufficient safeguards to foster fair remuneration remains a critical challenge, particularly in the rapidly evolving digital content landscape.

It is clear that different criteria and mechanisms adopted at national level ended up fragmenting creators' rights, some of which go beyond the *acquis communautaire*.[709] The additional remuneration rights codified for individual creators in the copyright laws of Germany, Belgium and Spain (despite their different scopes of application) and the minimum remuneration of performers envisaged under French law certainly reflect an effort to address the specific challenges posed by digital exploitations. As we have seen, these specific rights aim to ensure that authors and performers receive fair compensation *directly* from online exploiters, and not from their traditional industry counterparts (*i.e.*, publishers and producers). A clear downside of these laudable provisions is that they bring fragmentation and dis-harmonisation of remuneration rights within EU Member States which is a challenge for the still utopian idea of a 'Digital Single Market'.

Despite all the above-mentioned measures, a systemic imbalance between individual creators and corporate exploiters of their works persists. As we will see in Part III of this Study, creators still do **not** receive the data they are entitled to in order to turn the goal of 'fair remuneration' into a tangible reality.[710] This is one of the major reasons why, in June 2024, 87.6% of performing artists still believed streaming revenues were shared unfairly.[711]

4.3. Transpositions of Chapter 3's copyright contract law provisions

As recalled above in §4.1, Chapter 3 of the European Commission's proposal for the DSM Directive did not originally include Article 18, as the first proposal was a political compromise among different Parliament groups and the EU Council. From the outset, it was clear that a suitable compromise between freedom of contract and the protection of authors and performers, as weaker parties in copyright contractual bargains, would have required more precise and compelling measures at the EU level. These measures were eventually incorporated in the final version of Chapter 3.

This Chapter of the DSM Directive aims at fostering the 'adequate and proportionate', and thus 'fair', remuneration mentioned under Article 18. It does so through copyright contract law measures that aim at placing authors and performers in a position to know how much music publishers and record producers are earning through the exploitation of their works. To this end, Chapter 3 includes a provision (Article 19) mandating transparency across the music value chain, as well as the transposition of contract adjustment mechanisms (Article 20) which should allow creators to seek higher compensation if their initial remuneration becomes 'disproportionately low' compared to the revenue generated. Chapter 3 also obliges Member States to provide alternative dispute resolution

[709] Such as Belgium's new remuneration right explored above.
[710] International Artist Organisation & AEPO-ARTIS, 'Streams and Dreams: The Impact of the DSM Directive on EU Artists and Musicians' (2024) <https://www.iaomusic.org/the-impact-of-the-dsm-directive-on-eu-artists-and-musicians-part-2-2024/>.
[711] ibid.

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('ADR') mechanisms for conflicts that might arise between contractual parties (Article 21) and a right to revocation that creators can exercise, according to the specificities of each creative industry, as laid down in national laws, for the lack of the exploitation of their works (Article 22). Article 23 makes the aforementioned Articles 19, 20 and 21 mandatory by specifying that contractual clauses contrary to such provisions shall be unenforceable in relation to the rights of authors and performers.[712]

4.3.1. Transparency obligations as a prerequisite for the exercise of copyright contract law remedies

Article 19 of the DSM Directive establishes a transparency obligation that grants authors and performers an *ex post* right to obtain information about the use of their works and subject-matters. This obligation aims to address the information asymmetry and the imbalance in the bargaining power between creators and those who exploit their works.[713] It ensures that authors and performers can access data about how their creations are being used and the revenues generated from that use. While prior to the DSM Directive certain EU Member States had transparency provisions in their national laws, these were more common in the book and audiovisual sectors, and less so in the music sector.[714]

Under Article 19, contractual counterparties of music creators (namely: music publishers or record labels) as well as their sub-licensees (including online exploiters) shall provide composers and performers with up-to-date, relevant, and comprehensive information on the exploitation of their works and performances at least once a year. The directive itself makes Article 19 applicable to all contracts that have been concluded after 7 June 2021.[715] However, as suggested by AG Szpunar's Opinion in a request for preliminary ruling[716] concerning the applicability of Chapter 3 (Articles 18-23) of the DSM Directive over time, these provisions should be applicable to contracts signed before that date if a music performance occurred *after* 7 June 2021.

Furthermore, Article 19 shall be read in conjunction with the overall strengthening of transparency duties specifically mandated for social media platforms under Article 17 of the DSM Directive. As discussed more in depth in §8.4, Article 17(8) obliges OCSSPs to provide rightholders with "adequate information on the functioning" of mechanisms under Article 17(4), and with "information on the use of content" covered by the licensing agreements. Thus, on the one hand, the general obligation under Article 19 elaborates these requirements at great length and expands it to *all* uses outside the social media landscape, including the offline environment. On the other hand, Article 19(6) exempts creators' counterparts and their sublicensees from this information disclosure if their rights are licensed through contracts concluded by CMOs and IMEs, for which Article 18 of the CRM Directive is applicable instead.

[712] Art. 23 of the DSM Directive also specifies that the provisions in Arts. 18 through 22 do not apply to authors of computer programs as defined under the 2009 Software Directive.
[713] European Commission, 'Impact Assessment on the modernisation of EU copyright rules' (n 573) sec. 5.4.1.
[714] ibid.
[715] Art. 26(2) of the DSM Directive.
[716] See § 4.1.3 of this Study.

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Looking at the national transpositions of this important provision, most of the EU Member States covered by the present research transposed Article 19 in a literal or near-literal way. However, several transpositions contain slight deviations that deserve a special mention.

- First, in Italy, the failure to comply with transparency obligations constitutes a legal presumption of inadequacy of the compensation in favor of the rightholders; this, in turn, triggers the contract adjustment mechanism, foreseen under Article 20 of the DSM Directive.[717] Moreover, the Italian regulator, Autorità per le Garanzie nelle Comunicazioni (AGCOM), may impose administrative fines for failure to comply with transparency obligations.[718] Italian legislation also foresees that corresponding information shall be provided every 6 months, and not every 12 months, as required by Article 19 of the DSM Directive.[719]
- Second, the German transposition of Article 19 of the DSM Directive in relation to sub-licensees weakens the authors' and performers'[720] rights to transparency, if one compares it with the pre-2021 scenario. Before the transposition of Article 19, German authors and performers were entitled to receive information from sub-licensees when (i) the use carried out by the sub-licensee had a significant economic impact on the licensed work in the licensing chain; and (ii) when the disproportionately low remuneration related to (and was triggered by) the revenues earned by the sub-licensee. Following the transposition of the DSM Directive in 2021, the information right against sub-licensees only applies when (i) the assignee or licensee does not provide the author with the information after a 3-month period; or (ii) the information provided is not sufficient to assess the exploitation of the licensed work.[721] Moreover, the German transposition also includes remedies for the licensees' and sub-licensees' failure to comply with transparency obligations. Under § 36d of the German Copyright Act, authors' societies may seek an injunction against further use of their work, if the (sub-)licensee systematically refuses to provide the author with the required information. The Explanatory Memorandum to the transposing law highlights the impact of this provision on streaming platforms as it could promote greater transparency.[722]
- Third, the Portuguese transposition of Article 19 of the DSM Directive includes an important deviation. While Article 19 applies to both exclusive and non-exclusive licensees, Article 44-B(1) of the Portuguese CRRC specifies that the right to information applies only to exclusive licensees, but not to non-exclusive licensees,[723] which effectively limits the authors' and performers' rights. This may, for instance, exclude licences concluded with OCSSPs under Article 17 of the DSM Directive.

Despite the fairness-enhancing potential of Article 19, most of the stakeholders interviewed for the Fair Muse project clearly expressed skepticism about its effectiveness in the music ecosystem, at least for now. This provision is perceived as broadly insufficient to strengthen the real bargaining

[717] Art. 110-quater(4) of the ICA.
[718] ibid.
[719] Art. 110-quater(1) of the ICA.
[720] § 32d of the German Copyright Act read in conjunction with § 79(2)(a) of the German Copyright Act.
[721] § 32e of the German Copyright Act.
[722] German Explanatory Memorandum (n 599) 85.
[723] See Nuno Sousa e Silva, 'O que muda nos contratos de Direito de Autor com a transposição da Diretiva 2019/790?' (2023) 17 JURISMAT 207.

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power of authors and performers.[724] On the one hand, the transpositions of Article 19 do not assist music rightholders when they negotiate a rights transfer or licence and seek to understand - especially in digital settings - what type of exploitation the assignee or licensee intends to pursue. As we will see, this pre-contractual "blindness" or opaqueness is very obvious in the social media industry. On the other hand, this mandatory and (at least) annual default information mechanism mandated by Article 19 applies only to contracts that have been concluded from 7 June 2021, with the subsequent exclusion of exceptionally broad repertoires that are still commercially very successful and culturally influential.[725] As confirmed by empirical investigations, this is the main reason why the effectiveness of this measure is impossible to estimate after a very few years after the entry into force of the transpositions.

As regards the specific position of performers vis-a-vis record producers, both scholars and artists' organisations agree that the legal precedent and the forerunner of Article 19 in the recorded music market - Article 1 of Directive 2011/77/EU - failed to effectively guarantee to session musicians the data transparency their organisations would need in order to effectively claim, receive and allocate to their members the portion of additional revenues (*i.e.*, 20%) the 2011 Directive reserves to performers. This is because this very first pro-transparency attempt in EU music copyright law did not shed light on some very important details, the most important certainly being the supply of written evidence (*i.e.*, contracts or other relevant proofs or documents) enabling the concrete identification of performers and their inclusion into reliable databases. Fair MusE's interviews with stakeholders showed an unresolved conflict and mutual dissatisfaction between record producers and performers' organisations on who should have taken the initiative in order to build these data infrastructures. Moreover, as highlighted in the literature, this 2011 provision failed to introduce remedies against the failure to supply the data.[726] Italy and Germany seem to have learnt from these experiences.

4.3.2. Copyright contract law provisions: contract adjustment, out-of-court dispute resolution and revocation rights

Article 20 of the DSM Directive embodies a mandatory contract adjustment mechanism (or so-called 'best-seller' clause) that codifies on an EU-wide basis a clear deviation from the principle of freedom of contract. As noted in Recital 78 of the directive, the codification of this right is based on the assumption that the contracts for the exploitation of rights harmonised at the EU level are so long as to exhaust the term of protection of a work or performance - as in the case of contractual buyouts, typical of session musicians' contracts - and offer few or no opportunities for individual rightholders to renegotiate them with their counterparts or their successors. Given the impossibility to predict an author's or performer's success, 'freedom of contract' traditionally gives artists' contractual counterparts an incentive to clarify whether authors and performers shall keep a risk-taking position as regards the outcome of commercial exploitations. A 'bestseller clause' imposed under the law helps individual creators claim (and hopefully obtain) a fair adjustment of the originally agreed remuneration whenever it becomes - *ex post* - "disproportionately low" if compared to the relevant revenues derived from the subsequent exploitation of the work or fixation of the performance by the

[724] Chapter 4 of Fair Muse D2.3 has examined the extent to which EU competition law and platform regulation provisions assist authors and performers in accessing information on the exploitation of their works on digital platforms.
[725] Art. 26 DSM Directive. Notably, Art. 26 might be affected by the ruling in *ONB and Others*. See §4.1.3.
[726] Ramalho and Lopez-Tarruella (n 370) 26-27.

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contractual counterpart. In complex transactions where music publishers and record producers deal with inherently risky and uncertain businesses, this deviation from 'freedom of contract' targets the economic value of composers' and performers' rights whenever it proves to be significantly higher than value initially estimated by the artists (or their agents or collective representatives).[727] This measure is particularly important for cases where the exploitation of recorded music via streaming services or social media becomes extremely successful - for instance, in cases where some music tracks "go viral" because of the exposure a track receives from a platform's algorithm or due to its inclusion into a successful playlist.[728]

The above-mentioned Article 19's transparency obligations are thus crucial to place creators - and, ultimately, courts or ADR bodies - in a position to assess whether an artist's contract needs to be adjusted to provide higher remuneration per Article 20.[729] In this regard, Italy is a notable example: a licensee's failure to comply with transparency obligations acts as a legal presumption of the inadequacy of compensation in favour of the rightholders.[730]

Furthermore, since creators attempting to enforce their rights may easily run the risk of being "blacklisted" by their contractual counterparts, class actions with creators being represented anonymously can be the safest way for creators to use this contract adjustment mechanism.[731] To this end, the directive's preamble expressly recalls that duly mandated representatives of authors and performers should be able to assist their members with their contract adjustment requests, and should also protect their identities for as long as that is possible.[732]

Nearly *all* the examined Member States have been faithful to this provision. For some, this was relatively easy because of the preexistence of a corrective mechanism under their laws. Germany, perhaps the main promoter of this legislative mechanism, is certainly one of them, if one considers that Section 32a of its Copyright Act, also known as the *'Bestseller-Paragraph*', has provided requirements for contractual adjustments since 2002. Even before the transposition of the DSM Directive in 2021, the *Bestseller-Paragraph* granted authors the right to modify an existing licensing contract if the agreed remuneration was 'strikingly disproportionate' compared to the benefits derived

[727] Recital 78 of the DSM Directive provides useful criteria to estimate the value of rights, clarifying that "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 situation should take account of the specific circumstances of each case, including the contribution of the author or performer, as well as of the specificities and remuneration practices in the different content sectors, and whether the contract is based on a collective bargaining agreement".

[728] See also Senftleben and Izyumenko (n 468) 20.

[729] ibid 21.

[730] Art. 110-quater(4) of the ICA.

[731] ibid 30-31.

[732] Recital 78 emphasises the potential role of collective representatives by providing that "Where the parties do not agree on the adjustment of the remuneration, the author or performer should be entitled to bring a claim before a court or other competent authority." Moreover, and importantly, this Recital states that such mechanism should not apply to contracts concluded by collective rights management organisations, independent management entities or other entities subject to national rules implementing the CRM Directive.

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from the work's exploitation by the licensee. This mechanism entails that if the licensee transfers her rights to a third party, this party can be held liable for the contractual adjustment.[733]

Furthermore, under pre-2021 German law, the best-seller clause was only applicable if the agreed remuneration was "strikingly disproportionate" if compared to the revenues generated by the exploitation of the work. In 2020, the German Federal Court of Justice held that such a disproportion exists when there is a difference of 100% between these two amounts.[734] Due to the lower threshold applicable after the implementation of Article 20 of the DSM Directive — textually, from "strikingly disproportionate" to "disproportionately low" —, the benchmark has become more favourable for authors, with several commentators assuming that a difference of 20-30% can already be sufficient.[735] Since the 2021 reform, an increasingly important number of rulings held that both authors and performers can actively invoke the revised Section 32a of the German Copyright Act in their claims for additional remuneration in front of local courts.[736] Importantly, under Section 133(2) of the German Copyright Act, provisions on contract adjustment are also applicable to contracts signed *before* 7 June 2021, where the acts of exploitation (e.g. a music performance) take place after that date.

France provides another remarkable example. Prior to implementing the DSM Directive in 2021, French law already allowed authors to adjust their contracts in case of lump-sum remuneration, when they suffered a prejudice amounting to more than seven twelfths. No contract adjustment mechanism existed in case of proportional remuneration of authors, nor were there similar mechanisms in place for performers. After the 2021 reform, France preserved the mechanism in place for lump-sum payments of authors,[737] and added that for proportional remuneration, according to which authors may initiate contract adjustments when the proportional remuneration initially provided for in the exploitation contract proves to be excessively low in relation to all the income subsequently derived from the exploitation by the assignee.[738] In case of performers, only the second criteria is applicable, namely, that of an excessively low initial remuneration, if compared to the entire income subsequently derived from the exploitation by the assignee.[739]

Other Member States with some experience in this field are Spain and Portugal, whose laws provided contract adjustment mechanisms even before the transposition of the DSM Directive, although this mechanism was limited to authors in both jurisdictions.[740] As a general principle being

[733] Interestingly, economic studies conducted in the early 2010s showed that the Bestseller-Paragraph led to lower remuneration for authors: foreseeing a possible renegotiation in the future, licensees would initially offer a lower baseline price. See Christoph Engel and Michael Kurschilgen, 'Fairness Ex Ante & Ex Post – An Experimental Test of the German "Bestseller Paragraph"' (2010) Max Planck Institute for Research on Collective Goods: Discussion Paper No 2010-29.

[734] Bundesgerichtshof (German Federal Court of Justice), judgment of 20.02.2020 – I ZR 176/18 ("*Das Boot II*"), para 131.

[735] Reber (n 633) 896.

[736] See, for instance, Hamburg Regional Court, judgment of 23.10.2024 - 310 O 100/14; Frankfurt (a.M.) Higher Regional Court, judgment of 29.02.24 - 11 U 83/22; Berlin Regional Court, judgment of 27.09.2023 - 15 O 296/18; Hamburg Regional Court, judgment of 10.05.2024 - 310 O 214/23.

[737] Art. L.131-5(I) of the CPI.

[738] Art. L.131-5(II) of the CPI.

[739] Art. L.212-3-2 of the CPI.

[740] See, for instance, Art. 44-C 'additional remuneration' right in the Portuguese CRRC; Art. 47 TRLPI.

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in force as of 1996, former Article 47 of the Spanish TRLPI enabled authors to claim additional remuneration whenever they were paid via lump-sums. In Portugal, former Article 49 of the CRRC allowed contract adjustments if an author suffered serious financial harm due to a clear disproportion between his or her proceeds and the profits obtained by the assignee. Both countries amended their legislation to comply with Article 20 by making this mechanism available to performers.

The legislative landscape in other Member States reflects the main elements and requirements of the EU law model law, although with some exceptions. For instance, Portugal's transposition deviates from the Article 20's requirements by setting a deadline for the exercise of its contract adjustment mechanism, limiting its enforceability to a period of two years after an author or performer becomes aware of the relevant circumstances.[741] Moreover, rather than relying on the Directive's neutral language of "contract adjustment", Greece[742] and Portugal[743] directly refer to this mechanism as "claim for additional remuneration", strengthening the underlying philosophy of higher remuneration.

The DSM Directive makes other contractual law-based mechanisms mandatory for Member States to improve fair remuneration in authors' and performers' exploitation contracts. Voluntary, out-of-court dispute resolution procedures are one of them. Article 21 states that, if parties cannot agree on the adjustment of the remuneration, authors and performers can bring this claim before a court or other competent authority.[744] Relying on the flexibility granted by Recital 78, the Member States under scrutiny chose to assign this competence either to an existing ADR body,[745] to a new one created for this purpose[746] or to just refer parties to private mediators.[747] Furthermore, Member States are free to extend these mechanisms to cover disputes related to fair scope or fair exploitation.[748]

As Fair MusE's desk research shows, the only Member State from our examination that introduced a new dispute resolution mechanism is Portugal, although its *ad hoc* body has not been created yet.[749] Other countries, such as Belgium and France, decided not to explicitly transpose Article 21, since they already had relevant arbitration or mediation bodies and mechanisms in place.[750] In

[741] See Portugal's Art. 44-C(4) of the CRRC. This deadline was already present in the earlier Portuguese law provision on additional remuneration and was not removed, despite the absence of such a limitation under Art. 20 of the DSM Directive.
[742] Art. 32A of the Greek Law 2121. Art. 32A applies also to performers' licences and exploitation contracts, as per Art. 46(6) of the same law.
[743] Art. 44-C of the Portuguese CRRC.
[744] Recital 78 of the DSM Directive.
[745] Austria, Belgium, Denmark, Estonia, France, Italy, and Spain.
[746] Portugal.
[747] Germany and Greece.
[748] See Jozefien Vanherpe, 'Towards a Fair Balance in the Digitised Music Industry: Facing the Music' (PhD thesis, KU Leuven 2022) 448.
[749] The approved Decree Law 47/2023 in its Article 8 established a mechanism called 'specialised institutionalised arbitration and mediation in matters of copyright and related rights', which Art. 44-D(1) of the Portuguese CRRC explicitly refers to.
[750] Chambre des représentants de Belgique, 'Projet de Loi' (*Explanatory Memorandum of the Belgian Loi Transposant la Directive of 19 June 2022*) DOC 55 2608/001 of 5 April 2022, 14, available at <https://www.lachambre.be/FLWB/PDF/55/2608/55K2608001.pdf>.

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France, for example, its existing Act on justice promoting conciliation and mediation applies as a standard out-of-court dispute resolution procedure without an explicit transposition of the Directive.[751] Furthermore, in Denmark, the Copyright licence Tribunal can handle these procedures, although it cannot issue binding decisions, with parties remaining free to bring their dispute before ordinary courts.[752] It is worth recalling that, as indicated under the above-mentioned Recital 78 and Recital 79 of the DSM Directive, ADR proceedings under Article 21 can also be started by artists' representative organisations.[753]

Procedures for out-of-court dispute resolution are also included in Article 17(9) of the DSM Directive. It requires EU Member States to introduce ADR mechanisms for the settlement of disputes over content removal by OCSSPs. Moreover, OCSSPs also fall under the requirements of Article 21 of the Digital Services Act (DSA) on out-of-court dispute settlement for all types of content, as further explained in Chapter 6.2.1.1 of Fair Muse's D2.3 Deliverable. Article 21 of the DSA introduces more specific procedural requirements, including the need for online platforms to inform about and rely on certified out-of-court dispute settlement bodies for disputes with platform users. What is more, Article 6(12) of the Digital Markets Act (DMA) on applying fair, reasonable and non-discriminatory access terms to certain platforms requires social media gatekeepers (among others) to include ADR mechanisms in their platform access terms, as discussed in Chapter 6.2.1.2 of Fair Muse's D2.3 Deliverable. The DSM Directive remains silent as to whether disputes on content removal and on copyright contract law shall be entrusted to the same body. Desk research has shown that most of the Member States analysed by Fair MusE have concentrated these competences, increasing the exposure of the body in question to copyright disputes.

Finally, the right to revocation under Article 22 acknowledges that many individual authors and performers sign an exclusive contract for a full copyright term under the expectation that their works will be exploited. This European law provision seeks to protect the economic interests of creators by obliging Member States to implement rights' revocation mechanisms in case of lack of exploitation of the rights after the lapsing of a reasonable time from the rights transfer. While Recital 80 of the Directive states that the right of revocation applies when rights are "not exploited at all", Article 22's phrase "lack of" has been interpreted broadly by scholars, who suggest it covers not only the absence of exploitation but also an inadequate or insufficient exercise of the rights.[754] From a practical point of view, individual creators can only assess whether their rights are *not* being exploited - and, thus, revoke their rights transfers - by having access to the right information on the modes of exploitation and the revenues generated by their works or performances. This is yet another reason why the transparency rights under Article 19 are so important. Furthermore, according to Article 22,

[751] In its Ordinance no. 2021-580 of May 12, 2021, the French Government did not deem it necessary to cover Article 21 of the Directive as it considered that provisions on conciliation and mediation were already provided in the French Code of Civil Procedure and were sufficient. See Report to the President of the Republic *(Rapport au Président de la République relatif à l'ordonnance n° 2021-580 du 12 mai 2021 portant transposition du 6 de l'article 2 et des articles 17 à 23 de la directive 2019/790 du Parlement européen et du Conseil du 17 avril 2019 sur le droit d'auteur et les droits voisins dans le marché unique numérique et modifiant les directives 96/9/CE et 2001/29/CE)* OJ 13 May 2021, available in French at <https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000043496421>.

[752] § 55c of the Danish Ophavsretsloven.

[753] See also Vanherpe (n 748) 347.

[754] Senftleben and Izyumenko (n 468) 20-21; P Bernt Hugenholtz, 'Regulating creator's contracts under the DSM Directive. What we can learn from the Dutch' (2022) 4 NIR 467, 474.

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while implementing these revocation mechanisms, national lawmakers shall take the significant differences and contractual practices that exist across creative sectors (e.g. music v audiovisual sectors) into account, determining whether, how and when authors and performers shall be able to revoke their rights, being able to transfer or licence them to another party. Therefore, Article 22 leaves Member States with considerable flexibility in how they implement this right into their national laws.[755]

Considering the significant leeway created by Article 22, as well as the specific provisions Member States are entitled to implement in different creative sectors and for different types of works and performances, Article 22's national transpositions differ significantly in the various jurisdictions under scrutiny. The openness of this provision, notwithstanding its undeniable harmonisation goals, affects the conditions to revoke an assignment or licence, which concretely depend on the requirements of the law applicable to each case from a private international law perspective.[756]

Among the flexibilities allowed under Article 22(2), Member States chose different approaches to revocation of rights shared among multiple authors or performers. In Spain, for example, the right of revocation does not apply to collective works.[757] In other national laws, such as the Estonian, Greek and Italian transpositions, works with multiple authors or performers are eligible for revocation depending on the relative importance of the individual contributions.[758] Moreover, several countries, such as Belgium,[759] Greece,[760] Germany,[761] Italy,[762] and Spain,[763] took up the option under Article 22(2) to give authors and performers the choice to terminate the exclusivity of their contracts instead of revoking the licence or their rights transfers. Germany, in particular, allows authors to revoke licences with minimal conditions, and notably does not require proof of detriment to the author's interests.[764]

On a different front, as stipulated under Article 22(3), national laws are allowed to contemplate a minimum period that must have lapsed from the authorisation or transfer of the rights before their

[755] See also Vanherpe (n 748) 287-288.

[756] Notably, Ginsburg warns that Chapter 3 DSM Directive might be rendered ineffective if licensees – being the stronger party in negotiations– engage in forum shopping when deciding on law applicable to contracts with authors and performers. Thus, Chapter 3 DSM Directive would only apply in contracts with purely local, small publishers. See Jane C Ginsburg, 'Authors' Remuneration: Reforms to Wish For' in Gustavo Ghidini and Valeria Falce (eds), *Reforming Intellectual Property* (Edward Elgar Publishing 2022) 129.

[757] Art. 48bis(2) of the Spanish TRLPI.

[758] See Art. 15B(3) of the Greek Law. Worded slightly differently, § 49³(4) of the Estonian Copyright Act provides that the right of revocation may be exercised only by the joint authors who have made a significant contribution to the creation of the work. As for Italy, per Art. 110-septies of the ICA, collective works are not excluded from the right of revocation, but consensus from their main contributors is required. Furthermore, Art. 110-septies(3) of the ICA requires that revocation must be requested by all the authors and performers with the greatest contribution to the work or performance.

[759] Art. XI 167/4 of the Belgian CEL.

[760] Art. 15B(1) of the Greek Law.

[761] § 41(1) of the German Copyright Act.

[762] Art. 110-septies(1) of the ICA.

[763] Art. 48bis(1) of the Spanish TRLPI.

[764] § 41 of the German Copyright Act. Before the DSM transposition in 2021, § 41 of the German Copyright Act revocation was only allowed when the lack of use or the inadequate use was "significantly infring[ing] the legitimate interests of the author." This requirement was dropped during the revision.

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potential revocation. While Denmark requires the lapsing of a quantitatively undetermined 'reasonable time',[765] other countries set a minimum fixed time period that must pass until authors and performers can exercise their rights.[766]

To conclude on this front: it should be recalled that, together with Article 18, Article 22 can be freely waived contractually.[767] That is because of the straight provision under Article 23(1) ("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"). The waivable character of these rights certainly weakens their prescriptive force of both provisions under national laws and leaves the most vulnerable individual rightholders without effective protection in the absence of unions or CMOs able to protect the income of their members and to limit the transfer of their rights to their business counterparts. That is the case of music performers and of the very broad communities of 'session musicians' who normally transfer all their exclusive rights through buy-out contracts they conclude with record producers. Unlike music composers, performers cannot rely on a significant collective representation and management of their rights. As highlighted in the Introduction and Chapter 2 of this Study, the only performer rights that are represented collectively are established under national (*i.e.*, territorial) statutory remuneration schemes, where performers' organisations collect and allocate revenues among their members after sharing some of these rights revenues with record producers.

Thus, the fact that, over a total of 4,215 artists signed to a record label who participated in a joint survey undertaken by the International Artist Organisation ('IAO') and Association of European Performers' Organisations ('AEPO-ARTIS') between January and March 2024, only 5.9% of them attempted to revoke their rights under the terms of Article 22, and only 30.6% of these performing artists succeeded in their undertaking, should not come as a surprise.[768] However, as confirmed by the interviews conducted for the Fair Muse project, the same performers involved in this survey are deeply dissatisfied and frustrated by the concrete exercise of other rights such as those to transparency (Article 19), contractual adjustments (Article 20) and out-of-court dispute resolution mechanisms (Article 21) which are mandatory for all Member States and that are, at least on paper, enforceable even against contractual provisions aimed at restricting them (Article 23). The 2024 IAO & AEPO-ARTIS survey clearly shows that neither the transparency nor the renegotiation and adjustment mechanisms work in practice for performers.t Hence, only 15.3% of signed EU artists in disagreement with their label have engaged in a voluntary ADR process, although 62.9% feel comfortable using such a procedure. [769]

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[765] See § 54(1) of the Danish Ophavsretsloven.

[766] For instance, in Portugal and Spain, this minimum period is usually 5 years (Art. 48bis of the Spanish TRLPI; Art. 44-E(2) of the Portuguese CRRC - five years after the contract or a third of its duration, whichever occurs first, excluding audiovisual works), whereas for in Germany, for instance, the licensee generally has a two-year grace period starting from the date of the grant of rights or the delivery of the work (§ 41 of the German Copyright Act).

[767] Art. 23 of the DSM Directive.

[768] Daniel Johansson, 'Streams & Dreams Part 2 – The Impact of the DSM Directive on EU Artists and Musicians' (2024) International Artist Organisation, <https://www.iaomusic.org/the-impact-of-the-dsm-directive-on-eu-artists-and-musicians-part-2-2024/>. AEPO-ARTIS represents European CMOs for performers, along with CMOs and artist organisations.

[769] ibid, where the survey shows that 64.7% of the 4,215 signed EU artists reported a lack of transparency and detailed information as mandated by the new legislation (Art. 19); 4.1% of them have attempted to

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renegotiate their contracts (Art. 20), with 23% achieving contract adjustments resulting in enhanced royalties and additional remuneration.

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5. The fairness-enhancing dimension of the EU copyright liability regime for social media services

5.1. Article 17 of the DSM Directive and the 'fair balance' of interests

Since 2006, the emergence and widespread adoption of social media and Web 2.0 technologies fundamentally changed how digital content is created and distributed, instigating a new wave of progressive re-intermediation.[770] This period marked a significant shift in the music industry, enabling Internet users to effortlessly share a wide array of creative works. This phenomenon inevitably blurred the lines between making available original user-generated works and the unauthorised dissemination of third parties' copyright works.[771] These rapid technological transformations posed substantial challenges to the traditional framework of the creative industries. The advent of P2P networks from the late 1990s had already started undermining the effectiveness of copyright enforcement, as well as the expectation of professional creators to be properly remunerated for the online exploitation of their works. This era of structural disintermediation led to a dramatic reduction in earnings for authors, performers, and content producers. Consequently, this prompted influential academics and industry leaders to propose radical measures - such as flat remuneration schemes - to legalise online file-sharing.[772]

This Chapter will therefore use the emergence and the exponential rise of social media and Web 2.0 technologies as a starting point to shed light on the controversial notion of "value gap" and to explain why and how Article 17 of the DSM Directive was designed to target and reduce this gap.

5.1.1. Origins and dimension of the 'value gap'

The technological developments from 2006 onwards had profound economic repercussions in the music industry. The proliferation of unauthorised content-sharing practices without clear copyright licensing paths and without giving rightholders a chance to enforce and earn remuneration from their rights led to significant financial losses for creators and producers. When the World Wide Web was

[770] See Renda and others, 'Ex-Post Impact Assessment on the implementation, application and effects of Directive 2001/29/EC on the harmonisation of copyright and related rights in the information society (InfoSoc) and of its related instruments' (n 402) 180.

[771] Mazziotti, *EU Digital Copyright Law and the End-User* (n 86).

[772] Neil Weinstock Netanel, 'Impose a Noncommercial Use Levy to Allow Free Peer-to-Peer File Sharing', (2003) 17(1) Harvard Journal of Law and Technology 1; William W Fisher, *Promises to Keep. Technology, Law and the Future of Entertainment* (Stanford University Press 2004) 199; João P Quintais, 'Alternative Compensation Models for Large-Scale Non-Commercial Online Use of Works' in Silke von Lewinski (ed), *Remuneration for the use of works = La rémunération de l'utilisation des œuvres: exclusivity vs. other approaches = exclusivité c. autres approches* (De Gruyter 2017) 298.

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in its infancy, the US[773] and the EU[774] enacted copyright liability exemptions that shaped the digital landscape in which a handful of social media services scaled up, taking advantage of platforms' network effects, of the exponential growth of personalised advertising, and of the gratuity of the contents being offered to their audiences. Historically, the broad immunity created under copyright law for the social media industry made it difficult or impossible for the creative sector to properly licence, and thus promote fair remuneration, for the exploitation of copyright works. This was particularly the case in the audiovisual and music industries. However, reliable content identifiers emerged and adequate data infrastructures to foster *ex ante* licensing schemes were created, thus facilitating online intermediaries' content moderation.

This situation made the concept of a 'value gap' emerge in the policy and lobbying circles in Brussels. Although the Brussels-based recording industry's lobby introduced and primarily used this concept,[775] *pro domo sua*, it also proved effective in illustrating, more broadly, how the value of content was being transferred—rather than lost—from creators to the tech sector. Despite the inconsistencies and controversies which have characterised this term, 'value gap' can be defined, from a macroeconomic perspective, as the exceptional disparities between the revenues generated by creative works - through their exploitation by online platforms - and the overall compensation received by the actual creators of those works.[776]

The 'value gap' concept is pertinent in the music sector. In this industry, rightholders are not interested in restricting access to their musical compositions and sound recordings. This marks a significant difference with the audiovisual sector, where it is customary that film and TV producers exploit their works on the grounds of exclusive licensing deals. Music rightholders are different, in this respect, because they are commercially interested in licensing and extracting value from their works in social media. From an economic point of view, the birth and the exponential growth of the social media industry since 2005 offered creative industries a brand-new technological platform, delivering a wide variety of intermediated digital content to the public. In doing so, tech companies that built and controlled these online services used their Terms of Service to obtain free, perpetual and global licences from the creators being active on their platforms and uploading their works.[777] To a large extent, the price creators pay on social media to use these services and gain exposure is

[773] Sect. 512 of the US Digital Millennium Copyright Act 1998, which amended the US Copyright Act (17 US Code).
[774] Art. 14 of the E-Commerce Directive.
[775] See, for instance, Helen Smith (IMPALA), Veronique Desbrosses (GESAC) and Frances Moore (IFPI), 'Value gap is crucial for the music sector' (*The Guardian*, 24 July 2016) <https://www.theguardian.com/business/2016/jul/24/valu-gap-music-sector-youtube>.
[776] See, for instance, the figures used in the 2016 Impact Assessment of the European Commission, according to which, in 2015, YouTube's value was estimated at $70 billion, with annual revenues of $9 billion, while platforms like Pinterest and Soundcloud were valued at $12 billion and $700 million, respectively, see European Commission, 'Commission Staff Working Document - Impact assessment on the modernisation of EU copyright rules' 2016 SWD(2016) 301 final, Part 1/3 138, n 408. Despite the massive revenues generated by these platforms, the creators whose content fueled this growth saw little to no financial benefit. This discrepancy highlighted the inadequacies of existing copyright frameworks and underscored the need for reform.
[777] By accepting these terms, rightholders grant the platform a global, free, and perpetual licence that also covers activities by other social media users: see, for instance, YouTube's Terms of Service at: <https://www.youtube.com/static?gl=&template=terms>.

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the relinquishment of their right to be remunerated within a certain platform ecosystem. While this arrangement may seem acceptable and even justified for amateurs or "professionalising" amateur creators, it creates a loophole for small and medium-size copyright holders. Due to their weak bargaining power vis-a-vis large social media platforms, these rightholders have little chance - even if they become platform commercial partners - to negotiate appropriate and proportionate remuneration for the online distribution of their works. Therefore, in this context, 'value gap' also describes the disparity between the copyright royalties paid to music rightholders by the social media industry and the (much higher) royalties paid by music streaming services.[778]

The news publishing industry faces analogous challenges, given its strong reliance on news aggregator services and other information society service providers to distribute their content and attract a larger readership. Much like social media platforms, these tech-run news aggregator services typically refuse entering into licensing agreements, thereby undermining the ability of publishers to recoup their investment.[779] To address this dimension of the value gap, the EU legislator adopted the controversial Article 15 of the DSM Directive, which obliges Member States to grant press publishers an ancillary right to compel information society service providers to obtain a licence and to enforce their rights against unauthorised exploitation.[780] Clearly, despite targeting different sectors, both Article 15 and Article 17 of the DSM Directive aim to enhance the bargaining power of "financially weaker" stakeholders in industries that are dependent on digital multi-channel content distribution by tech giants.[781]

5.1.2. The 2016 European Commission's policy response and the resulting public debate

In response to the above-mentioned economic challenges, the European Commission inserted a provision in its 2016 proposal for a Directive on copyright in the DSM that can be viewed as a real game changer.[782] This provision was Article 13, which sought to impose new copyright-related obligations on UGC platforms. Aiming to abandon the well-established (although controversial) principle of platform neutrality in social media, this Directive proposal required platforms of a certain

[778] According to 2017 estimates by the IFPI, Spotify paid record companies $20 per subscriber, whereas YouTube paid even less than $1 per user, see IFPI, 'Global Music Report 2017: Annual State of the Industry' (2017) 25 <https://www.musikindustrie.de/fileadmin/bvmi/upload/06_Publikationen/GMR/GMR2017_press.pdf>.

[779] Cf. Recital 54 of the DSM Directive.

[780] Following the national implementation of Art. 15, cases are emerging which suggest that, depending on the way in which Member States have implemented it, the provision may indeed have a positive impact on press publishers' revenues. In its Resolution No. 3/23/CONS, AGCOM has established criteria for licensing negotiations between publishers and information society service providers and for determining what constitutes fair remuneration. In particular, the Resolution allows both parties to request AGCOM, Italy's national supervisory authority for the communication sector, to determine a fair remuneration if no agreement has been reached within 30 days. On 24 July 2024, AGCOM set, on the basis of the criteria set out in the Resolution, such a fair remuneration to be paid by Microsoft to Gruppo Editoriale SpA (GEDI) for the online use of its journalistic publications on Microsoft's "Bing" search engine, see AGCOM, 'Agcom calcola l'equo compenso dovuto da Microsoft al gruppo Gedi' (25 July 2024), avaliable in Italian at <https://www.agcom.it/comunicazione/comunicati-stampa/comunicato-stampa-del-25-luglio-2024>.

[781] Edouard Treppoz, 'The Past and Present of Press Publishers' Rights in the EU' (2023) 46 Columbia Law Journal of Law & the Arts 267, 267.

[782] European Commission, 'Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market' (n 550).

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size and which played active roles in content distribution to have copyright law obligations, so they prevent unauthorised content sharing.[783] Article 13 was grounded in the principle that platforms should have taken "appropriate and proportionate measures" to prevent the availability of works that their service users made available without their respective copyright holders' consent. This would include implementing content identification technologies (such as Google's Content ID), to disable access to unauthorised works and to build technical infrastructures for the enforcement of licensing agreements with rightholders.

This proposal inevitably sparked intense debate, particularly with regards to its balance between the purpose of protecting intellectual property rights and preserving other fundamental rights such as freedom of expression and Internet user privacy.[784] Critics argued that this measure would have stifled innovation, limiting user participation by imposing onerous obligations on platforms.[785] There were also concerns about the effectiveness and reliability of content identification technologies, particularly in sectors like photography, where such technical standards and data infrastructures are much less developed than in other sectors.[786] Legal uncertainties further complicated the discourse. For instance, it was unclear whether the Directive would impose new filtering obligations on all platforms or only on those with existing licensing agreements.[787] Additionally, the proposal's impact on the liability exemptions provided by the EU E-Commerce Directive remained a contentious issue.[788] In short, the Commission's initial proposal drew significant criticism for its legal uncertainties, inconsistencies with existing EU Directives, and potential infringements on certain fundamental rights.

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[783] This would be the case of platforms that play active roles in content distribution by optimising the presentation and the promotion of their content.

[784] This aspect has been raised by Mazziotti and Ranaivoson (n 16) 257-258, which referred to a number of academic initiatives and critical voices in legal scholarship, including Sophie Stalla-Bourdillon and others (40 academics), 'Open Letter to the European Commission – On the Importance of Preserving the Consistency and Integrity of the EU Acquis Relating to Content Monitoring within the Information Society' (2016) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2850483>; European Copyright Society, 'General Opinion on the EU Copyright Reform Package', (2017) <https://europeancopyrightsocietydotorg.files.wordpress.com/2015/12/ecs-opinion-on-eu-copyright-reform-def.pdf>; Max Planck Institute for Innovation and Competition (2017), 'Position Statement on the Proposed Modernization of European Copyright Rules: Art. 13' (2017) <https://www.ip.mpg.de/fileadmin/ipmpg/content/stellungnahmen/MPI_Position_Statement_PART_G_incl_Annex-2017_03_01.pdf>. See also Cory Doctorow, 'Four million Europeans' signatures opposing Article 13 have been delivered to the European Parliament' (*EFF,* 10 December 2018,) <https://www.eff.org/deeplinks/2018/12/four-million-europeans-signatures-opposing-article-13-have-been-delivered-european>.

[785] This issue has been raised in an open letter signed by various academics across Europe, see 'Copyright Reform: Open Letter from European Research Centres' (*Create,* 24 February 2017) 1 <https://www.create.ac.uk/wp-content/uploads/2017/02/OpenLetter_EU_Copyright_Reform_24_02_2017.pdf?x24425>.

[786] On the issue of the lack of standardised data infrastructure in, inter alia, the photographic industry, see Martin Senftleben and others, 'Ensuring the Visibility and Accessibility of European Creative Content on the World Market The Need for Copyright Data Improvement in the Light of New Technologies and the Opportunity Arising from Article 17 of the CDSM Directive'(2022) 13(1) Journal of Intellectual Property, Information Technology and Electronic Commerce Law 76, 90.

[787] Christina Angelopoulos, 'On Online Platforms and the Commission's New Proposal for a Directive on Copyright in the Digital Single Market' (2017) CIPIL 35.

[788] Mazziotti and Ranaivoson (n 16) 256.

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It is worth noting that, from the perspective of achieving a fair balance of interests, academic debates and the legal scholarship critiquing the proposal of Article 13 were founded on a systematic prioritisation of users' freedom of expression and social media platforms' business freedom over authors' rights and copyright enforcement.[789] As we will see, this approach, which unduly penalises artists' interests and their expectation to enforce their intellectual property rights to receive fair compensation, cannot be justified on the grounds of the human rights law applicable in EU jurisdictions.[790] Moreover, there are specific rulings on the necessity to consider authors' rights as human rights, not only in CJEU case law[791] but also, in numerous rulings of the ECtHR, where the Court found that copyright, recognised as a form of "property," can indeed outweigh other fundamental rights.[792]

Despite the above-mentioned controversies, the European Commission, in its Impact Assessment published together with the 2016 Directive proposal, emphasised the need for a fairer system that adequately compensates content creators.[793] In doing so, the Directive proposal embodied legal mechanisms which were revised by the EU Parliament and the Council before its adoption. These significant revisions help to understand the ultimate purpose and scope of application of this provision.

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[789] Representative of this broadly shared view, certain legal scholars did *not* place the fundamental rights dimension of authors' rights at the same level of other fundamental rights in the assessment of the initial Commission proposal and, afterwards, of Art. 17. Among these scholars are: Angelopoulos (n 787); João P Quintais and others, 'Safeguarding User Freedoms in Implementing Article 17 of the Copyright in the Digital Single Market Directive: Recommendations from European Academics' (2019) 10 Journal of Intellectual Property, Information Technology and Electronic Commerce Law 277; Felix Reda, Joschka Selinger and Micheal Servatius, 'Article 17 of the Directive on Copyright in the Digital Single Market: a Fundamental Rights Assessment' (2020) Gesellschaft für Freiheitsrechte 42; Christophe Geiger and Bernd J Jütte, 'Platform Liability under Art. 17 of the Copyright in the Digital Single Market Directive, Automated Filtering and Fundamental Rights: An Impossible Match' (2021) 70 GRUR International 532.

[790] These consist of the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms and the Charter of Fundamental Rights of the European Union, in particular Art. 17(2) thereof, which explicitly states that intellectual property is protected as a form of property. With the entry into force of the Treaty of Lisbon in 2009 both of them became constitutionalized, with the Charter of Fundamental Rights becoming legally binding, acquiring the same status as EU primary law and the legal obligation for the EU to "accede" to the Convention for the Protection of Human Rights.

[791] As we will discuss later, the CJEU held that the platform user's freedom of expression is not inviolable and can be restricted in order to effectively protect intellectual property right: see Case C–401/19 *Republic of Poland* [2022] ECLI:EU:C:2022:297, paras 63-69.

[792] See Fredrik Neij and Peter Sunde Kolmisoppi (The Pirate Bay) v Sweden (2013), Appl. nr. 40397/12 where the Court stressed that intellectual property - more specifically of the 'rights of the copyright holders' - is a form of 'property' protected by Art.1 of Protocol No. 1 to the ECHR. This includes protection against unauthorised dissemination of protected works through file-sharing technologies. At an earlier stage, in the ECtHR case *Ashby Donald et autres v France* - Appl. nr. 36769/08, the Court similarly founded the protection of the copyright of fashion houses in their own creations (against unauthorised photographers invoking their right to freedom of expression). For a detailed review of the ECtHR case law on intellectual property rights, see Christophe Geiger and Elena Izyumenko, 'Intellectual Property before the European Court of Human Rights' in Christophe Geiger, Craig A Nard and Xavier Seuba (eds), *Intellectual Property and the Judiciary* (Edward Elgar 2018) 9.

[793] European Commission, 'Commission Staff Working Document - Impact assessment on the modernisation of EU copyright rules' (n 549) Part 1/3 138 ff.

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5.2. Main elements of Article 17: from the proposal stage to the final version

This section offers a brief, critical analysis of the key revisions to Article 17, coupled with the key takeaways from relevant CJEU judgments which have shaped its interpretation and application.

5.2.1. Scope of application

The first front where the proposed provision of Article 13 was significantly revised concerns its scope of application. Initially, Article 13 of the 2016 Directive proposal embodied a definition targeting "information society service providers" hosting large amounts of user-uploaded content.[794] The broad and vague character of this provision was criticised due to the legal implications and the concerns of excessive regulation that it raised from the perspective of a fair balance between competing fundamental rights.[795] A significant legislative shift occurred in September 2018, when the European Parliament adopted a crucial amendment to the Commission's Proposal. This amendment introduced a more precise and reliable definition by identifying service providers obliged to seek a licence for copyrighted works uploaded by users as "Online Content-Sharing Service Providers" ('OCSSPs').[796] This was a remarkable effort of EU lawmakers to create a well-defined category of digital platforms subject to the new copyright liability regime enshrined in Article 17 of the DSM Directive.

Another significant revision, aimed at specifically targeting the online service providers contributing to the value gap, explicitly excluded non-profit services, educational repositories, open-source platforms, and private cloud services from the scope of application of Article 17. The unintentional inclusion of services like Wikipedia — which was temporarily shut down in several Member States in protest against the proposed Article 13[797]— provided a good example of what a 'fair balance'-oriented provision should have looked like. This narrower definition mitigates legal uncertainties, limits the scope to entities primarily engaged in commercial content-sharing, and makes Article 17's scope much clearer. Furthermore, carving out particular types of services avoids imposing unintended regulatory burdens on non-commercial and educational platforms.

5.2.2. From 'strict' liability to 'best efforts'

Another key revision to Article 17 refers to its original legislative proposal, which assigned primary copyright liability to all information society service providers for the sole fact of hosting and making infringing materials uploaded by their users available to the public. This original proposal contained what amounted to a strict liability provision. Under the original proposal, any online content service provider that played an active role - such as optimising or promoting uploaded works - would

[794] Art. 13(1) of the Commission's Proposal.
[795] On the general problem of Art. 13's unclear terminology, see Giancarlo Frosio, 'To filter, or not to filter? That is the question in EU Copyright Reform' (2017) Cardozo Arts & Entertainment, 340 ff.
[796] European Parliament, 'Amendments adopted by the European Parliament on 12 September 2018 on the proposal for a directive of the European Parliament and of the Council on copyright in the Digital Single Market' (n 578).
[797] David Meyer, 'Why Four Versions of Wikipedia Have Deliberately Gone Dark' (*Fortune,* 21 March 2019) <https://fortune.com/2019/03/21/wikipedia-dark-eu-copyright-protest/#>.

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automatically face copyright liability, irrespective of the nature of the means used.[798] Considering that no social media service hosts uploaded materials *neutrally,* and each platform designs and implements its own algorithms to organise and commercially exploit user-uploaded contents, this provision would have linked primary copyright liability to the normal functioning and content exploitations performed by social media services. To avoid such liability, the text of the Commission proposal specified that information society service providers, as (broadly) defined above, should have taken "appropriate and proportionate measures to ensure protection of works," and explicitly recommended the use of automated content recognition tools.[799] However, it was obvious that the initial text of Article 13 would have entered into conflict with CJEU rulings which sought to clarify the conditions for a fair balance of interests in the protection of authors' rights and of other fundamental rights.

In particular, Article 13 appeared to introduce a broad legal requirement for online service providers to install complicated, costly, and permanent monitoring systems at their own expense. The CJEU had found this obligation contrary to the principle of proportionality under Article 3 of Directive 2004/48 (IPRED) as well as incompatible with the fundamental rights framework's goal of achieving fair balance.[800] Interestingly, three years later, when approving a common text for the Directive, the EU lawmakers agreed upon a revision that changed the language of this provision and introduced a tiered and more nuanced copyright liability regime. Under the final version known as Article 17, online exploiters have an obligation under copyright law to obtain authorisation from the relevant rightholders which is consistent with industry standards and the specificities of licensing practices in each creative sector. This revision demonstrates a remarkable attempt to make copyright compliance 'fair' in the social media landscape by making liability ultimately depend on whether social media platforms have made their "best efforts" to either: (i) obtain the necessary authorisation; or (ii) continuously prevent the availability of unauthorised content upon a rightholder's request ("notice-and-stay-down") according to high industry standards of professional diligence.[801] In principle, this implies that while upload filters are one method to achieve this, they are not the only way to avoid platforms' direct liability.

To conclude on this front: by making liability depend on the availability of effective content recognition technologies, Article 17 ensured flexibility, nuance and fairness. This dimension considers the completely different incentives, content identifiers and data infrastructures that exist in different content industries. In the audiovisual sector, for instance, professional creators seek mostly to enforce their rights by preventing the availability of their works on social media. They do so by providing these operators with information that allows them to ensure unavailability of these works across their services. This is normally the case because proprietors of film, TV and sport contents pursue *exclusive* licensing policies in the exploitation of their works. In contrast, in the music sector, the various rightholders are commercially interested in licensing their works to social media services.

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[798] See Recital 38 of the Commission's Proposal.

[799] Art. 13(1) of the Commission's Proposal.

[800] See *SABAM v Netlog* (n 405) and *SABAM v Scarlet Extended* (n 405), where the CJEU reviewed the legitimacy of the injunctions requested by Belgian composers' collecting society (SABAM) against - respectively - an Internet access provider (Scarlet) and a social media service (Netlog). In the Court's ruling, both Scarlet and Netlog were asked to remove SABAM's music repertoires from the materials these two service providers were making available to the public.

[801] Art. 17(4) of the DSM Directive.

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The fact that these commercial entities are now legally obliged, under Article 17, to negotiate and obtain licences according to high standards of professional diligence in the digital music sector entails close cooperation and data-sharing practices with both individual and collective licensors. On the one hand, this legal reality addresses the fairness gap between social media platforms (which rely on personal advertising-based models), and music streaming services, which have engaged in licensing negotiations with rightholders, distributors and CMOs from the outset. On the other hand, negotiating licences remains challenging, particularly for less established digital platforms with limited resources.

5.2.3. From a one-size-fits-all approach to proportionality and copyright exceptions

When the initial proposal was published in 2016, it faced criticism for subjecting all information society service providers to a uniform set of obligations, regardless of their size. This was because smaller entities with limited capacities were concerned that Article 13 might impede their ability to enter the market and compete with larger players that have dominated the industry for decades.[802] This lack of proportionality was compounded by the absence of exceptions for quotation, criticism, review, caricature, parody, or pastiche, perpetuating the legal patchwork left by Article 5(3)(k) of the InfoSoc Directive.[803] As recalled above, coupled with the requirement for automated content filtering, Article 13 raised concerns about potential infringements on users' freedom of expression and information as well as social media companies' freedom to conduct a business.[804] However, the final version of Article 17 foresees the mandatory implementation of copyright exceptions for end user's activities falling within the scope of Article 17. Further proportionality considerations were introduced, exempting newly launched OCSSPs with low turnover from the "stay-down" obligation. With these amendments, the legislator created a further layer of fair balance by addressing valid concerns about overreach and the potential stifling of free expression and business freedoms, thereby reflecting a more nuanced regulatory approach.

5.2.4. From mandatory upload filters to fundamental rights safeguards

Furthermore, the potential requirement for all information society service providers to implement automated content recognition tools, as envisioned in the proposed Article 13, ignited a high-profile debate about excessive content filtering and censorship. This suddenly made copyright a matter of concern for the general public.[805] To mitigate these concerns, Article 17 ultimately provided a detailed framework that includes both a prohibition of general monitoring obligations - originally embodied into Article 15 of the E-Commerce Directive - and the mandatory implementation of robust complaint and redress mechanisms for users. The measures outlined in Articles 17(7) and 17(9) of the DSM

[802] Aleksandra Kuczerawy, 'EU Proposal for a Directive on Copyright in the Digital Single Market: Compatibility of Article 13 with the EU Intermediary Liability Regime' in Bilyana Petkova and Tuomas Ojanen (eds), *Fundamental Rights Protection Online: The Future Regulation of Intermediaries* (Edward Elgar 2020).

[803] Prior to the implementation of Art. 17, only 9 Member States had introduced exceptions for all three parodies, pastiches and caricatures into their national law, see Teresa Nobre, 'The Post-DSM Copyright Report: The Meme Supplement' (*Communia,* 7 June 2024) <https://communia-association.org/2024/06/07/the-post-dsm-copyright-report-meme-supplement/>.

[804] See case *SABAM v Netlog* (n 405) paras 44-46; *SABAM v Scarlet Extended* (n 405) paras 46-48.

[805] In Germany, a country historically very sensitive to censorship, there were mass citizen protests against Art. 13, later Art. 17, until its final approval by the European Parliament, see Morgan Meaker, 'Inside the giant German protest trying to bring down Article 13' (*Wired,* 26 March 2019) <https://www.wired.com/story/article-13-protests/>.

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Directive aim to reinforce the balance between intellectual property rights and users' fundamental freedoms by addressing the interests of this third key stakeholder. Thus, these provisions not only promote social media users' opportunities to disseminate their own creative works with billions of others but also offer mechanisms to enforce their rights. Nevertheless, as we will explore in the following section, it will be the 27 national implementations that determine whether - or to what extent - the balanced approach envisaged by the EU legislator will be effective, and whether the rights and interests of one stakeholder outweigh those of others.

5.2.5. The European Commission's (last-minute) Guidance on Article 17

Only a couple of days before the DSM Directive entered into force, on 4 June 2021, the European Commission issued its Guidance on Article 17, in the form of a mere Commission Communication, which is non-binding for Member States.[806] The 26-page long document provided clarity on Article 17's general application and manifested its balanced approach by continuously insisting on a case-by-case assessment.[807] It further underscored important cooperative measures between OCSSPs and rightholders, such as the provision of "necessary and relevant information" by the latter when requesting the blocking of content,[808] as well as the general yet crucial premise to avoid general monitoring obligations.[809] Although the guidelines shed light on several crucial aspects of Article 17, its soft law nature initially bore the risk of fragmented national interpretations, potentially undermining the Directive's goals. As we will in the following section, a significant number of Member States seemingly outright ignored the Commission's Guidance, transposing Article 17 verbatim without additional refinements.

5.3. The relevance of the CJEU rulings on social media platforms' copyright liability

The transition to a *post*-Article 17 landscape in the EU proved to be even more interesting and complex because of two very different and equally important referrals made before the CJEU. These referrals related to different aspects in the copyright liability regimes applicable to social media services under the old (*i.e.*, pre-2019) and new regimes. The first case, in fact, consisted of joined cases having resulted in two rulings - Youtube (C-682/18) and Cyando (C-683/18) - which are entirely based on the legislation preceding the DSM Directive. As we will see, the rulings confirmed the necessity of having harmonised intermediary copyright liability criteria through a provision like Article 17. The second case stemmed from the Republic of Poland's challenge to Article 17(4)(b) and (c) of the DSM Directive, seeking to annul this provision on the assumption that its content blocking requirements would violate social media users' freedom of expression and information.[810] Despite the paradox of having such an appeal brought before the CJEU by a national government whose conduct was found in breach of EU human rights, this judicial initiative appeared to many like a sword of Damocles hanging over the entire legislative process.

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[806] Commission, 'Guidance on Article 17 of Directive 2019/790 on Copyright in the Digital Single Market' COM/2021/288 final.
[807] ibid 4, 7, 9, 11, 13, 15.
[808] ibid 8.
[809] ibid 8, 15, 22, 25.
[810] Art. 11(1) of the EU Charter of Fundamental Rights.

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5.3.1. The Youtube and Cyando cases

Firstly, the YouTube and Cyando rulings addressed whether content-sharing services such as YouTube and Cyando[811] engaged in acts of communication to the public, thereby bearing primary liability for the unauthorised upload of copyright works in their respective services. In his Opinion, the AG Saugmandsgaard Øe argued that neither YouTube nor Cyando carried out acts of communication to the public under Article 3(1) of the InfoSoc Directive when third-party users uploaded content to their platforms. Instead, they were seen as no more than intermediaries, providing mere physical facilities for content sharing.[812] In such cases, the AG proposed, information society service providers should only be liable under national laws governing secondary liability.[813] It is only when platform providers play an "active role," defined as having knowledge of or control over the uploaded content, that they fall outside the safe harbour of Article 14(1) of the E-Commerce Directive.[814] For YouTube and Cyando, however, this would not be the case.

The CJEU's final judgment disagreed with the AG by holding that these platforms can, in certain cases, be held liable for copyright infringement if they play an "indispensable" and "deliberate" role in making the content available to the public.[815] Drawing upon the previous case law of the CJEU on the notion of 'communication to the public',[816] the CJEU emphasised that the platforms' knowledge and awareness of illegal activities are essential for determining liability, focusing on specific information rather than general awareness.[817] First, it was inevitable for the judges to refer to the case of the P2P file sharing platform "The Pirate Bay."[818] Although it was the user of The Pirate Bay who placed the copyright work on the site, the judges found that its operator also made the work available to the public, having full knowledge of the user's illegal activities. A similar reasoning was given by the court in the *Filmspeler* case concerning the supply and use of multimedia players with pre-installed links to unauthorised streams of copyright works.[819] Again, the supplier's knowledge that the pre-installed content containing the links gave access to these copyright infringing works went beyond the mere provision of physical facilities and was sufficient to communicate the works to the public. Finally, the *GS Media* case,[820] which is one of many CJEU precedents on 'linking,' related to the "element of knowledge." In this case, the judges held that the operator of a website communicates a work to the public if it links to a work published without authorisation, provided the operator is fully aware of the lack of authorisation.

[811] Cyando was the operator of the former file-sharing and hosting service 'Uploaded'.
[812] Joined cases C–682/18 and C-683/18 *Petersons/Elsevier v Youtube/Cyando* [2020] ECLI:EU:C:2020:586, Opinion of AG Saugmandsgaard Øe.
[813] ibid paras 102-104.
[814] ibid para 152.
[815] Joined cases C–682/18 and C-683/18 *Petersons/Elsevier v Youtube/Cyando* [2021] ECLI:EU:C:2021:503, para 68.
[816] ibid paras 63-70.
[817] ibid paras 111-118.
[818] Case C-610/15 *Stichting Brein v Ziggo* [2017] ECLI:EU:C:2017:456.
[819] *Filmspeler* (n 164).
[820] *GS Media* (n 162).

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The judges also referred to the cases *SABAM* v *Netlog*[821] and *Scarlett Extended*[822] when assessing the compatibility of injunctions targeted at these platforms and aimed at removing and preventing copyright infringement for information society service providers falling under the safe harbour of the E-Commerce Directive (cf. Article 14). Through these two judgments from the early 2010s, the CJEU addressed the tension between ordering platform providers to implement preventive automated measures to protect intellectual property rights and the prohibition of general monitoring obligations. Drawing on these precedents, the Court held that requiring platform providers to implement a screening system to prevent future copyright infringement by all future uploads would constitute an unlawful general monitoring obligation.[823] Accordingly, in *L'Oréal v eBay*, the judges underlined the possibility of 'injunctions which are both effective and proportionate' if an information society service provider does not take such measures on its own initiative.[824] In this case, instead of implementing content identification tools, the Court suggested that eBay could prevent future trademark infringements either by blocking the user's account or by implementing user identification measures to identify the infringer and prevent him or her from placing future offers on the platform.[825] Overall, the CJEU has never denied the legitimacy of preventive measures but has previously indicated that information society service providers may indeed be required to take such measures in order to combat repeated infringements of intellectual property rights.[826] In the L'Oréal judgment, the judges concluded by pointing out that, once again, implementing such measures is a matter of fairly balancing the rights and interests at stake.[827]

5.3.2. Poland's appeal against Article 17(4)

In the Poland appeal case, instead, the CJEU aligned with the AG's opinion, underscoring the critical importance of balancing the rights of all the three stakeholders whose interests came into play: rightholders; social media platforms; and —from the perspective of freedom of expression raised by the Polish government— Internet users. To assess the compatibility of the obligation challenged by the appeal, the AG recognised that Article 17 of the Directive does impose certain monitoring obligations on OCSSPs to protect intellectual property rights. However, in the AG's view, these obligations can comply with users' fundamental rights, provided that sufficient safeguards, such as exceptions for parody and criticism, are put into place.[828] By acknowledging that Articles 17(7) and 17(9) of the DSM Directive function only as *ex-post* safeguards, the Court placed such responsibility on Member States and encouraged them to prevent the *initial* blocking of non-infringing content.[829] Nevertheless, it eventually concluded that the Directive already followed a balanced approach with its safeguards foreseen in Articles 17(7)-17(9) of the DSM Directive, supplemented by the Commission's Guidance. All these measures are designed to promote a fair balance between

[821] *SABAM v Netlog* (n 405).
[822] *SABAM v Scarlet Extended* (n 405).
[823] *Youtube/Cyando* (n 815).
[824] Case C-324/09 *L'Oréal v eBay* [2011] ECLI:EU:C:2011:474 (hereafter, '*L'Oréal v eBay*'), para 141.
[825] ibid para 142.
[826] *SABAM v Netlog* (n 405) para 29; *Scarlet Extended* (n 405) para 31;. Recital 47 of the E-Commerce Directive also emphasises that monitoring obligations "in a specific case" are excluded from the prohibition of general monitoring.
[827] *L'Oréal v eBay* (n 824) para 143.
[828] *Republic of Poland*, Opinion of AG Saugmandsgaard Øe (n 791) paras 189-190.
[829] *Republic of Poland* (n 791) paras 85-87, 99.

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restrictions on freedom of expression and intellectual property rights.[830] In the end, the CJEU upheld the validity of Article 17. Undeniably, the initially proposed Article 13, lacking all of these safeguards, would have failed the AG's and the CJEU's test and scrutiny.

5.3.3. Final remarks

In essence, the above-mentioned CJEU judgments provide vital clarifications on the purposes, scope and application of Article 17 of the DSM Directive. *YouTube* and *Cyando* indirectly confirmed that prior to the DSM Directive, EU law, due to the inconsistent application of the E-Commerce Directive' safe harbours, did not guarantee legal certainty or adequate protection of authors' rights in the social media industry. By re-affirming the platforms' liability whenever they play an active role in content dissemination, the CJEU rulings reinforced the need for platforms to take proactive measures without undermining user's fundamental rights. The CJEU's reliance on its own case law on the scope of the right to communication to the public and the emphasis on the requirement of specific (in the US: "red-light") knowledge and active participation as criteria for social media platform's liability underscores the importance of a precise and fair implementation to avoid overburdening platforms and infringing on users' rights.

[830] ibid paras 93-96.

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6. Art. 17's national transpositions: trends, effects and unsettled issues

The effectiveness of Article 17 of the DSM Directive in achieving its main goal, *i.e.*, to enable creators and other rightholders to exercise their rights, depends on how it is transposed into national law. A key measure of success is whether it reduces the value gap between the remuneration they earn from social media and what they receive from streaming services. National laws also determine, concretely, whether and how social media services' copyright liability strikes a fair balance between the rights of the various stakeholders involved. Maintaining this balance was straightforward for Belgium, Estonia, Greece and Portugal, which transposed Article 17 almost verbatim. More problematic was this goal was for lawmakers in Austria, Denmark, France, Germany, Italy, and Spain, where transpositions of Article 17 diverged from the EU law text—some to a significant extent— triggering additional challenges.

Rather than providing a comprehensive analysis of the implementations across these ten selected countries,[831] Chapter 6 focuses on highlighting the most successful and unsuccessful national transpositions, as well as their positive harmonisation effects. The chapter pays special attention to how these outcomes, particularly the new obligations to obtain licences and the indirect requirement for some platforms to implement automated content recognition technology, may impact the various stakeholders within the music and social media industries.

6.1. Unequal requirements for online platforms across Member States

6.1.1. How Member States define 'online content-sharing service provider'

The EU legislator's decision to opt for a Directive instead of a Regulation gave Member States legislative leeway, while also giving rise to a lack of uniformity among the countries under investigation. This is clearly reflected in the national definitions of OCSSPs.[832] As the classification of an online service as an OCSSP paves the way for the mandatory compliance with the tiered liability regime of Article 17, most Member States made sure to adhere to the definition provided by the Directive.[833] From a policy perspective, despite the use of a suboptimal EU legislative instrument,

[831] For such an in-depth analysis of the implementation of the 25 Member States that had transposed Art. 17 of the DSM Directive when conducting the report (all except Bulgaria and Poland), see Christina Angelopoulos, 'Articles 15 & 17 of the Directive on Copyright in the Digital Single Market: Comparative National Implementation Report' (Information Labs 2023) 37-69. <https://informationlabs.org/wp-content/uploads/2023/12/Full-DCDSM-Report-Dr-Angelopoulos.pdf>.

[832] Art. 2(6) of the DSM Directive defines 'online content-sharing service provider' as a "a provider of an information society service of which the main or one of the main purposes is to store and give the public access to a large amount of copyright-protected works or other protected subject matter uploaded by its users, which it organises and promotes for profit-making purposes".

[833] § 18c of the Austrian Copyright Act; Art. XI.228/2 of the Belgian CEL; § 57[8](1) of the Estonian Copyright Act; Art. L.137-1 of the French CPI; § 2(1) of the UrhDaG; Art. 66F (1) of the Greek Law 2121/1993; Art. 102-sexies of the Italian Copyright Act, and Art. 175A of the Portuguese CRRC. Noteworthy, the Portuguese

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the approach followed by the vast majority of Member States is beneficial. It improves the overall harmonisation of EU law in this area and ensures that online music services unrelated to the existing value gap are not unnecessarily burdened by Article 17's obligations. Nevertheless, despite the critical risks that divergences in national transpositions entailed, at least three countries *clearly* deviated from the definition.

Firstly, contrary to both Recital 63 of the DSM Directive and the European Commission's Guidance,[834] the French Ministry of Culture set explicit thresholds for what constitutes a "large amount of works"[835] that a platform must store to be considered an OCSSP. This approach is highly inflexible, since it does not allow the individual case-by-case assessment favoured by the Commission. The second and probably most controversial attempt comes from Spain, where OCSSPs are defined as *either* storing and providing access to a large number of works *or* having a large audience in the country.[836] As a result, platforms that only have a high number of users in Spain would qualify as OCSSPs, even if they do not meet the most crucial criterion ("large amount of copyright-protected works") set out in the Directive. Lastly, Danish law only partially implements Article 2(6) of the DSM Directive, as its definition excludes the second part of the Directive's provision, which outlines carve-outs for certain entities, such as non-profit online encyclopaedias.[837]

These three national solo efforts create a first gateway to legal fragmentation across the Member States. Much like the varied transpositions of Article 18 of the DSM Directive, this ultimately contradicts the logic of a Digital Single Market. The Spanish transposition, in particular, bears the risk of significantly broadening the scope of Article 17's obligations by potentially encompassing platforms that, because of small amounts of works made available to the public, were not a target of the EU lawmakers. The Danish version, however, may alleviate some of these concerns, as national courts are required to interpret the definition in light of EU law. It is therefore unlikely that Danish courts can consider an online non-profit encyclopaedia an OCSSP.

6.1.2. The Spanish approach to Article 17's 'safe harbour'

Once a platform meets the national criteria defining OCSSPs, its main goal is to benefit from Article 17(4) of the DSM Directive, whose safe harbour exempts a service provider from direct copyright liability. It is precisely this safe harbour that gives social media platforms an incentive to negotiate with and obtain a licence from rightholders, as well as to implement automated content recognition technologies. In our analysis, nine out of the ten countries incorporate this safe harbour inherent to

transposition only provides for an exhaustive list of exemptions for, inter alia, non-profit online encyclopaedias , which is contrary to Recital 62 and the Commission's guidelines.

[834] European Commission, 'Guidance on Article 17 of Directive 2019/790 on Copyright in the Digital Single Market' COM (2021) 288 final.

[835] In this respect, storing and giving access to 100 audiovisual or 5000 musical works is sufficient to be considered an OCSSP under French law, as long as the platform reaches an audience of minimum 400 000 unique monthly visitors in France, see Decree of 20 October 2021 implementing Decree No. 2021-1369 of 20 October 2021 amending the law on intellectual property and on certain online content sharing service providers, available in French at <https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000044229253>.

[836] Art. 66(6) of Royal Decree-Law 24/2021.

[837] § 52c para 1 of the Danish Copyright Law.

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Article 17 into their national laws,[838] providing a common ground for the social media services operating in these countries.

Spain, instead, substantially reinforces the Article's liability regime by providing that rightholders can still claim damages if the exploitation of their works causes them "significant harm," irrespective of whether OCSSPs comply with all the "best effort" requirements.[839] However, Spanish law fails to specify the criteria for determining what constitutes "significant harm." This aspect of the Spanish implementation can be considered the most significant deviation from the text of Article 17 because it veers away from a core requirement with the intent to provide greater legal protection to copyright holders. As critically remarked in scholarship, this creates a shift from an obligation to make and demonstrate best efforts to an "obligation of result,"[840] which ends up disregarding the fair allocation of risks the EU lawmakers intended to achieve by agreeing on the final version of the Article's text. It is obvious that this misalignment of Spanish law with the EU Directive might give rise to an intervention of the CJEU in the near future.[841]

6.2. The 'best efforts' standard as a boost for rightholders' bargaining power

Since all the countries under scrutiny implemented Article 17(4)(a) of the DSM Directive,[842] rightholders have now, after nearly two decades of legal uncertainties, a solid legal basis to oblige social media services to negotiate and obtain a licence for the online use of protected works. Interviews with stakeholders and industry experts conducted for the Fair MusE project clearly show that, despite the inconsistencies in the national transpositions of Article 17, the law has induced even the most reluctant social media companies to seek music rights clearance. As a result, these companies are now approaching and collaborating with record labels, music publishers, their online licensing hubs and CMOs for the clearance of music rights - with a more transparent allocation of revenues - the same way as streaming service providers. Our empirical investigations confirm that, despite the financial gaps which persist between services funded by subscription fees and platforms

[838] § 89a(1) of the Austrian Copyright Act; Art. XI.228/5(2) of the Belgian CEL; § 52c para 4 of the Danish Copyright Law; § 57^9 (3) of the Estonian Copyright Act; Art. L.137-2(III) of the French CPI; § 1(2) of the German Copyright Act; Art. 66F(5) of the Greek Copyright Act; Art. 102-septies(1) of the ICA and Art. 175-C(1) of the Portuguese CRRC.

[839] Art. 73(4)(c) of Royal Decree Law 24/2021.

[840] See Miquel Peguera, 'Spanish transposition of Arts. 15 and 17 of the DSM Directive. An overview of some selected issues' (2022) 17(5) Journal of Intellectual Property Law & Practice 450, 454. The author points out that Recital 66 of the Directive allows Member States to introduce additional remedies for cases other than the infringement of copyright law. Nevertheless, there remains significant doubt as to whether this grants Member States the authority to fundamentally alter the liability regime outlined by Art. 17, see Miquel Peguera, 'Is the Spanish implementation of Art. 17 CDSM compatible with EU Law?' (*Kluwer Copyright Blog*, 11 November 2021) <https://copyrightblog.kluweriplaw.com/2021/11/11/is-the-spanish-implementation-of-art-17-cdsm-compatible-with-eu-law/>.

[841] ibid.

[842] § 89a(1) a) of the Austrian Copyright Act; Art. XI.228/5(§ 1er.) of the Belgian CEL; § 52c para 4(1) of the Danish Copyright Law; § 57^9(3) a) of the Estonian Copyright Act; Art. L137-2(III-1°) of the French CPI; § 1(2) of the UrhDaG; Art. 66F(5) a) of the Greek Copyright Act; Art. 102-septies(1) a) of the Italian Copyright Act and Art. 175-C(1) a) of the Portuguese CRRC.

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based on advertising revenues (especially personalised advertising), the licensing fees paid to the music right-holders by the social media industry have remarkably increased.

6.2.1. The definition of "best efforts" under German Law

As stated above,[843] the "best efforts" requirement under Article 17(4)(a) of the DSM Directive allows a case-by-case assessment of the situation in which social media service providers find themselves vis-a-vis the copyright holders. Yet, the German legislator opted for a more rigid solution by passing legislation that seeks to mitigate concerns of legal uncertainties arising from an excessively broad and unpredictable implementation of the 'best efforts' standard. In pursuing this goal, the German transposition ended up potentially distorting the fairness-enhancing character of Article 17. The reasons for this are twofold. Firstly, this transposition requires social media platforms to actively initiate licensing negotiations only with i) representative rightholders "known by them", or ii) CMOs[844] or dependent management entities[845] operating in Germany. Secondly, this law obliges OCSSPs to accept an offer solely if it encompasses a 'considerable repertoire of works *and* rightholders'.[846]

To correctly understand the implications of this transposition, one shall consider well-established market practices, as well as the preparatory works for Article 17 which show the music industry is the only creative industry commercially interested in licensing its works to social media for a fee.[847] We shall also consider the extreme fragmentation of rights and interests that characterises the music sector, where licensing the rights of the smallest and most vulnerable rightholders (i.e. composers and performers) through collecting agreements is more difficult and commercially less profitable than licensing the rights of major record producers and music publishers on an individual basis.

The *first* requirement laid down in the German law transposition allows social media service providers to proactively seek licences only from "large" rightholders to meet the "best efforts" requirement. Thus, under a restrictive (and undesirable) interpretation of this German law requirement, social media platforms might not be required to initiate licensing negotiations with

[843] See §4.2.2.

[844] In this context, Leistner argues that this German provision should serve as an incentive for rightholders who currently manage their rights independently to have their rights managed by a collecting society, thereby strengthening the already strong German collective rights management landscape, see Matthias Leistner, 'The Implementation of Art. 17 DSM Directive in Germany – A Primer with Some Comparative Remarks (2022) 71(10) GRUR International 909, 913.

[845] Under German law, dependent management entities are organisations whose shares are at least indirectly or in part held by at least one collecting society or which are at least indirectly or in part controlled by at least one collecting society (§ 3 of the German Act on the Management of Copyright and Related Rights by Collecting Societies (Verwertungsgesellschaftengesetz - VGG)). This also includes online music licensing hubs such as SOLAR and ICE, both officially operating in Germany, see <https://www.dpma.de/dpma/wir_ueber_uns/weitere_aufgaben/verwertungsges_urheberrecht/aufsicht_verwertungsges/listederverwertungseinrichtungen/index.html>.

[846] See Section 4(2) of the UrhDaG, which further requires that the catalogue of rights offered must be used by the social media platform in more than insignificant quantities, cover the territory of Germany and be offered under otherwise reasonable conditions.

[847] That is because other creative industries engage in exclusive licensing policies which presuppose that their works shall be not available across multiple channels. This is especially true for audiovisual works, as the audiovisual sector is characterised by high upfront production costs, necessitating the pre-sale of exclusive licences on territory-by-territory basis to ensure investment recoupment, see Giuseppe Mazziotti, 'Is geo-blocking a real cause for concern in Europe?' (2015) 43 EUI Working Paper.

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owners of small and independent music repertoires and sound recordings and their distributors. Paradoxically, even Merlin - a broadly representative and influential music licensing partner for indie labels - might fall under this notion.[848] Although this recording rights aggregator and licensor represents 15% of the global recorded music market, Merling is not classified as a CMO, a dependent entity, or a rightholder itself under German law. Instead, it solely negotiates online recorded music licences with streaming and social media platforms on behalf of its members. As a result of this classification, Merlin does not receive the same legal privilege as CMOs or dependent management entities under a strictly literal and, once again, undesirable interpretation of this provision. Despite being considered the 'fourth major'[849] in the recorded music industry and having played a prominent role in licensing negotiations with the major tech companies in the social media business,[850] German law might end treating Merlin as badly as it treats - without any plausible reasons - small, independent rightholder. For the independent recording industry as a whole, this could mean that, instead of platforms reaching out to right-holders for licensing agreements, these right-holders might be responsible for initiating licensing negotiations with an OCSSP itself.

Moreover, as a consequence of the *second* requirement, large social media platforms may continue to benefit from the safe harbour of Article 17(4) of the DSM Directive even if they reject an otherwise reasonable licensing offer from a rightholder who fails to comply with the high standard of 'considerable repertoire of works *and* rightholders'. These provisions clearly place vulnerable rightholders at a disadvantaged position. They facilitate the licensing deals between social media platforms and major record labels (Universal, Warner, and Sony) and major music publishers (or their online licensing vehicles), which already enjoy significant bargaining power in the digital music market and already have more established relationships with tech companies. While the German legislator chose not to place a disproportionate burden on social media services, its transposition contradicts the EU legislator's goal of requiring OCSSPs to obtain a licence for copyright-protected works irrespective of the size of each licensor's repertoire.

6.2.2. Article 17's role in mitigating licensing disputes with social media platforms: case studies

Despite Germany's unique trajectory, the overall increase of bargaining power resulting from the "best effort" standard implemented by all ten countries under scrutiny,[851] although with some

[848] See Merlin's homepage <https://merlinnetwork.org/>.

[849] Bill Rosenblatt, 'The Global Digital Music Landscape: An Overview of Distribution, Copyright, and Rights Administration for Music in the Digital Age' (April 2024) WIPO Commitee on Intellectual Property and Development 11 <https://www.wipo.int/export/sites/www/cooperation/en/docs/digital-music-landscape.pdf>. The record labels commonly referred to as "majors" are Universal Music Group, Warner Music and Sony Music Entertainment.

[850] In June 2024, Merlin successfully negotiated on behalf of its members with Meta to renew their licensing deal for the use of their sound recordings on Facebook, Instagram and Messenger, see Murray Stassen, 'Meta renews licensing deal with Merlin for independent music across Instagram, Facebook and Messenger' (*Music Business Worldwide*, 12 June 2024) <https://www.musicbusinessworldwide.com/meta-renews-licensing-partnership-with-merlin-for-independent-music-across-instagram-facebook-and-messenger1/>.

[851] § 89a(1) No. 1 of the Austrian Copyright Act; Art. XI.228/5(§ 1er.)(1°) of the Belgian CEL; § 52c para 4(1) of the Danish Copyright Law; § 57^9(3) 1) of the Estonian Copyright Act; Art. L.137-2(III.-1°) a) of the French CPI; § 4(1) of the UrhDaG; Art. 66F(5) (a of the Greek Law 2121/1993; Art. 102-septies(1) of the ICA; Art. 175-C(1) (a) of the Portuguese CRRC; Article 73(4) a) of the Spanish Royal Decree-Law 24/2021.

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deviations in wording,[852] must be seen as an exceptional achievement in today's platform-dominated European music sector. This positive impact can be exemplified by recalling previous licensing attempts by social media platforms. For example, in 2023 the Italian collecting society SIAE and Meta came together to renegotiate a licence for SIAE's repertoire. During these negotiations, Meta refused to provide transparent information necessary to assess the value of SIAE's repertoire, which is crucial for determining fair remuneration.[853] Following SIAE's rejection of Meta's financial proposal, which lacked the necessary data, Meta proceeded to remove the CMO's full music catalogue from its platform.[854]

The threat of removals of entire repertoires from a social media platform can be persuasive when wielded by a major label or a large CMO managing a vast number of musicians and their rights. A prominent example of this kind of reaction was a dispute that arose between the Universal Music Group, along with its music publishing division (Universal Music Publishing Group), and ByteDance, owner of TikTok, in early 2023.[855] Before the expiry of the licences that TikTok had obtained for Universal Music's recorded music *and* publishing repertoire, the parties were in the process of negotiating new licences. However, this major label disagreed with the overall artists' remuneration offered by TikTok, among other conditions. After Universal's repertoire was no longer licensed on the platform, TikTok had to *instantly* disable access to 120 million user videos due to several take-down requests made by Universal. As TikTok's core business is to enable its users to combine short videos with snippets of recorded music, the removal of Universal's recorded music and publishing catalogue, including the most popular artists, had a very significant impact on the user's experience.

The situation is different for smaller CMOs and labels, as well as for less popular or commercially successful artists. For them, withdrawing their repertoire is not a practical or effective strategy, especially given the potential fragmentation of their catalogues. Empirical investigations and interviews with industry experts conducted for the Fair MusE project also show that disputes between large social media services and major copyright holders are the only ones attracting potentially reputation-damaging media coverage, which can significantly influence rights clearance negotiations. A reality check in the industry shows that for these smaller and more vulnerable rightholders, the intervention of administrative or judicial authorities, which copyright laws facilitate

[852] Austria opted for the term 'every effort' (§ 89a(1) of the Austrian Copyright Act), which is derived from the respective German translation of the DSM Directive. Denmark's transposition contains the wording 'its [the OCSSP's] best efforts' (§ 52c para 4 (1) of the Danish Copyright Act. Similarly, the Spanish legislator chose the term 'their [the OCSSPs'] best efforts' for its national transposition (Art. 73(4) of the Royal Decree-Law 24/2021). The Greek implementation requires 'every possible effort' (Art. 66F(5) of the Greek Law 2121/1993), the Italian 'maximum' ones (Art. 102-septies(1) (a)of the ICA). While 'best effort' allows for interpretation based on context and proportionality on a case-by-case basis, these national divergences in language suggest that the OCSSP is required to act to the extent possible, disregarding any other considerations, see Angelopoulos, 'Articles 15 & 17 of the Directive on Copyright in the Digital Single Market: Comparative National Implementation Report' (n 831) 35.

[853] See §8 on this broad issue.

[854] Murray Stasse, 'In a shock move, Meta has pulls music by Italian songwriters from its platforms: Is this connected to Mark Zuckerberg's 'Year of Efficiency'?' (*Music Business Wordwide*, 17 March 2023) <https://www.musicbusinessworldwide.com/in-a-shock-move-meta-has-pulled-music-by-italian-songwriters-from-its-platforms-is-this-connected-to-mark-zuckerbergs-year-of-efficiency/>.

[855] See Murray Stassen, 'Universal Music and TikTok strike new licensing deal – including 'improved remuneration' for UMG artists and musicians' (*Music Business Worldwide,* 2 May 2024) <https://www.musicbusinessworldwide.com/universal-music-and-tiktok-strike-new-licensing-deal/>.

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or make possible as a result of EU directive provisions, is a much more promising and effective tool. If assessed by a court or another competent authority, Meta's above-mentioned behaviour towards SIAE in 2023 might not qualify as "best efforts" to obtain a licence, thereby excluding its social media platforms from the Article 17's safe harbour. It is remarkable in this regard that Meta's unfair negotiation practices in Italy led to investigations by the Italian Competition Authority (*Autorità Garante della Concorrenza e del Mercato or AGCM)*. AGCM held that Meta was abusing SIAE's "economic dependence" to disrupt music rights licensing negotiations. After Meta removed SIAE's repertoire from its platforms, AGCM ordered Meta to resume negotiations with the Italian collecting society "inspired by principles of good faith and fairness", allowing SIAE's access to the necessary platform usage information.[856] This proceeding was one of the first high-profile controversies between rightsholders and a social media service provider after the adoption of the DSM Directive.

In this context, as persuasively argued in the relevant literature, the 'best effort' criteria under Article 17(4) of the DSM Directive can lead to a "judiciali[s]ation of the negotiation process".[857] This mechanism can oblige large tech companies to start negotiating fairly with all music rightholders to avoid costly and reputation-damaging judicial interventions at the national level. Consequently, negotiations can no longer be considered immune from public policy scrutiny, in a way that social media platforms must comply with external legal rules - rather than just their own Terms of Service - to avoid direct copyright liability.[858]

6.2.3. The 'best effort' requirement before national courts

A recent case before the Munich Regional Court illustrates how such "judicialization" can work in practice. A rightholder approached TikTok to start licensing negotiations after discovering that their content had been uploaded to the platform. Instead of negotiating in good faith, TikTok stalled the plaintiff and failed to make a serious offer, while the content remained uploaded and kept generating profit for the company. The court held that the social media platform did not make its "best efforts" to obtain a licence, considering also the fact that the plaintiff was the only party providing information flow to the content exploiter. In its first instance judgment, the Munich court ordered TikTok to cease making the plaintiff's works available on TikTok and to disclose to the plaintiff information including the net revenue generated by the making available of the rightholder's works on the platform.[859]

Further legal proceedings of this nature are to be expected and are already being brought before national courts. Indeed, a case pending at the Munich Regional Court deals with a Swiss licensing body suing Twitter International, which operates "X" in Europe, for copyright infringement on the

[856] See Mandy Dalugdud, 'Italy's Competition Watchdog Orders Meta to Resume Negotiations with Collecting Society SIAE (*Music Business Worldwide*, 25 April 2023) <https://www.musicbusinessworldwide.com/italys-competition-watchdog-orders-meta-to-resume-negotiations-with-collecting-society-siae/>. Following Meta's appeal, the AGCM upheld these measures. See AGCM, decision from 30 October 2023, No. 16069/2023, Meta platforms Ireland limited and others v Autorità garante della concorrenza e del mercato <https://portali.giustizia-amministrativa.it/portale/pages/istituzionale/visualizza/?nodeRef=&schema=tar_rm&nrg=202308975&nomeFile=202316069_01.html&subDir=Provvedimenti>.

[857] Treppoz (n 781) 280.

[858] ibid.

[859] Munich Regional Court, judgment of 9 February 2024 - 42 O 10792/22.

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platform after having failed to obtain a licence despite being approached by the claimant.[860] This comes to little surprise considering that, even in the US, Twitter has been the only platform that blatantly refused to seriously negotiate licences with both record labels and music publishers, resulting also in a $250 million claim for damages by several publishers.[861]

To conclude: it will be crucial to identify trends at national level on how courts interpret the "best efforts" standard as a new and autonomous notion of EU law. This concept is even more important if one considers its inherent link to other EU law provisions that are pivotal to foster a fair treatment of copyright holders (especially individual authors and performers) - such as Article 18 of the DSM Directive[862] on appropriate and proportionate remuneration - or the transparency obligations regarding information on online platform usage and its net revenues, per Article 19 of the DSM Directive.[863] The process of judicial review of the 'best efforts' made by social media services is likely to help determine the scope of their obligations, as well as the extent to which they shall cooperate with rightholders in order to build modern and reliable copyright data infrastructures. Finally, such legal precedents can provide clearer guidance to both negotiation fronts to avoid costly and time-consuming litigation.

6.3. Upload filters as the new norm for large social media platforms

A further requirement for OCSSPs to escape copyright liability resulting from Article 17(4)(b) and 17(4)(c) of the DSM Directive and their national transpositions is the so-called "notice-and-stay-down" regime. Article 17(4)(b) and 17(4)(c) outline the responsibilities of online platforms when they cannot obtain a licence from rightholders. Firstly, if an online platform provider fails to secure a licence from the rightholder despite making its best efforts, it must subsequently make another best effort "in accordance with high industry standards of professional diligence." This is so to ensure, *ex-ante*, that no unlicensed work or subject matter is initially uploaded to the platform. However, this obligation is contingent on the rightholder providing "relevant and necessary information" that can definitively identify the unlawful content. If unauthorised content appears on the platform despite the provider's "best efforts," or if the rightholder does not cooperate, Article 17(4)(c) takes effect. Under this provision, upon receiving a substantiated notice from the rightholder, the platform must immediately disable access to the respective content. Following its removal, the platform must make a (final) "best effort" to prevent the same work from being re-uploaded, whether as an identical user-generated file or integrated into new content created by an end user.[864] Essentially, both Articles

[860] See Daniel Tencer, 'Swiss licensing body Suisa Digital sues Elon Musk's X for 'refusing' to license music' (*Music Business Worldwide,* 7 December 2023) <https://www.musicbusinessworldwide.com/swiss-licensing-body-suisa-digital-sues-elon-musks-x-for-refusing-to-licence-music/>.

[861] See Ben Sisario and Ryan Mac, 'Music Publishers Sue Twitter, Accusing It of Copyright Infringement' (*The New York Times,* 14 June 2023) <https://www.nytimes.com/2023/06/14/technology/music-twitter-lawsuit-elon-musk.html>.

[862] See §3.2.

[863] See § 4.3.1.

[864] Art. 17(4)(c) of the DSM Directive reads as follows: "If no authorisation is granted, online content-sharing service providers shall be liable for unauthorised acts of communication to the public [...] unless the service providers demonstrate that they have [...] acted expeditiously, upon receiving a sufficiently substantiated notice from the rightholders, to disable access to, or to remove from their websites, the notified works or other subject matter, and made best efforts to prevent their future uploads in accordance with point (b)".

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17(4)(b) and 17(4)(c) of the DSM Directive serve a similar purpose, but apply at different stages. Article 17(4)(b) serves as a preventive mechanism to prevent the availability of infringing content before they happen. Article 17(4)(c) is activated *ex post*, requiring a blocking action following a notification of specific user-uploaded content.[865]

Empirical investigations run in the context of Fair MusE have shown that, with this new regime in place, rightholders have eventually gained greater control over the online exploitations of their works, experiencing a significant reduction in the cost of legal disputes against large-scale social media services falling within the scope of application of Article 17. Moreover, it seems clear from our empirical analysis that most of the concerns that had been raised with regard to the possible 'censorship' effects or the so-called "false positives" that this legal regime would have caused were mostly unfounded, in a way that Article 17 does not come at the expense of the public domain, free licences such as Creative Commons, and ultimately, the public good.[866]

As a result of this obligation, it is up to social media services falling within the definition of Article 2(6) to ensure that unauthorised copyright-protected works do not appear on the platform - or do not reappear after having been removed. This obligation clearly aims to release rightholders from the *de facto* online monitoring burden stemming from the liability standard based on Articles 14 and 15 of the E-Commerce Directive and their national implementations. By transposing Article 17(4)(b) and (c) of the DSM Directive almost verbatim,[867] Member States' laws now embody a uniform and EU-wide set of basic obligations for social media platforms. Only Spanish law introduced a further requirement - targeted mostly at the exploitation of audiovisual and TV programs - by mandating OCSSPs to disable access to live content, such as live broadcasts or webcasts of concerts, during its (unauthorised) broadcasting.[868] It is evident that the unauthorised exploitation of such time-sensitive works, which falls within the broad category of online piracy, can cause significant economic losses for rightholders and, even more so, for their *exclusive* licensees. However, this Spanish provision reinforces the liability regime established by the Directive (once again) by urging social media platforms to take *immediate* action, rather than merely acting "expeditiously" as required by the EU law. In doing so, this additional obligation raises the bar of compliance especially for smaller platforms with fewer resources. Only online platform providers that qualify for the "start-

[865] Gerald Spindler, 'The Liability system of Art. 17 DSMD and national implementation Contravening prohibition of general monitoring duties?' (2019) 10(3) Journal of Intellectual Property, Information Technology, and Electronic Commerce Law 344, 351.

[866] Very critical were scholars such as Giancarlo Frosio, 'From Horizontal to Vertical: An Intermediary Liability Earthquake in Europe' (2017) 12 Journal of Intellectual Property Law & Practice 565; Martin Senftleben and others, 'The Recommendation on Measures to Safeguard Fundamental Rights and the Open Internet in the Framework of the EU Copyright Reform' (2018) 40(3) EIPR 149; Severine Dusollier, 'The 2019 Directive on Copyright in the Digital Single Market: Some progress, a few bad choices, and an overall failed ambition' (2020) 57 Common Market Law Review 979, who at p. 1008 describes Art.17 as a "monster provision" of this directive considering "its size and its hazardousness". This stance in legal scholarship is in line with the general view that has predicted fatalistic consequences for freedom of expression for social media users since the Proposal of Art. 13, see n 789.

[867] § 89a(1) No. 2, 3 of the Austrian Copyright Act; Art. XI.228/5(§1er.)(2°)(3°) of the Belgian CEL; § 52c para 4 (2), (3) of the Danish Copyright Law; § 57^{9} (3) 2), 3) of the Estonian Copyright Act; Art. L.137-2(III.-1°) b), c) of the French CPI; §§ 7, 8 of the UrhDaG. 66F(5)(b), (c) of the Greek Copyright Act; Art. 102-septies(1) b), c) of the ICA; Art. 175-C(1)(b) of the Portuguese CRRL; Art. 73(4) b) and c) of the Spanish Royal Decree-Law 24/2021.

[868] Art. 73(4)(c) of the Spanish Royal Decree-Law 24/2021.

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up privilege" under Article 17(6) of the DSM Directive[869] – transposed verbatim by the Spanish legislator[870] and the nine other Member States under our investigation[871] – are exempt from this rule.

6.3.1. The primary objective of prioritising licensing over filtering

Contrary to the text of Article 13 in the 2016 Commission proposal, the provisions under Article 17(4)(b) and (c) of the DSM Directive are worded in a technology-neutral way and have been implemented as such by all the countries being taken under review. The proposed Article 13, instead, specifically referred to "the use of effective content recognition technology" with the aim of preventing the availability of copyright-infringing content. Article 17(4), in its final version, does not address such technology at all. Rather, it requires all social media platforms to make 'best efforts' to negotiate licences through its tiered liability regime. The rationale for this is that obtaining a licence would make content blocking un-necessary, as the making available would be authorised by the rightholder from the outset. This means that, even if online platforms implement effective upload filters, they will still be directly liable for copyright infringement if there has not been a prior serious licensing attempt. This reiterates the importance of licensing, which serves as the 'default setting' under Article 17(1) and 17(4).[872] Only if an agreement cannot be reached, platforms shall make best efforts - which may include the use of upload filters - to remove access to the unlawfully uploaded content.

However, even after the Directive came into force, tech companies- through their counsels or lobbyists sought to discredit this legal obligation. They argued that these provisions would oblige large UGC platforms to censor contents, despite Article 17 shifting the focus from 'filtering' to 'licensing'. It is certainly true that online services cannot provide a human review and manual processing of the very numerous claims filed by (alleged) rightholders. Nor can they track the vast number of unlicensed re-uploads of unlicensed works without the use of automated content recognition measures. Yet, these platforms can, at least potentially, profit from every single content upload, as their algorithms are designed to target specific audiences through personalised advertising. Moreover, the above-mentioned "best efforts" standard, requires platforms to implement automated content recognition and encourages collaboration with rightholders. Article 17 also introduced additional liability mitigation criteria for the specific purpose of mandating, or incentivising, cooperation between copyright holders and social media services through constant data exchanges.[873]

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[869] Art. 17(6) of the DSM Directive reads as follows: "Member States shall provide that, in respect of new online content-sharing service providers the services of which have been available to the public in the Union for less than three years and which have an annual turnover below EUR 10 million [...], the conditions under the liability regime set out in paragraph 4 are limited to compliance with point (a) of paragraph 4 and to acting expeditiously, upon receiving a sufficiently substantiated notice, to disable access to the notified works or other subject matter or to remove those works or other subject matter from their websites".

[870] Art. 73(4) c) of the Spanish Royal Decree-Law 24/2021.

[871] § 89a(3) of the Austrian Copyright Act; Art. XI.228/5(§2) of the Belgian CEL; § 52c para 8 of the Danish Copyright Law; § 57^{10}(1) of the Estonian Copyright Act; Art. L.137-2(III)(3°) of the French CPI; § 2(2) UrhDaG; Art. 66F(7) of the Greek Copyright Act; Art. 102-octies of the ICA; Art. 174-D(1) a) of the Portuguese CRRC. Notably, Germany added a rebuttable presumption for so-called "small service providers" – OCSSPs with an annual turnover of no more than 1 million Euros, regardless of how long they have been operating, which enjoy the same privilege as start-ups under Art. 17(5) of the DSM Directive. Therefore, they are generally not obliged to implement upload filters, see German Explanatory Memorandum (n 599) 131.

[872] Leistner (n 844) 149.

[873] Under letters b) and c) of Art. 17(4) of the DSM Directive.

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The aforementioned liability regime entails that for uploads or re-uploads regarding works for which there is no or little information or the data infrastructures are poor, the copyright liability criterion remains the "old" one - namely, the "notice-and-takedown" model based on the service provider's awareness or knowledge (cf. Article 17(4)(c)) and factually conditioned by the processing capacity of each provider. Moreover, we shall consider that, as a result of the almost verbatim transposition of Article 17(5) of the DSM Directive[874] and its principle of proportionality, the "filtering" obligations of social media service providers are clearly made dependent on the type, audience and size of the service and, even more importantly, on the type of works being uploaded on social media. Since the classification of works is very developed in the music sector, as well as the availability of reliable content identification technologies for sound recordings, music rightholders can place social media platforms in a position to effectively detect their protected materials for licensing and copyright enforcement purposes. As we will see in Chapter 8, the identification of all the relevant rightholders depends on data collaboration between different levels of rights ownership and a transparent exchange of repertoire information and usage reports between the recording sector and the online exploiters.

6.3.2. Necessary cooperation between OCSSPs and rightholders

The European Commission emphasises in its Guidance on Article 17 of the DSM Directive that "cooperation is key".[875] Social media platforms are not solely responsible for preventing unauthorised use of copyright content: rightholders' must also play an active role. Without their cooperation, algorithmic content recognition tools cannot effectively prevent unauthorised content from appearing on the platform. To address this, Article 17(4)(c) of the DSM Directive imposes an obligation on rightholders to proactively provide platforms with a "sufficiently substantiated notice" regarding unlawful uploads. This notice then triggers the platform's take-down and stay-down responsibilities, to prevent the reappearance of the content. This obligation is not novel, it reinforces the CJEU's established case law on the notice-and-take-down obligations under Article 14 of the E-Commerce Directive.[876] Furthermore, to avoid potential overblocking that could impinge on social media platforms' business freedom or users' fundamental rights, the requirements placed on rightholders cannot be too minimal but must be clear and reasonable.

To clarify what constitutes a "sufficiently substantiated notice" in practical terms, the Commission refers to its 2018 Recommendation on measures to effectively tackle illegal content online.[877] In point 6 of this Recommendation, the Commission emphasises that the information provided must be sufficiently precise to enable the hosting provider to make a diligent and informed decision.

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[874] § 89a(2) of the Austrian Copyright Act; Art. XI.228/5(§3) of the Belgian CEL; § 52c para 5 of the Danish Copyright Law; § 57[9](4) of the Estonian Copyright Act; Art. L.137-2(III)(2°) of the French CPI; § 1(2) of the UrhDaG; Art. 66F(6) of the Greek Law 2121/1993; Art. 102-septies(2) of the ICA; Art. 175-C(2) of the Portuguese CRRC; Article 73(6) of the Spanish Royal Decree-Law 24/2021.

[875] European Commission, 'Guidance on Article 17 of Directive 2019/790 on Copyright in the Digital Single Market' (n 834) 14.

[876] *L'Oréal v eBay* (n 824) para 122.

[877] European Commission, 'Guidance on Article 17 of Directive 2019/790 on Copyright in the Digital Single Market' (n 834); see European Commission, 'Commission Recommendation (EU) 2018/334 of 1 March 2018 on measures to effectively tackle illegal content online' C/2018/1177 <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32018H0334&qid=1633966011528>.

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Specifically, rightholders must explain *why* the flagged content infringes on copyright or related rights and must provide its exact location.[878] Germany has set an early legal precedent on this issue. In 2023, the Higher Regional Court of Hamburg ruled against a record producer who had asked YouTube to remove several videos incorporating sound recordings, simply asserting that it was "the sole owner of copyrights" to the entire flagged repertoire. YouTube refused to follow the request and the court held that YouTube was entitled to act this way. The ruling confirmed that general claims of ownership over an entire repertoire are inadequate to compel the platform provider to block content. Instead, rightholders must provide *detailed* information that allows platforms to verify rights ownership for each individual uploaded item without conducting their own legal assessment. Furthermore, as recommended by the Commission, the rightholder must pinpoint the exact location of the infringing content, which, in the digital context, typically means supplying a URL to the respective UGC.[879]

6.3.3. Implementation of upload filters by large social media platforms

Shortly after the implementation of Article 17 by the various Member States, social media platforms started dealing with the necessary changes and adjustments in the settings and functioning of their services to ensure an effective enforcement of copyright, while complying with the 'fair balance' safeguards codified in the nation transpositions of the EU law provision. For instance, an analysis from a German study of the terms of service of several social media services after the transposition of Article 17 suggests that services like TikTok, which had not applied any upload filters until then, introduced technologies similar to Google's 'Content ID.'[880] Simultaneously, as evidenced in the same study, platforms like YouTube and Meta's Facebook and Instagram, which had already implemented automated content identifiers, expanded their existing systems to comply with new legal requirements.[881] Meta, in particular, stopped relying on Audible Magic technologies to implement its own "Rights Manager" system, which does more than just identifying and blocking unauthorised content automatically.[882] Just like Content ID, which remains the most prominent example in this field, Meta's Rights Manager enables rightholders to monetise either works created and uploaded by them, or flagged UGC which includes their works.

6.3.4. Uncertainties of filtering tools in the context of music rights licensing

It is somehow inevitable that in the music industry, which is the only legacy content sector that is commercially interested in licensing its works to social media, legal ambiguities arise regarding the

[878] European Commission, 'Commission Recommendation (EU) 2018/334 of 1 March 2018 on measures to effectively tackle illegal content online' C/2018/1177, point 6 <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32018H0334&qid=1633966011528>.

[879] Hanseatic Higher Regional Court, judgment of 12.01.2023 - 5 U 22/19.

[880] See Jasmin Brieske and Alexander Peukert, 'Coming into Force, not Coming into Effect? The Impact of the German Implementation of Art. 17 CDSM Directive on Selected Online Platforms' (2022) CREATe Working Paper 2022/1, 9, available at <https://doi.org/10.5281/zenodo.5865619>. This important study evaluated the changes that eight different OCSSPs (YouTube, Rumble, TikTok, Twitter (now 'X'), Facebook, Instagram, SoundCloud and Pinterest) made to their terms of service after Germany's implementation of Article 17 of the DSM Directive came into force.

[881] ibid. It is worth recalling that the study's findings are based solely on an analysis of the platforms' terms and conditions, rather than testing the actual functioning of the filtering systems.

[882] Meta, Rights Manager - Overview, available at <https://rightsmanager.fb.com/>.

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effective benefits for creators of tech companies' rights management systems and their 'monetisation' mechanisms.

A first source of ambiguity stems from the purposes, scope and character of music licensing. Although individual musicians and music rightholders are in a position - technically and legally - to receive revenues generated by platform users through online advertising (e.g., YouTube's 'AdSense'), the economic outcome monetisation remains exceptionally low or even negligible unless artists become platform "partners." This change of status normally occurs when account owners who upload their original content reach a certain, non-negligible threshold of followers. After that, they can conclude customised licensing and representation agreements with a specific platform where remuneration can be remarkable. However, in an industry dominated by collective rights management such as the music sector, professional composers and, to a much more limited extent, music performers, license their rights and obtain 'remuneration' (*i.e.*, not just 'monetisation') through their respective collecting societies. This means - as confirmed by several tech companies' legal counsels interviewed within the Fair MusE project - that the individual management of music rights enabled and promoted by social media services works only, or mostly, for amateur musicians and industry outliers, and not for professional musicians.

A second legally uncertain aspect of music rights clearance on social media linked to the above-mentioned platforms' licensing systems concerns the lawfulness of the 'derivative' works created and uploaded by platform users. In particular, it is unclear, also with regard to Article 17(2) of the DSM Directive, whether the licences granted to each social media platform, respectively by composers' collecting societies and, for the recording rights, by record labels, cover the merging (or pairing) of pre-existing copyright-protected works (*i.e.*, sound recordings) with user-generated videos. The question arises from the practice of licensing only the making available to the public right of these works, without adding a so-called synchronisation licence, which entails higher remuneration for rightholders. This situation derives from the contradictory practices of composers' and publishers' CMOs, some of which traditionally do not manage sync rights, and are now trying to include them into the framework agreements they are renegotiating with major social media platforms.[883] This issue is still uncertain and of a certain relevance if one considers that Article 17(2) of the DSM Directive obliges social media services to obtain (only) licences for the communication to the public of copyright works made by users "[...] not acting on a commercial basis or where their activity does not generate significant revenues."[884]

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[883] Interviews conducted for the Fair MusE project with several representatives of European CMOs, as well as their annual transparency reports, show that there is a persisting lack of uniformity on this front and that music collecting societies are trying to develop a uniform approach to the issue of sync rights to be licensed to social media services. Data provided by SGAE (Spain) shows that this CMO generally has no mandate for licensing sync rights. Representatives of KODA, a Danish CMO, and SIAE, the Italian CMO, reported that their respective CMOs have received a mandate from their members to license synchronisation rights only for non-commercial use, which is similar to GEMA's licensing practice, see <https://www.gema.de/en/help/creators/rights/social-media/synch-right-ugc-platforms-managed-by-gema>. The Austrian collecting societies AKM/Austro Mechana, on the other hand, state that they have concluded special framework agreements with the most prominent social media platforms, which includes the granting of synchronisation rights for both commercial and non-commercial uses. Therefore, social media users do not need to obtain an additional licence for making available derivative works in Austria, see <https://www.akm.at/service/faq/>.

[884] Art. 17(2) states: "Member States shall provide that, where an online content-sharing service provider obtains an authorisation, for instance by concluding a licensing agreement, that authorisation shall also cover

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6.4. Balancing creators' rights and users' freedom of expression: the value and specific protection of copyright exceptions

Following the publication of the Commission's Guidance in 2021 and the issuance of the CJEU's *Poland v Parliament* judgment in 2022, Member States were encouraged to adopt provisions aiming to ensure that the implementation of automated content identification technologies, such as *Content ID* and *Rights Manager*, does not result in the initial blocking of works and other materials that are not copyright-infringing. All ten countries under our scrutiny implemented Article 17(7) of the DSM Directive in a nearly literal manner.[885] This means that all national laws currently embody provisions that read the same way as the DSM Directive, placing strong emphasis on the necessity to preserve specific exceptions that are very valuable for the protection of online free speech.[886]

The exceptions included in Article 17(7) can cover a broad variety of uses qualifying, under pre-existing national copyright laws, as quotation, criticism, review, caricature, parody or pastiche. This explicit reference under the DSM Directive on exceptions harmonised under Article 5 of the InfoSoc Directive - but not made mandatory for Member States - spurred an important policy and academic debate on the significance of Article 17(7) for the domain of copyright exceptions.[887] In particular, it has been argued that, as a result of this provision, all Member States shall be obliged to provide and enforce the above-mentioned exceptions, at least in the online environment, where they serve the specific purpose of fostering a fair balance of interests. Moreover, the fact that these exceptions cover uses that cannot (or cannot easily) be predicted and typified under the law has made several scholars argue, also on the grounds of the case of the CJEU, that courts should enjoy greater freedom and flexibility in interpreting and implementing these exceptions by going beyond the rigid limits traditionally imposed within national copyright provisions exceptions in continental-European jurisdictions.[888]

The quest for greater freedom and flexibility in implementing core provisions and for a balanced approach to copyright enforcement in the social media landscape was supported, to a certain extent,

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acts carried out by users of the services falling within the scope of Article 3 of Directive 2001/29/EC when they are not acting on a commercial basis or where their activity does not generate significant revenues."

[885] § 89b(1) in conjunction with § 42f of the Austrian Copyright Act; Art. XI.228/6 in conjunction with Arts. XI.189, XI.190(10°) of the Belgian CEL; §§ 22, 52c paras 9 and 10 of the Danish Copyright Law; § 57^{9}(5) in conjunction with § 19(1), (7) of the Estonian Copyright Act; Art. L.137-4(1) in conjunction with L122-5(3°), (4°) of the French CPI; §§ 7(2)(1), 8(2), 5(1) of the UrhDaG read in conjunction with §§ 51, 51a of the German Copyright Act; Art. 66F(8) of the Greek Law 2121/1993; Art. 102-nonies(1), (2) of the ICA; Art. 175-I in conjunction with Art. 75(2) h), x) of the Portuguese CRRC; Art. 73(8) of the Spanish Royal Decree-Law 24/2021.

[886] Art. 17(7) of the DSM Directive reads as follows: "The cooperation between online content-sharing service providers and rightholders shall 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. Member States shall ensure that users in each Member State are able to rely on any of the following existing exceptions or limitations when uploading and making available content generated by users on online content-sharing services: (a) quotation, criticism, review; (b) use for the purpose of caricature, parody or pastiche".

[887] Geiger and Jütte (n 789) 539-540; Quintais and others (n 789) 278-279.

[888] Legal scholars expressed concerns, even after the entry into force of the DSM Directive, that content identification technologies are unable to identify a parody or caricature version of a copyright protected works and, as such their broad implementation would stifle such uses: see for instance Geiger and Jütte (n 789) 534.

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by the CJEU's reasoning in its 2022 *Poland v Parliament* judgment.[889] This reasoning contains a meaningful reference to the attempt made by the DSM Directive, especially under Article 17(8), to insert additional protections of users' freedom of expression through copyright exceptions that entail an *ex post* judicial assessment on the grounds of information provided by the rightholders.[890] As recalled in this CJEU's reasoning, Recital 66 of the DSM Directive states that "it cannot be excluded that in some cases availability of unauthorised content can only be avoided upon notification of rightholders." Moreover, with regard to such a notification, "*[...] the Court has held that it must contain sufficient information to enable the online content-sharing service provider to satisfy itself, without a detailed legal examination, that the communication of the content at issue is illegal and that removing that content is compatible with freedom of expression and information*".[891]

6.4.1. Ex-ante safeguards under Austrian and German law

Despite the existing and unambiguous guidance regarding the *ex post* character of the assessment of certain unauthorised uses of copyright works, Austria and Germany introduced additional and specific *ex ante* safeguards for users' freedom of expression against the implementation of social media's upload filters.

6.4.1.1. Scope of national user rights safeguards

Both national laws introduced presumptions concerning so-called "minor uses." Under both Austrian and German law, for instance, a minor use shall be considered "presumably authorised by law" if its length does not exceed 15 seconds and contains a musical or audiovisual work combined with the user's own work or copyright-free content. However, in Germany, this minor use privilege only applies to non-commercial uses or uses that do not generate more than insignificant revenue for the social media user.[892]

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[889] *Republic of Poland* (n 791) paras 90-92.

[890] See *Republic of Poland* (n 791) para 90: "[...] Article 17(8) of that directive provides an additional safeguard for ensuring that the right to freedom of expression and information of users of online content-sharing services is observed. That clarification means that the providers of those services cannot be required to prevent the uploading and making available to the public of content which, in order to be found unlawful, would require an independent assessment of the content by them in the light of the information provided by the rightholders and of any exceptions and limitations to copyright (see, by analogy, judgment of 3 October 2019, *Glawischnig-Piesczek*, C-18/18, EU:C:2019:821, paras 41-46)".

[891] See *Republic of Poland* (n 791) para 91, where the CJEU refers to its own judgment in *YouTube and Cyando* (n 167) para 116.

[892] Under § 89b(3) of the Austrian Copyright Act) and §§9, 10 of the UrhDaG) in Germany, small excerpts of a work combined with less than half of the works or protected subject matter of third parties with user's own content are considered "presumably authorised by law" if these small excerpts do not exceed 15 seconds per cinematographic work or motion picture, 15 seconds of a soundtrack, 160 characters per text, or a photograph or graphic with a data volume of 250 (Austria) or 125 (Germany) kilobytes. Interestingly, the limit was even more generous (up to 20 seconds of a musical or audiovisual work) for UGC in the first draft of the German transposition authored by the Federal Ministry of Justice, where these uses were deemed to be strict exemptions from online copyright enforcement (cf. §6 of the draft law); see German Federal Ministry of Justice and Consumer Protection, Draft Act on the Adaptation of Copyright Law to the Requirements of the Digital Single Market' (2 September 2020) <https://www.bmj.de/SharedDocs/Downloads/DE/Gesetzgebung/RefE/RefE_Urheberrecht.pdf?__blob=publicationFile&v=3>. Although the reduction of this limit and the shift from a complete exemption to a rebuttable presumption was not clearly explained in the legislative materials, it is highly likely that significant backlash by associations of musicians influenced this adjustment during the legislative process: see Guy Forte, 'Just a little

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In Germany, in the Explanatory Memorandum that accompanied the draft for the legislative transposition, the federal government argued that such uses are likely to fall under a copyright exception.[893] Consequently, social media services operating in Germany and Austria are prevented under these laws from automatically blocking UGC containing such snippets, while this content must remain accessible until the end of the complaint and redress procedure. Nevertheless, even if the snippet of the sound recording used by the user exceeds the 15-second threshold, German law provides a second option for social media users. If UGC is the subject of a stay-down request by a rightholder, the user must be informed of this fact by the social media platform. In these cases, users shall be given the opportunity to manually mark the content as lawful.[894] It is therefore up to the individual user to decide whether the content they have created falls within a copyright exception. However, users are not encouraged to recklessly flag their content as legal, as they, unlike the online platform, will be held liable for copyright infringement if the flagged content is found *ex post* not to fall within an exception.[895] Once content is flagged this way, it enjoys the same protection from automated blocking as minor uses. It seems obvious that, in both jurisdictions, these are just presumptions and do not restrict the social media service providers and, if necessary, national courts, from assessing the detailed information users and rightholders can be requested to provide in disputes, which include the (mandatory) complaint and redress mechanisms contemplated under Article 17(9).

6.4.1.2. Practical implications and national limitations

Nevertheless, these peculiar *ex ante* safeguards introduced by Austria and Germany undoubtedly matter in the practice and business model of the largest social media platforms. At first glance, snippets not exceeding 15 seconds taken from a copyright sound recording may seem short. However, social media and streaming platforms have considerably shortened users' attention spans for entertainment, fostering a broader trend towards shorter song durations and, therefore, increasing the significance of such 15-second snippets.[896] Additionally, this exact length, 15 seconds, amounts to the average length of a video on TikTok.[897] This results in a large amount of UGC falling under this provision, which is advantageous for platforms like TikTok and all other services that, in an attempt to imitate TikTok, started enabling the sharing of 'Reels' or 'Stories' (Instagram and Facebook) and 'Shorts' (YouTube). It is therefore obvious that such short videos have an enormous commercial relevance for today's business models and it would not be fair to automatically consider them lawful under copyright law (if not properly licensed by the respective rightholders). Because of this, both Germany and Austria introduced limits to these presumptions:

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bit: comparing the de minimis doctrine in U.S. and German copyright regimes' (2022) 39(3) Arizona Journal of International & Comparative Law 416, 427-429.

[893] German Explanatory Memorandum (n 599) 140.

[894] §§ 9, 11 of the UrhDaG.

[895] Cf. § 12(2), (3) of the UrhDaG, according to which the OCSSP cannot be held liable for making available for all presumably lawful uses before the end of the complaint procedure. On the contrary, the individual social media user is only exempted from liability for making available content with minor uses during this period.

[896] Szu Yu Chen, 'Pop songs are getting shorter in the era of streaming and TikTok' (*The Washington Post*, 26 January 2024) <https://www.washingtonpost.com/entertainment/interactive/2024/shorter-songs-again/#>.

[897] Jannik Lindner, 'Average TikTok Video Length Findings: Optimal Length, Engagement Rates' (2024) <https://gitnux.org/average-tiktok-video-length/>. The link was accessed on 11 June 2024, but it is no longer accessible..

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- German copyright law, akin to its Spanish counterpart,[898] obliges OCSSPs to block that time-sensitive audiovisual content by automated means, regardless of its duration or whether it has been manually flagged by a user, if the rightholder provides the relevant information in advance.[899] The same applies to complaints from a so-called "trusted flagger".[900] A "trusted flagger" is a rightholder who can trigger the initial blocking by rebutting the legal presumption of lawfulness. The trustworthiness of a rightholder may be indicated by a large or premium repertoire or a history of justified blocking requests.[901] However, ultimately, the categorization of such flaggers is left to the discretion of each social media service.[902]

- Austria's implementation includes a broader limitation under which a copyright holder can prove that an ongoing exploitation of a short excerpt of her or his work is causing "significant harm". In such a situation, Austrian law provides that access to the work must be disabled at once.[903] In practice, however, the burden of proof for this vaguely phrased exception can be hard to meet, in a way that the national case law will be crucial to provide clarity on this provision.

By comparing these two national attempts to protect lawful uses *ex ante*, the German approach seems more fair to creators and balanced than the Austrian one. That is because, while large social media platforms can significantly exploit the presumption of lawful uses, the German transposition contemplates *(i)* a "trusted flagger" system[904] and *(ii)* the introduction of a new statutory remuneration right for such presumably lawful uses[905] that help mitigate the potential negative economic impact of these safeguards on rightholders.

However, it is the German, not the Austrian, regime for minor uses that is currently the subject of a constitutional challenge. This claim, lodged by members of the BVMI, the German branch of IFPI, is the same one challenging the three statutory remuneration rights vis-à-vis OCSSPs, which were introduced with the transposition of Article 18 of the DSM Directive.[906] It appears to be only a matter of time before the question of this regime's compatibility with EU law eventually becomes the subject of a referral, either by the German or the Austrian courts, to the CJEU.

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[898] See §6.3 of this Study.

[899] § 7(2)(3) of the UrhDaG, which reads as follows: "[...] Sections 9 to 11 [on presumably lawful uses] apply to the use of automated procedures. [This] does not apply to uses of cinematographic works or moving images until the completion of their first communication to the public, in particular during the simultaneous transmission of sporting events, insofar as the rightholder requests this from the service provider and provides the necessary information for this purpose".

[900] § 14(4) of the UrhDaG.

[901] Leistner (n 844) 916.

[902] German Explanatory Memorandum (n 599) 144.

[903] § 89b(3) of the Austrian Copyright Act.

[904] § 14(4) of the UrhDaG.

[905] § 12(1) of thee UrhDaG; see also §4.2.3 of this Study.

[906] Bundesverband Musikindustrie, 'Verantwortungsraum Internet' <https://www.musikindustrie.de/warum-wir-tun-was-wir-tun/wir-sind-aktiv/verantwortungsraum-internet>.

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6.4.1.3. National privileges for user-generated content: compliance with EU law and international copyright treaties?

Although the unique approaches adopted by Austria and Germany have been praised by advocates of maximum protection of users' fundamental rights,[907] they impose a practical, albeit temporary, restriction on rightholders' ability to enforce their exclusive rights. Unless specific carve-outs apply (see *supra*, 6.4.1.2.), rightholders are unable to request the removal of copyright-infringing UGC before the complaint procedure is concluded, if the content meets the criteria for *de minimis* uses. This leads to the creation of a national copyright exception[908] that extends beyond the scope of those set forth in Article 5 of the InfoSoc Directive. Should an Austrian or German court bring this privilege for minor uses before the CJEU, this will likely become a central issue for the judges to consider. In fact, as established by CJEU case law, the list of exceptions and limitations under Article 5 of the InfoSoc Directive is *exhaustive*, thus preventing Member States from enacting additional legislative restrictions on the exclusive rights of rightholders.[909] Consequently, national provisions granting privileges for short snippets of a work or subject matter appear to be incompatible with EU law. Ironically, Austrian and German copyright laws have previously shown a tendency to introduce exceptions beyond the boundaries of the InfoSoc Directive. Their former "free use" exception allowed users to adapt copyrighted works without specifying the nature or purpose of the adaptation. Following the CJEU's *Pelham* judgment, which deemed this exception incompatible with EU law due to Article 5's closed list, both legislators repealed the provision. They subsequently replaced it with the specific exceptions outlined in Article 17(7) of the DSM Directive, which, notably, apply to uses in both online and offline contexts.

Moreover, the legitimacy of the Austro-German regime of presumably lawful uses seems to be questionable under the three-step test of the Berne Convention,[910] the TRIPS Agreement, the WCT and, under EU law, Article 5(5) of the InfoSoc Directive.[911] Significant doubts already arise as to whether these national privileges for minor uses would satisfy the first and most basic of the three requirements. To qualify as a "certain special case", the provisions at issue must not be vague or

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[907] See, for instance, Communia Association 'Article 17 implementation: German proposal strengthens the right of user and creators' (*Communia,* 24 June 2020) <https://communia-association.org/2020/06/24/article-17-implementation-german-proposal-strengthens-right-user-creators/>; Felix Reda and Joschka Sellinger 'Germany attempts to square the circle in its implementation of Article 17 CDSMD – Part 1' (*Kluwer Copyright Blog*, 2021) <https://copyrightblog.kluweriplaw.com/2021/06/02/germany-attempts-to-square-the-circle-in-its-implementation-of-article-17-cdsmd-part-1/>.

[908] It is noteworthy that the German government describes this privilege merely as a protection of users against overblocking rather than explicitly labelling it as an additional copyright exception. In his analysis of the German implementation of Art. 17, Leistner also hesitates with this label. He argues that §§ 9-11 of the UrhDaG "at first sight [come] *dangerously close to an additional exception to copyright* – which would not be permissible under Art. 5 InfoSoc Directive and hardly reconcilable with the Berne and TRIPS three-step test." See Leistner (n 844) 915. Westkamp puts the word 'exception' in quotation marks, indicating a similar attitude; see Guido Westkamp, 'Two Constitutional Cultures, Technological Enforcement and User Creativity: The Impending Collapse of the EU Copyright Regime?' (2022) 53 IIC 62, 68.

[909] See *Pelham I* (n 61) paras 56-65.

[910] Art. 9(2) of the Berne Convention introduced the three-step test only for authors' reproduction right.

[911] Furthermore, Recital 6 of the DSM Directive contains a sort of restatement of the three-step test by providing that exceptions introduced by this very Directive must (i) be restricted to a certain special case; (ii) not conflict with a normal exploitation of the work or subject matter; and (iii) not unreasonably prejudice the legitimate interests of the rightholder.

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overly broad but should instead be clearly defined and distinguishable from other copyright exceptions.[912] Both the Austrian and German provisions,however, categorically exclude UGC of a specified or limited length. Accordingly, these national laws potentially cover and justify an unpredictable range of uses on social media every day.[913] In contrast, legitimate copyright exceptions under EU law are tied to a specific purpose or activity whereas the two provisions at hand merely impose a time limit to rigidly exclude these contents from automated filtering.

From a market perspective, the clash of these supposedly *de minimis* exceptions with the "normal exploitation of the work" (second requirement) on social media platforms seems even more evident. As emphasised above, one shall consider that snippets not exceeding 15 seconds are the average length of a video on TikTok and are increasingly paired with sound recordings and musical compositions whose rights clearance constitutes a very important source of revenues for the respective rightholders.[914] This means that the exploitation of sound recordings lasting just over a dozen seconds constitutes a major element of the business model for today's largest and most profitable video-sharing platforms. Empirical investigations in the digital music industry conducted by Fair MusE researchers clearly show that, especially after the entry into force of Article 17, there has been a significant increase in the revenues earned by music rightholders from these tech giants. This market reality, which does not seem to be different in Germany or Austria than in the rest of Europe, at least for now, makes the provisions at issue conflict with standard exploitations of copyright works. This exploitation consists of licensing the (very short) use of sound recordings and the underlying musical compositions to social media platforms *prior* to the upload of UGC, including the licensed music as a freely picked soundtrack.

Finally, by providing a statutory remuneration scheme for these minor uses, at least the German "exception" would more easily comply with the test's third requirement, which aims at excluding an *unreasonable* prejudice for the rightholders' interests. However, as suggested above, and considering the cumulative character of the test's requirements, the compliance with this final step would be irrelevant for the overall assessment of the legitimacy of these provisions.[915]

6.4.2. The opposite trajectory: the cases of Italy and Spain

More protective of rightholders' interests are the transpositions of this section of Article 17 in Spain and Italy.[916] While implementing Article 17(7) and Article 17(8) verbatim, their laws added a specific requirement in the provisions regarding effective complaint mechanisms (cf. Article 17(9)). Both laws

[912] Martin Senftleben, 'Copyright, Limitations and the Three-step test. An Analysis of the Three-Step Test in International and EC Copyright Law' (Kluwer Law International 2004) 137.
[913] Jannis Lennartz and Christoph Möllers, 'Vogelfreie Werkteile–Zur unions- und verfassungsrechtlichen Zulässigkeit der "mutmaßlich erlaubten Nutzungen" im UrhDaG' (2021) 123(9) Gewerblicher Rechtsschutz und Urheberrecht 1109, 1111.
[914] WTO, Report on 'United States - Section 110(5) of the US Copyright Act' (15 June 2000) WT/DS160/R para 6.183.
[915] World Intellectual Property Organization, Records of the Intellectual Property Conference of Stockholm - June 11 to July 14, 196: Volume 1 (1967) 740.
[916] Interestingly, Spain was one of the Member States, with France and Portugal, in addition to the European Commission, that intervened in the *Republic of Poland* proceedings to support the arguments of the defendants before the CJEU. In doing so, Spain argued that Art. 17(7) and (9) of the DSM Directive itself provide sufficient safeguards for the fundamental rights of users: see *Republic of Poland* (n 791) para 62.

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stipulate that access to content being subject to a rightholder's complaint must be disabled until the conclusion of the complaint procedure.[917] However, as remarked in the literature, the fact that these provisions do not contemplate remedies against abusive behaviour, such as intentionally false claims, contradicts the premise of Article 17(7), the *Poland* judgment and the Commission's Guidance paving the way for potential over-blocking. Moreover, these additional procedural requirements jeopardise the implementation of internal complaint mechanisms by social media platforms, which are consequently obliged to develop separate internal complaints mechanisms to meet the different requirements laid down under the law of each Member State.[918]

6.5. Final observations

To conclude, among the countries under investigation, Germany, Italy and Spain undeniably stand out as the most striking outliers in their implementations of Article 17, although for opposite reasons. While Germany ended up over-regulating the rights and duties of social media services when handling uploaded materials of uncertain legitimacy, seeking to to foster a fair balance of interests, Italy and Spain openly prioritised the interests of rightholders at a time tech companies are still reluctant to pay fair levels of remuneration for the copyright works they make available.

At both ends of this spectrum, in our view, these countries evidenced a fundamental distrust of industry's self-regulation for the pursuit of a fair balance of interests, at least in the short term. It is clear that the detailed and more restrictive character of these national transpositions seeks to complement, and prevail over, the industry standards of professional diligence, the terms of service, and the redress and complaint mechanisms that each social media service is obliged to develop to comply with Article 17. As observed in the relevant literature, it is primarily through a scrutiny of the platforms' terms of service that one can assess the degree of compliance of every service with this complex EU law provision, especially when it comes to giving rightholders and users a smooth, effective and inexpensive way to solve disputes without having to bring their cases before courts.[919]

The development of modern content recognition technologies, which include sophisticated rights management systems and exceptionally vast repertoire databases built together with different creative industries, seems fit to make the social media industry and the commercial exploitations in this sector. These are characterised to comply with the fair balance of interests embodied in Article 17, and were assessed in detail by the CJEU in the *Poland* judgment. Contrary to concerns raised

[917] See, respectively, Art. 102-decies(3) of the ICA and Art. 73(10) of the Spanish Royal Decree Law 24/2021.

[918] Simona Lavagnini, 'The Italian Implementation of Article 17 of Directive 2019/790: Complaints, Appeals and the new powers of AGCOM' (2022) 17(5) Journal of Intellectual Property Law & Practice 443, 444. On the opposite side of the spectrum, Austrian law requires social media platforms to provide access to contested content if the user substantiates that it is either lawful or that the complainant is not entitled to the alleged rights, and if the right holder does not submit a sufficient statement without undue delay following the user's statement: see § 89b(6) of the Austrian Copyright Act.

[919] In the study conducted in Germany by Brieske and Peukert, the authors found that not all social media services duly informed their users about the applicability of copyright exceptions or limitations to their content uploads. Overall, this study found Facebook to be the most compliant with the new requirements for OCSSPs set out in the German law. At the other end of the spectrum, Twitter (now 'X') appears to have complied only with the requirement to implement a user complaints mechanism, but not with any of the other new obligations set out by the German transposition, see Brieske and Peukert (n 880) 9.

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shortly after the publication of the 2016 Commission Proposal, these technologies are not causing censorship, "meme bans" or the death of creativity and a 'free' Internet on online platforms. Instead, innovative content recognition has advanced to the point where these tools can accurately interpret UGC within its humourous context, resulting in a significant reduction in "false positives" to almost zero.[920] In fact, three figures from YouTube's Copyright Transparency reports allow an optimistic view on the functioning of automated filtering tools.[921] Firstly, in the first half of 2022, a substantial 90% of claims filed by users in 2022 focused on monetization rather than the automated blocking or removal of UGC.[922] Consequently, only one in ten claims involved a potential infringement of users' fundamental rights. Secondly, and more impressively, automated decisions by Content ID were contested only about half as often as manual claims by the human user during this period.[923] Thirdly, following YouTube's introduction of a specific complaint mechanism for automated blocking in September 2022, only 0.01% of all blockings were appealed by affected users.[924] Although this does not necessarily confirm that 99.99% of all blocking actions were lawful, it implies that the incidence of "false positives" is not substantial enough to warrant the widespread opposition to automated filtering tools—especially considering that manual claims are even less reliable.

[920] See for example Audible Magic, an automated content recognition software licensed to platforms such as Soundcloud and, before Meta developed 'Rights Manager', to Facebook and Instagram, < https://www.audiblemagic.com/identification/>.

[921] For a more in-depth, yet too optimistic (or benevolent) evaluation of YouTube's transparency reports regarding the impact of Content ID on end users' fundamental rights, see Paul Keller, 'Article 17 - five years later' (*Kluwer Copyright Blog*, 7 June 2024) <https://copyrightblog.kluweriplaw.com/2024/06/07/article-17-five-years-later/>4.

[922] YouTube, 'YouTube Copyright Transparency Report H1 2022' (2022) 3 <https://storage.googleapis.com/transparencyreport/report-downloads/pdf-report-22_2022-1-1_2022-6-30_en_v1.pdf>.

[923] ibid, 13.

[924] YouTube, 'YouTube Copyright Transparency Report: Creating a Balanced Ecosystem' (2024) <https://transparencyreport.google.com/youtube-copyright/balanced-ecosystem?hl=en>.

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Part III

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7. Music licensing in Europe: collective rights management and beyond

7.1. Introducing the European digital music licensing landscape

The evolving landscape of the music industry has brought significant changes in the management of music rights, with collective rights management becoming increasingly central to the public discourse concerning music licensing and copyright policy. This is entirely justified, as CMOs continue to play a crucial role in the music industry traditionally occupied by publishers and labels. Furthermore, there has been a recent emergence of multiple new actors in the music field, including IMEs, tech companies, music distributors, aggregators, and do-it-yourself musicians turned 'entrepreneurs.' Whether we refer to publishing or neighbouring rights, or to the licensing of mechanical or public performance rights, per the definitions provided in Part I of this Study, a critical common issue to address is the fair remuneration of authors and performing artists. This complex issue was thoroughly analysed in Part I and II of our Study, where we observed how EU law supports music creators through statutory rights, copyright contract law provisions and a copyright liability regime targeted at social media services that aim - all together - at making creators' remuneration 'fair.' In this Part of the Study, instead, we will look more specifically at how CMOs and other commercial entities help individual creators exercise their rights through their professional intermediation and through their ability to maximise rightholders' revenues.

Building on this, Chapters 7 and 8 explore the notion of fairness from the not-so-obvious perspective of data management, data standardisation, and data transparency. Our analysis builds on legal scholarship that has identified several issues concerning music repertoire fragmentation,[925] diverging data management formats,[926] achievements and failures of the EU copyright policy in the field of music licensing,[927] and the current status of collective licensing.[928] In doing so, we provide an analysis of these and other unsettled issues based on two main assumptions:

- The post-2005 shifts in EU law and policy meant that, in practice, the digital music licensing industry went through a transition from the traditional licensing of the global music repertoire

[925] Giuseppe Mazziotti, 'New Licensing Models for Online Music Services in the European Union: From Collective to Customized Management' (2011) 34(4) The Columbia Journal of Law 757; Reto M Hilty and Sylvie Nérisson, 'Collective Copyright Management' in Ruth Towse and Christian Handke (eds), *Handbook on the Digital Creative Economy* (Edward Elgar 2013).

[926] Frank Lyons and others, 'Music 2025: The Music Data Dilemma: Issues Facing the Music Industry in Improving Data Management' (2019) UK Intellectual Property Office Research Paper <https://ssrn.com/abstract=3437670>.

[927] Emanuela Arezzo, 'Competition and Intellectual Property Protection in the Market for the Provision of Multi-Territorial Licensing of Online Rights in Musical Works – Lights and Shadows of the New European Directive 2014/26/EU' (2015) 46(5) IIC 534; Lucie Guibault and Stef van Gompel, 'Collective Management in the European Union' in Daniel Gervais (ed), *Collective Management of Copyright and Related Rights* (3rd edn, Kluwer Law International 2015) 159.

[928] Lucius Klobučník, 'Navigating The Fragmented Online Music Licensing Landscape In Europe A Legislative Compass In Sight?' (2021) 11(3) JIPITEC; Giuseppe Mazziotti, 'The Role of Market-Driven and Legislative Solutions to Online Music Licensing in Europe' (2019) 7/19 Jean Monnet Working Paper.

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in a single territory to the licensing of specific rightholders' repertoires on a multi-territorial basis;

- The ensuing fragmentation of digital music repertoires, as initially recommended and then legally mandated by the European Commission, led to the coexistence of a high number of CMOs and for-profit licensing entities operating simultaneously in the same European music sector.

As we will explain in this Part, both these changes have inevitably caused fragmentation and lack of interoperability and mutual accessibility of the various music licensors' repertoires and, as a result, fragmentation and limited coordination of the related data infrastructures.[929]

On the first front, the structural change from territorial to multi-territorial licensing was crystallised by the CRM Directive. We argue that this resulted in the contractual and technical fragmentation of the information regarding musical works, which currently hinders the development of integrated data infrastructures for the licensing of composers' and publishers' rights in online settings. It also prevents music streaming services and social media platforms from easily identifying relevant copyright works, their rightholders and the sound recordings where these works are incorporated, preventing them from clearing all applicable rights fully. Together with the rights of record producers, online music exploiters now need to secure all the rights in musical compositions - which were previously covered, within each Member State, by a single territorial blanket licence - through a multitude of negotiations and licensing agreements with various entities. As confirmed by interviews with stakeholders within the Fair MusE project, the consequences are higher transaction costs and a significant increase of the number of licences that each music service provider requires to operate legitimately.

On the second front, regarding the data-driven operations of CMOs and the creation of other licensing hubs throughout Europe, this Study argues that the pre-existing inequalities among European CMOs have been exacerbated by bigger technological gaps which have materialised regarding the music data processing capacity of each European licensing entity. As we will see, joint ventures formed by music publishers and a few CMOs, and licensing initiatives undertaken by different CMOs, have given rise to distinct and proprietary music repertoire databases. These datasets interact with each other only in a limited way, providing information to the recording industry that can be inaccurate or incomplete. This situation leads to financial losses for the music publishing sector as a whole and, in particular, to lower remuneration of composers, whose earnings depend on their musical works being identified and associated to specific commercial uses made by online exploiters.

In order to illustrate these consequences, Chapter 7 (§7.2) starts by outlining the evolution of collective management from a historic and legal perspective in the EU. This section provides a brief overview of the policy choices that led to the shift from mono-territorial "blanket" licensing to multi-territorial, repertoire-specific licensing, including the evolution of the EU policy in this field and the

[929] See, for instance, the European Commission Staff Working Paper, 'Report on the application of Directive 2014/26/EU on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market' SWD(2021) 338 Final, 12-13, which acknowledges the existence of significant disparities among European CMOs in terms of level of transparency and accuracy of their repertoires' data.

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relevant case law. Afterwards, §7.3 places the Commission-induced freedom of rightholders to choose how to exercise and assign the management of their rights at the centre of the analysis. This section inspects the achievements and failures of the CRM Directive, after having selected and analysed two of its parts, namely: (i) the, rather unexpected, regulation of IMEs and its diverging national transpositions; and (ii) the implications of the so-called "passport" system, wherein 'passport' stands for several mandatory standards of technical and legal nature that CMOs willing to issue multi-territorial licences for online uses of musical compositions are obliged to comply with. The consequences of this system are also investigated in §7.3. After this, §7.4 provides an overview of the European digital music licensing landscape and the evolution of the music licensing market, emphasising its recent developments and highlighting unresolved issues which are at the core of this Study.

7.2. Evolution of the collective management of copyright and related rights and the data infrastructure

Collective management of rights has been a traditional part of the music copyright landscape since the second half of the 19th century, having widely expanded throughout Europe and elsewhere in the 20th century. CMOs were founded and developed with a view to easing the licensing of rights on behalf of large numbers of composers who owned rights in works or catalogues of works being used and exploited on a commercial scale. Originally, music CMOs resembled trade unions rather than licensing bodies with a public mission as we know them today. However, they soon became 'one-stop' shops for clearing performance and mechanical rights in musical compositions and to distribute royalties among their members, always at the forefront of this industry's development.

From a functional and structural point of view, CMOs are designed to lower the transaction costs that would arise - for both rightholders and users - from having to clear copyright on an individual basis. This is especially evident in a field, like the music sector, where CMOs emerged as a cost-effective, practical solution to clear rights in multiple musical works and repertoires when these works are utilised across diverse locations, times, and media environments through single, collective transactions. This is even more so with the appearance of sound recording technology in the early 1900s and the consolidation of a mass media environment where radios and, subsequently, TV broadcasters multiplied music dissemination and exploitation opportunities. These developments caused the framework that CMOs had originally created for music performances taking place in theatres, concert halls and similar public venues to expand to multiple media where these organisations could monitor large-volume uses of their works, negotiate licences, and effectively collect and distribute royalties on behalf of individual rightholders.[930] Only so could the challenges associated with the practically impossible individual monitoring and licensing of copyright music be addressed.[931]

By the late 19th and early 20th centuries, CMOs emerged as 'performing rights organisations'. The first CMO dedicated to music, SACEM, was established in France in 1851 to manage public

[930] See Ficsor, *Collective Management of Copyright and Related Rights* (n 70) 14.
[931] ibid.

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performance rights in musical works.[932] This marked a significant shift in how music rights were handled, transitioning from individual negotiations to a collective approach. Following the lead of SACEM in France, communities of composers became actively involved in the establishment of performing rights societies, conceived as single organisations, in other European countries. These organisations include SIAE in Italy (1882), SGAE in Spain (1889), AFMA in Germany (1903) (predecessor to GEMA), MARS in Hungary (1907, predecessor to Artisjus), AKM in Austria (1913), PRS in the UK (1914, now called "PRS for Music"), among others.[933] To enhance their cooperation and further coordinate their activities globally through the conclusion of reciprocal representation agreements (RRAs), these societies founded the CISAC in 1926. CISAC is the leading global network for CMOs, ensuring the collective management of authors' rights and safeguarding the interests of creators in various artistic fields.[934]

From the very beginning of their history, CMOs' operations have been based on the extensive and increasingly complex collection, storage, and use of different types of data, starting with information relating to their members and the repertoires they represent. Using contemporary terminology, it is fair to say that CMOs have always been data-intensive organisations. Whether licensing musical venues and live music establishments, manufacturers of mechanical devices (such as piano rolls and sound recording technologies), or radio and television broadcasters, CMOs have had to continuously adapt to the demand for comprehensive "blanket" licences designed to cover their entire repertoires.

Under these transactions, each CMO grants users, in exchange for a fee, a broad permission to exploit their whole repertoires asking each licensee for a user's report on the grounds of which the organisation can distribute the related proceeds among its members.[935] These licensing schemes presupposed, from the outset, the creation of CMOs' databases where they kept the records of their members, the works of these members, and where and how these works were used and exploited commercially. On the one hand, this entailed the progressive creation of large repertoires and artists' communities, whose works and data were essentially kept at a national level. On the other hand, the fact that these societies were established as single organisations, conceived often as legal or de facto national monopolies, entailed the clearing of composers' and publishers' rights in just one country, on a strictly territorial basis. Thus, CMOs progressively gained the ability to license the entire global music repertoire by setting up a global network of societies, under the shield of CISAC. This network paved the way for the conclusion of RRAs under which each CMO granted access to all

[932] CISAC 'The History of Collective Management' (*CISAC,* 2020) <https://www.cisac.org/sites/main/files/files/2020-11/CISACUniversity_The_History_of_Collective_Management_FINAL.pdf>.

[933] Ficsor (n 70) 49-50.

[934] At the time of writing, CISAC has 227 member societies in 116 countries, representing over 5 million creators from all geographic areas and artistic repertoires, including music, audiovisual, drama, literature, and visual arts: see 'CISAC Overview' (CISAC) <https://www.cisac.org/about/cisac-overview#:~:text=With%20227%20member%20societies%20in,drama%2C%20literature%20and%20visual%20arts>.

[935] CISAC, 'The Role of Collective Management Organisations' (*CISAC,* 2020) <https://www.cisac.org/sites/main/files/files/2020-11/CISACUniversity_The_Role_of_CMOs_FINAL.pdf>. For more on blanket licensing, see Eric Priest, 'The Future of Music Copyright Collectives in the Digital Streaming Age' (2021) 45(1) The Columbia Journal of Law & The Arts 1.

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national repertoires in its country of establishment and operation, being able to process the related users' reports.

With the introduction and consolidation of neighbouring rights of performers, phonogram producers and broadcasters in the second half of the 20th century, music CMOs significantly expanded and, at the same time, changed their role in a constantly evolving industry. Rightholders created neighbouring rights' societies - representing mainly performing artists and phonogram and videogram producers - mostly to collect remuneration due under various national statutory schemes, rather than for the purpose of licensing exclusive rights. Such fragmentation (on which we will elaborate further in this chapter and then in Chapter 8) causes flaws in the international exchange of data and remuneration between neighbouring rights' CMOs.

The international organisations representing neighbouring rightholders - acting the same way as CISAC acts for composers and music publishers - and performing, in addition to lobbying, standardisation and data collection activities that are necessary for the licensing and collection of revenues in the recording sector of the music industry are fundamentally two:

- For record producers, the International Federation of the Phonographic Industry ('IFPI'), an international umbrella association of phonogram producers, is the most powerful and influential advocate for the interests and rights of its members and the broader recording sector. Founded in 1933 and based in London, with an important office in Brussels, IFPI is dedicated to promoting the economic value of recorded music and expanding the commercial uses of music globally.[936]
- For music performers, the Societies' Council for the Collective Management of Performers' Rights ('SCAPR'), established in 1986 and based in Brussels, is a not-for-profit organisation fostering cooperation among performers' CMOs worldwide. The organisation plays a key role in facilitating the efficient exchange of data and ensuring that performers can properly exercise the remuneration rights they are granted under copyright laws.[937]

All the above-mentioned CMOs, despite their long-term experience with data collection and processing activities, entered the digital age in the early 2000s facing completely new challenges triggered by unprecedented volumes of data analysis and information exchanges. The inherently territorial nature of CMOs' licensing businesses and, in the field of composers' and publishers' rights, the well-established practice of licensing rights in one country for the entire global music repertoires, guaranteed a central role to these organisations. This role was also crystallised, in a few countries, by local laws granting specific and local CMOs a monopoly in their field of operations. Irrespective of legal monopolies, the "natural" monopoly held by CMOs in all countries of the world allowed them, as emphasised above, to establish a network of RRAs that presupposed (and still presuppose, in offline exploitations) territorially segmented exploitations. This model worked well in the offline environment but proved to be problematic in online settings. RRAs immediately appeared to be

[936] See IFPI's webpage at <https://www.ifpi.org/>. Another very important organisation for the advancement of the rights of independent record labels in Europe is 'IMPALA' (Independent Music Companies Association), a non-profit pan-European organisation established in 2000 with the specific mission to promote the sustainability and diversity of the music and enrich Europe's cultural landscape: see IMPALA's webpage at <https://impalamusic.org/>.

[937] For further details, see SCAPR's webpage at <https://www.scapr.org/>.

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inadequate or insufficient as soon as online music services (often referred to as Digital Service Providers, 'DSPs') started seeking multiple licences for all territories where they operated simultaneously. A DSP needed to acquire the rights in all territories where it operated, with a subsequent involvement in multiple negotiations with many CMOs at once that proved to be very costly.[938] There was, therefore, a fast-growing need for licences that could cover multiple territories at once.

After having briefly outlined the historical evolution of collective management in the music sector, the following subsections will focus on the transition to multi-territorial licensing and the related challenges this posed to music streaming and social media services (§7.2.1). Attention will be paid to the evolution of EU law and policy which both mirrored and solidified this transition, culminating in the adoption of the CRM Directive in 2014 (§7.2.2).

7.2.1. The transition to multi-territorial licensing of musical compositions and related challenges to DSPs

To ease the difficulties encountered by DSPs, CMOs started experimenting with multi-territorial licences. Firstly, cross-border mechanical licences for CD production already existed, under which one CMO granted one licence on behalf of several others for several territories and then collected and distributed the royalties accordingly.[939] Moreover, in 1997, the MCPS, now a branch of the UK-based PRS, contracted directly with music publishers and provided a multi-territorial mechanical licence to produce CDs to Polygram, bypassing the traditional network of RRAs that CMOs typically managed.[940] This represented a significant departure from the territorial licensing model and paved the way for the future adoption of multi-territorial licences, which would become essential in the digital era.

Furthermore, to better adapt to the cross-border nature of digital music distribution, various internet services commenced multi-territorial licensing when CMOs developed standard agreements to provide commercial users with multi-territorial licensing solutions adapted for Web based exploitations.[941] In the early 2000s, CISAC members agreed upon the implementation of the so-called Santiago Agreement.[942] Under this agreement, each CMO member could provide a multi-territorial worldwide public performance licence on behalf of other members to a DSP, which included

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[938] Substantial change in how music is consumed can be documented on the iTunes Music Store, which started in 2003 by selling mp3 songs to its customers. In five years, it became the largest music vendor in the US. See Brian Chen, 'April 28, 2003: Apple opens iTunes Store' (*Wired*, 28 April 2010) <https://www.wired.com/2010/04/0428itunes-music-store-opens/>; Apple Press Release, 'iTunes Store Top Music Retailer in the US' (Apple Inc., 3 April 2008) <https://www.apple.com/newsroom/2008/04/03iTunes-Store-Top-Music-Retailer-in-the-US/>.

[939] In 1996, four such agreements existed: STEMRA (Netherlands) – Polygram, SACEM/SDRM (France) – Sony, GEMA (Germany) – Warner/BMG, SACEM/SDRM/MCPS/GEMA (France, UK, Germany) – EMI. See Rudolf Leška, 'Globalization of Collective Rights Management and the Role of National CMOs' in Tatiana Eleni Synodinou (ed), *Pluralism or Universalism in International Copyright Law* (Kluwer Law International 2019) 97.

[940] ibid. For further details, see Nils Bortloff, 'Collective Management of Rights in Musical, Literary and Dramatic Works in Europe' (1997) 6 German American Law Journal 67, 75; Jeff Clark-Meds, 'Polygram Deal Angers EU' (1996) 6 Billboard Magazine 101.

[941] Mazziotti, 'New Licensing Models for Online Music Services in the European Union: From Collective to Customized Management' (n 925) 763.

[942] Case COMP/38.126 'Santiago Agreement'.

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webcasting, streaming and downloading of music, including music videos. The condition was that the DSP would register with a CMO in its country of residence.[943] This system was extended to mechanical licences in 2001 by the so-called Barcelona Agreement, allowing a similar licence for digital reproduction rights.[944] In practice, this meant that each CMO had the exclusive right to represent its global music repertoire within its operating territory. Therefore, the Santiago and Barcelona agreements provided a one-stop-shop for a global, *i.e.*, multi-territorial, licence[945] which eased the transaction costs of DSPs. Such a system resulted in economic residence clauses being a part of the Santiago and Barcelona agreements, since DSPs had to direct their (global) licensing efforts to the CMO of their country of residence.[946]

Although this approach might have been well-received by CMOs, it nevertheless drew criticism from the European Commission. As a competition regulator, the Commission took a stance and started the fight against multi-territorial digital licences, as they enshrined the principle of strict territorial reciprocal representation.[947] In 2004, following the commencement of antitrust proceedings related to the Santiago Agreement, the Commission issued a Statement of Objections, which effectively marked the end of single multi-territorial licences that provided access to the global music repertoire for online exploitations.[948] The Commission specifically found that the economic residence clauses were anticompetitive, as they contravened the former EC Treaty's Article 81 (now Article 101 of the Treaty of the Functioning of the European Union, TFEU) by preventing users from obtaining licences from a society of their choice.[949] This restriction was seen as maintaining a territorial exclusivity for each participating society, hindering market evolution and competition between CMOs.[950] The hostility shown by the European Commission led to a premature end of the application of the Santiago and Barcelona Agreements,[951] and to a shift from multi–repertoire to mono-repertoire cross-border licensing.

As far as the neighbouring rights of record producers were concerned, IFPI's Simulcasting Agreement was another model reciprocal agreement based on similar principles as the above agreements, this time between record producers' rights administration societies for the licensing of certain simulcasts of phonograms.[952] Simulcasting refers to the simultaneous broadcasting of, for

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[943] See Mazziotti 'New Licensing Models for Online Music Services in the European Union: From Collective to Customized Management' (n 925); Leška 'Globalization of Collective Rights Management and the Role of National CMOs'(n 939) 99.
[944] Case COMP/38.377 'Barcelona Agreement'.
[945] Leška 'Globalization of Collective Rights Management and the Role of National CMOs' (n 939).
[946] See Mazziotti 'New Licensing Models for Online Music Services in the European Union: From Collective to Customized Management' (n 925).
[947] ibid.
[948] See Commission Notice Published Pursuant to Article 27(4) of Council Regulation (EC) No 1/2003 in Cases COMP/C2/39152—BUMA and COMP/C2/39151 SABAM (Santiago Agreement—COMP/C2/38126), 2005 O.J. (C 200) 11.
[949] ibid. See also Mazziotti 'New Licensing Models for Online Music Services in the European Union: From Collective to Customized Management' (n 925) 763-764.
[950] ibid.
[951] Santiago Agreement and Barcelona Agreement. The agreements are reprinted in Volume 16, Paolo Spada (ed), *Gestione collettiva dell'offerta e della domanda di prodotti culturali* (Quaderni di AIDA Giuffrè 2006).
[952] Case COMP/C2/38.014 'IFPI Simulcasting Agreement'.

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instance, sound recordings, by radio and TV stations over the internet in real time.[953] The main difference with the Santiago and Barcelona agreements was that IFPI's Agreement gave users the freedom to approach and obtain a licence for such international simulcasting from any CMO of their choice. After being notified about the Simulcasting Agreement, the European Commission granted a time-limited exemption from competition law based on the condition that the agreement would embody certain amendments.[954] However, the project failed due to the impossibility to agree upon the requirements imposed by the Commission. Additionally, the agreement did not cover performers' rights. Thus, it established a reciprocal network of phonogram producers' societies, but not of performers' societies. Since any licence granted by such a society would need to be accompanied by a licence to exploit the performers' rights in such phonograms, a mere licence to use a phonogram was of no use to users without a performers' licence. This issue was not resolved by IFPI's Simulcasting Agreement, and it was not coordinated with the performers' (musicians') societies.[955]

7.2.2. The evolution of EU Law towards the CRM Directive

As the collapse of the Santiago and Barcelona agreements illustrated, preceded by the failure of the IFPI Simulcasting Agreement, the European Commission halted pan-European licensing of online exploitation rights from the outset. The Commission had started to investigate the model reciprocal agreements agreed upon by CMOs through CISAC's intermediation. It started by objecting to issues such as exclusivity of representation of the members, or the prohibition of cherry-picking by the rightholders in entrusting the CMOs only certain categories of rights – usually those where its licensing and enforcement is costly and burdensome – while keeping certain categories of rights for individual licensing, typically online (on-demand) public performance rights. In this regard, it is crucial to highlight the important 2008 decision of the European Commission in the CISAC case, which was issued following a competition investigation of the EEA's 24 CMOs, which are members of CISAC.[956] Specifically, the Commission found that the membership clauses in mutual representation agreements, which required rightholders to depend on their national collecting society for management services, were incompatible with European competition rules.[957] The Commission also deemed territorial exclusivity clauses to be concerted practices that restricted competition.[958] It ordered EEA collecting societies to reassess their agreements, clarifying that while territorial mandate delineation remains permissible, it should be determined independently and on a strictly bilateral basis.[959] This decision was partly annulled years later, in 2013, by the General Court, which upheld only the Commission's conclusions regarding the membership clauses of the RRAs.[960] On the portion of the CISAC decision regarding territorial exclusivity and segmentation, to the contrary, the Court found that, without documentary evidence, the Commission could not establish the

[953] ibid para 2.
[954] ibid.
[955] See Leška (n 939) 99.
[956] *Commission Decision Relating to a Proceeding Under Article 81 of the EC Treaty and Article 53 of the EEA Agreement*, at 1, 5 COM (2008) 3435 final (July 16, 2008) (hereafter '*CISAC Decision*'), *available at* <http://ec.europa.eu/competition/antitrust/cases/dec_docs/38698/38698_4567_1.pdf>.
[957] ibid 74–75 (including Arts. 1 and 4).
[958] ibid Art. 3.
[959] ibid 75; Art. 4(2).
[960] Case T-442/08 *CISAC v Commission* [2013] EU:T:2013:188.

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existence of concerted practices beyond the parallel conduct of collecting societies.[961] Furthermore, the Court emphasised that the Commission's decision should have provided sufficient evidence to dismiss alternative justifications presented by the societies.[962]

Following these developments, EU policy evolved accordingly. The first substantial involvement of the EU bodies commenced in 2004 with the Resolution of the European Parliament on a Community Framework for CMOs,[963] and with the 2004 Commission Communication on the Management of Copyright and Related Rights in the Internal Market.[964] Interestingly, the Parliament did not consider the territorial character of copyright as an explicit obstacle to pan-European or even global licensing, although it emphasised that the management of copyright and related rights was based on the principle of territoriality, considering also that the attempts to adjust copyright management to the digitalisation of music were insufficient at the time.[965] However, it was the ensuing Commission Communication which preferred legislative action. The Commission stated that the lack of uniform rules and the significant divergence on collective copyright management rules within the EU was a barrier to the functioning of the internal market, especially in the digital environment.[966] The Commission was also clear in announcing a new legislative proposal focused on setting common rules among the EU's CMOs.[967]

Consequently, the way towards what is now the CRM Directive was paved by the 2005 Commission Recommendation on Collective Cross-border Management of Copyright for Music Services.[968] This Recommendation addressed the need for licensing policies that reflected the ubiquity and potentially multi-territorial character of online environments. It did so by introducing principles, such as rightholders' freedom to choose their CMOs irrespective of the Member State of residence or the nationality of the collective rights manager or of the rightholder,[969] which became pillars of the CRM Directive.[970] It also highlighted the need for equal treatment of different categories of rightholders;[971] the importance of the equitable distribution of royalties;[972] the need for CMOs to provide sufficient information to users in advance of negotiations, including the repertoire they represent;[973] among

[961] ibid paras 132, 182-183.

[962] ibid para 181.

[963] European Parliament, 'Resolution on a Community framework for collective management societies in the field of copyright and neighbouring rights of 15 January 2004', 2002/2274(INI) (2004 Parliament Resolution) <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P5-TA-2004-0036>.

[964] Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee, 'The Management of Copyright and Related Rights in the Internal Market of 16 April 2004' COM(2004)261 final (2004 Commission Communication) <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52004DC0261:EN:HTML>.

[965] 2004 Parliament Resolution (n 963) para 11.

[966] See also Vlassis and others (n 24), 58-59 and 67-68.

[967] 2004 Commission Communication (n 964) 18.

[968] Commission Recommendation 2005/737/EC on collective cross-border management of copyright and related rights for legitimate online music services of 18 May 2005 (2005) OJ L276/54 (2005 Commission Recommendation) <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32005H0737>.

[969] ibid recommendation number 3.

[970] See CRM Directive, Recital 6.

[971] 2005 Commission Recommendation (n 968) recommendation number 13(a).

[972] ibid recommendation number 10.

[973] ibid recommendation number 6.

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other important points on CMO's governance and related practices. This stance of the Commission also explains the Commission's involvement in the above-mentioned CISAC investigation. Nevertheless, the Recommendation was unevenly followed. Furthermore, while the Commission focused on users, the European Parliament, in its later 2007 Resolution on Cross-border Collective Copyright Management,[974] in response to the Commission's Recommendation, again stressed the role of cultural diversity and the role of local repertoires. Firstly, the Parliament criticised the Commission's Recommendation in its lack of consultation with stakeholders and the Parliament.[975] Furthermore, the Parliament advocated for a flexible solution for the cross-border management of copyright and related rights,[976] and emphasised the need for 'fairness' and 'transparency' in the governance of CMOs.[977]

Still, the Commission did not falter, and it continued its work towards the CRM Directive, as further exemplified in its 2008 Communication on Creative Content Online in the Single Market.[978] In it, the Commission also mentioned multi-territory licensing for creative content and stressed the need for more competition on the market of rights management services.[979] In the same year, once again, the European Parliament was critical towards the Commission's stance and its competition investigation,[980] in which it saw an obstacle to EU-wide copyright licensing. Yet, the modernisation of the EU copyright regulatory framework with the introduction of a collective management regulation on an EU level had become a common agenda of the Commission. This can be seen by the Europe 2020 Strategy published in 2010,[981] the 2010 Communication on A Digital Agenda for Europe,[982] and the 2011 Intellectual Property Strategy 'A Single Market for Intellectual Property Rights.'[983] In the

[974] European Parliament resolution of 13 March 2007 on the Commission Recommendation of 18 October 2005 on collective cross-border management of copyright and related rights for legitimate online music services (2005/737/EC) (2006/2008(INI)) (2007) (2007)0064 <https://www.europarl.europa.eu/doceo/document/TA-6-2007-0064_EN.html>.

[975] ibid. paras A-C.

[976] ibid. para 1.

[977] Ibid. para 2(4).

[978] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on creative content online in the Single Market of 3 January 2008 (2008) COM(2007)836 final <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2007:0836:FIN:EN:HTML>.

[979] ibid, whereby "[w]hile it is first for right holders to appreciate the potential benefits of multi-territory licensing, there is a need to improve the existing licensing mechanisms to allow for the development of multi-territory licensing mechanisms, for instance by promoting fair competition on the market for rights management. It should be noted that different practices apply to different types of content".

[980] European Parliament Resolution of 25 September 2008 on collective cross-border management of copyright and related rights for legitimate online music services (2008) OJ 2010/C 8 E/19 <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52008IP0462>.

[981] Communication from the Commission: EUROPE 2020, A strategy for smart, sustainable and inclusive growth of 3 March 2010 (2010) COM(2010) 2020 final <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:2020:FIN:EN:PDF>.

[982] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 19 May 2010 'A Digital Agenda for Europe' (2010) COM(2010) 245 final <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex:52010DC0245>.

[983] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 24 May 2011 'A Single Market for Intellectual Property Rights: Boosting creativity and innovation to provide economic growth, high quality jobs and first class

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latter, one can even identify the idea of 'super CMOs' being able to license pan-European repertoires.[984]

These efforts, paired with developments on the judicial branch of the EU - as exemplified by the above mentioned 2013 General Court judgment - created the scene for the introduction of the CRM Directive.[985] The Proposal for the CRM Directive was introduced to the European Parliament on 11 July 2012. It identified key objectives aimed at enhancing the management of collecting societies by establishing common standards for governance, transparency, and financial management. The Proposal also sought to set minimum standards for multi-territorial licensing of rights in musical works by authors' collecting societies for online services while also creating conditions to expand the legal offer of online music.[986] Following several amendments to ensure a balanced approach towards all stakeholders, the Directive was enacted on 26 February 2014.[987] The final text reflects these aims through complementary objectives focused on increasing transparency and efficiency in CMOs and facilitating the licensing process.

In this regard, it is important to note that the CRM Directive finally introduced the pan-European licensing of music; however, this was only for digital music in webcasting or simulcasting services.

7.2.3. Collective management of neighbouring rights: the case of remuneration rights and their potential extension to online exploitations

As illustrated in Chapter 2, neighbouring rights were introduced at the EU level by Chapter II of the 1992 Rental, Lending and Neighbouring Rights Directive. At that time, some Member States were not even signatories to the Rome Convention and, as a result, had not developed a scheme for the protection of neighbouring rights, notably lacking the recognition of performers' and phonogram producers' rights.[988] This also caused delays in the establishment and development of collective management in a field - neighbouring rights - where record labels predominantly operated through direct licensing schemes. The 1992 Directive made this field broader and more complex by introducing both exclusive and equitable remuneration rights for performers and phonogram producers.

The recognition of performers' rights at the EU level, and the subsequent necessity to allocate revenues originating from their remuneration rights (i.e., which performers cannot validly transfer to

products and services in Europe' (2011) COM/2011/0287 final <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52011DC0287>.

[984] ibid, whereby "[t]his is why, in 2011, the Commission will submit proposals to create a legal framework for the collective management of copyright to enable multi-territorial and pan-European licensing. While the focus on the cross-border management of copyrights in the online environment is of particular importance in view of the development of a digital marketplace for cultural goods and services, attention should also be given to the governance structures of other forms of collectively managed rights".

[985] European Commission, 'Proposal for a Directive of the European Parliament and of the Council on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online uses in the internal market' 2012/0180/COD ('2012 Proposal') <https://eur-lex.europa.eu/procedure/EN/2012_180>.

[986] ibid.

[987] CRM Directive.

[988] International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, done at Rome on October 26, 1961.

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record producers because of their non-waivable character) fostered the establishment of CMOs for performers in the music and audiovisual sectors even in Member States where such societies had not yet existed or acted only as unions or advocacy associations. Depending on each Member State's transposition of the directive and the (different) roles assigned to record producers' and performers' organisations in the negotiation, collection and allocation of these rights' revenues, these new national statutory rights gave rise to different rights management models.

Notwithstanding the EU's harmonisation efforts from the early 1990s, the current EU law landscape shows that remuneration rights granted to record producers and performers and managed by their respective collective agencies and CMOs is scattered and differs significantly on a country-by-country basis. National differences aside, as far as performers' rights are concerned, the core business of their CMOs lies in the collection of revenues stemming from the remuneration rights listed in the box below. As we will see in Chapter 8, it is evident that the lack of proper harmonisation of these rights, and of their operational aspects, creates exceptional obstacles in the development of reciprocal representation agreements (RRAs) between national CMOs and challenges their data exchanges.

Performers' statutory remuneration rights collected by performers' CMOs

- Broadcasting and communication to the public rights, which in some Member States such as Spain include on-demand rights for streaming exploitation
- Rental right
- Lending right (if a Member State provides for performers' remuneration, which is optional under the EU law)
- Cable retransmission right
- Internet Protocol Television (IPTV) and satellite retransmission rights (if existing under national law and practice)
- Private copying levies (which are optional under EU law)

- Annual supplementary remuneration under the Term Extension Directive[989]

7.3. Rightholders' freedom to choose their best rights licensors as the new music licensing principle in Europe

When introducing the EU regulatory framework for collective licensing, the European Commission was convinced that, to ensure a modern, competitive and transparent system of collective rights management in the music sector, this system should have been based on the principle of rightholders' freedom of choice. As emphasised in the 2005 Commission Recommendation, this freedom should have been primarily that of choosing one or more CMOs, with a subsequent freedom to decide the extent to which each of these societies can represent rightholders in the exercise of

[989] Cf. Term Extension Directive, Art. 1(2)(c).

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certain types of rights regarding a specific repertoire. Moreover, to replace the previous system of RRAs challenged on competition law grounds, the European Commission believed that music rights licensors should have started treating the EU as a Single Market to be addressed through the introduction of pan-European licences. Given this, under the new system codified by CRM Directive, only those CMOs which possess the necessary capacities (*i.e.*, personal, financial, technological) can be authorised to grant multi-territorial licences to online music users. This is how, according to EU lawmakers, non-profit management entities such as traditional CMOs can acquire the technical and data infrastructure capacity needed to cope with the challenges of today's digital music exploitations.

The CRM Directive aimed at enhancing the functioning of CMOs, as well as promoting the multi-territorial licensing of musical compositions for digital uses across the EU. Since its enactment in 2014, all EU Member States transposed this Directive - albeit only 5 Member States managed to do it within the transposition deadline.[990] Nevertheless, not all EU Member States have dealt with the Directive provisions on good governance and cross-border online music licensing uniformly. There are significant differences that this section seeks to explore with the aim to assess the Directive's level of success, especially considering today's data-driven dimension of collective rights management.

As remarked in the literature, the CRM Directive sought to make it possible for rightholders to choose which among their rights they want a CMO to manage, and which rights they prefer to manage individually.[991] Moreover, the fundamental freedoms granted to rightholders in the 2014 Directive codified principles of collective rights management that originated from soft law and competition law enforcement initiatives undertaken by the European Commission between 2005 and 2008.

As §7.3.1 shows, in the difficult journey towards harmonisation of rules applicable to collective rights management, Article 5 of the CRM Directive and its transpositions under national laws hold a prominent place by providing rightholders with a "charter" of rights and freedoms in their relationship with CMOs. Furthermore, as shown in §7.3.2, the main principle of rightholders' freedom of choice embodied in Article 5 refers not only to CMOs, wherever in Europe, but also to another type of commercial licensing entity or vehicle that was not contemplated in the initial legislative proposal of the European Commission. In the final text of the directive these new licensors are defined as 'Independent Management Entities'. This section thus analyses the role and regulatory framework of IMEs, with particular emphasis on their national transpositions and the varying approaches adopted by Member States. Following this, §7.3.3 addresses the mandatory requirements applicable to multi-territorial licensing by emphasising their function as "Passport" rules. This system sets out mandatory legal and technical standards that any CMO willing to offer multi-territorial licences for online uses of musical works must adhere to, under the supervision of national authorities identified

[990] The deadline for the transposition of the CRM Directive was 10 April 2016. By then, only 5 EU Member States (Denmark, Estonia, Ireland, Slovakia and the UK - still part of the EU back then) had transposed it. This led to the Commission starting infringement proceedings against the remaining EU Member States, which culminated in bringing several Member States to the Court of Justice. In the end, no Court decision was necessary as all Member States eventually implemented the Directive into their national systems. For further details, see European Commission, 'Report on the Application of Directive 2014/26/EU on Collective Management of Copyright and Related Rights and Multi-Territorial Licensing of Rights in Musical Works for Online Use in the Internal Market' (n 929) 3-4.

[991] See Guibault and van Gompel (n 259).

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by Member States. Finally, §7.3.4 critically evaluates the consequences of rightholders' freedom of choice and of these Passport rules for: *(i)* the modernisation of CMOs, as a whole; *(ii)* the relationships between different music repertoires; and *(iii)* the creation of data infrastructures that are necessary to foster fair remuneration of music creators in digital markets.

7.3.1. Article 5 of the CRM Directive

This Directive provision sets the stage for an unprecedented "liberalisation" of this field, where Member States are obliged to allow both individual and corporate rightholders to entrust their rights to any CMO of their choice. Moreover, the provision specifies that rightholders shall be free to decide on the specific rights and categories of rights they intend to entrust to CMOs (Article 5(2)), and to terminate or withdraw any of these rights (Article 5(4)).[992] Specifically, CMOs are obliged to manage these rights, categories of rights, types of works, and other subject matter, provided that such management falls within the scope of their activities, unless they can provide objective reasons for refusal. It is important to observe that in the initial draft of the Directive, the text merely referred to the right of rightholders to choose a collecting society for the management of their rights.[993] There was no mention in this text of the related obligation of a CMO to accept such management requests. This ambiguity in the Proposal's text left the issue unresolved, potentially allowing CMOs to refuse these rightholders' requests.[994] In this regard, scholars who recommended the introduction of this (explicit) obligation under EU law stressed that this obligation already existed in several European countries to counterbalance CMOs' natural monopolies.[995]

In its final version, Article 5 of the CRM Directive contains specific, mandatory provisions that operationalise rightholders' freedom to choose their rights manager and right to decide how, and with whom, to exercise their rights.

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[992] CRM Directive, Art. 5.

[993] 2012 Proposal, Art. 5(2): "[r]ightholders shall have the right to authorise a collecting society of their choice to manage the rights, categories of rights or types of works and other subject matter of their choice, for the Member States of their choice, irrespective of the Member State of residence or of establishment or the nationality of either the collecting society or the rightholder".

[994] For instance, by commenting on the 2012 Proposal, scholars from the Max Planck Institute advocated for the imposition of an obligation on CMOs to contract with all rightholders, a requirement already established in several Member States: see Josef Drexl and others, 'Comments of the Max Planck Institute for Intellectual Property and Competition Law on the Proposal for a Directive of the European Parliament and of the Council on Collective Management of Copyright and Related Rights and Multi-Territorial Licensing of Rights in Musical Works for Online Uses in the Internal Market COM(2012)372 (2013) 44 IIC 322.

[995] See, for instance, in Portugal, Art. 11 of the Law of 3 August 2001 No. 83/2001; in Greece, Art. 57(1) of the Law No. 2121/1993.

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Rightholders' rights to choose their CMO and how to exercise their rights

- ➢ Rightholders shall have the right to grant licences for non-commercial uses of any rights or types of works they choose (Article 5(3)). The Directive provides that CMOs shall inform rightholders of their rights and any conditions related to the granting of non-commercial licences before obtaining their consent to manage any rights or categories of rights (Article 5(8)).
- ➢ Rightholders are entitled to terminate their authorisation for the management of their rights or to withdraw any rights previously assigned to a CMO (Article 5(4)). This right must be exercised with a notice period not exceeding six months and can be applied to any rights or categories of rights, as well as to any territories designated by the rightholder. It is important to note that a CMO may stipulate that such termination or withdrawal will only become effective at the end of the financial year.
- ➢ Article 5(5) ensures that rightholders retain their entitlement to any amounts due for acts of exploitation occurring prior to the effective date of termination or withdrawal, or under a licence granted before such termination or withdrawal.
- ➢ Article 5(7) specifies that when rightholders grant an authorisation to a CMO to manage their rights, they shall provide explicit consent for each individual right, category of rights, or type of work or subject matter. This requirement ensures that rightholders are fully informed of their rights and any applicable conditions prior to consenting to CMO management.

As emphasised in the relevant literature, if the Directive had not explicitly incorporated this obligation for CMOs, as it does in its final text, it would have merely reaffirmed a general private law principle of contractual freedom for both rightholders and CMOs. This freedom would have been mostly beneficial to CMOs that administer commercially valuable repertoires, which might not have been interested in managing rights in diverse or "niche" works. At the end of the legislative process, Article 5(2) introduced a binding provision that explicitly obliges Member States to ensure that CMOs must accept the mandate given by rightholders and admit them as members *unless* there are such objectively justified reasons for refusing management. In this regard, according to Article 6(2), in cases where a CMO refuses a membership request, it shall give the rightholder a clear explanation of the reasons for its decision, which shall be based on objectively justifiable criteria as outlined in its statutes or membership conditions.[996] This provision clearly benefits cultural diversity and makes non-discrimination between rightholders more effective, since a CMO's objective justification cannot

[996] For example, as elucidated in the Guidance for the Directive's transposition issued by the UK Intellectual Property Office when the UK was still an EU Member State, under the Collective Management of Copyright (EU Directive) Regulations 2016 No. 221, the mere fact that a rightholder is situated in another country does not qualify as an objectively justified reason for refusing management. Conversely, an objectively justified reason for the refusal can materialise if the requested management of the copyright works falls outside the CMO's defined scope of activity: see Intellectual Property Office, 'Guidance on the Collective Management of Copyright (EU Directive) Regulations 2016' (*UKIPO*, 25 February 2016) 11 <https://assets.publishing.service.gov.uk/media/5ff6cbb68fa8f53b7f26d6fe/collective-management-of-copyright-regulations.pdf>.

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validly consist of factors such as the geographical origin or the potentially limited commercial value of the repertoire of the requesting rightholder.[997]

In this regard, several music industry stakeholders raised the issue of disparity of treatment between traditional CMOs and the IMEs, which are not bound by the same provisions of the CRM Directive (see *infra* §7.3.2).[998] On the specific issue of membership, for instance, while a CMO is obliged under Article 5(2) of the CRM Directive to represent every composer or performer, if so requested, regardless of how commercially appealing their respective repertoires and recordings are, IMEs are not. Given their mere profit-seeking purposes, IMEs can potentially restrict their right-holders representation to a very few major music stars, lowering their transaction costs to a minimum. To the contrary, having an obligation to collect revenues for a much higher number of artists, with higher operating costs and lower revenue, CMOs are clearly placed at a disadvantaged position in their "competition" with IMEs.

Empirical investigations conducted by the Fair Muse project suggest that, at least in the Member States under our analysis, CMOs have transitioned from a rigid situation where they did not allow any splits of rights - besides the one between performing and mechanical rights in the music publishing sector - to much more flexible scenarios. Due to the progressive transformation of these organisations into reliable data processing businesses, CMOs' members can count on an increasingly high level of granularity when choosing the types of rights to assign to a CMO and the territories where this CMO can manage them.

7.3.2. Role and regulation of IMEs under the CRM Directive and its national transpositions

A genuinely new addition of the 2014 Directive to the legal framework on copyright's collective management concerns IMEs. In the past fifteen years, IMEs have started to populate the music sector, specialising in all sorts of activities from the licensing of background music to the issuance of multi-territorial licences.[999] These entities were not contemplated in the original proposal of the European Commission.[1000] IMEs were introduced later, in a sudden and rather unexpected manner, which caught many copyright experts and stakeholders across the EU by surprise.

The concept of IMEs began to surface during discussions in the European Parliament, in particular in the context of the Gallo report prepared for the Committee on Legal Affairs.[1001] Although the

[997] By commenting on the 2012 Proposal, the above-mentioned Max Planck scholars persuasively argued that the introduction of this obligation would have significantly furthered the goal of preserving and promoting cultural diversity, as requested in the EU constitutional order and as actively pursued by the EU institutions, starting by the European Parliament.

[998] AEPO-Artis specifically expressed this concern in its voluntary data exchanges with Fair MusE.

[999] European Commission, 'Report on the application of Directive 2014/26/EU on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market' (n 929) 6.

[1000] European Commission, 'Proposal for a Directive of the European Parliament and of the Council on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online uses in the internal market' (2012) COM/2012/0372 final - 2012/0180 (COD).

[1001] Marielle Gallo (Rapporteur), 'Report on the proposal for a directive of the European Parliament and of the Council on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online uses in the internal market' (2013) COM(2012)0372 – C7–0183/2012 –

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provision under Recital 4 of the draft Directive mentioned "service providers" and "agents" with regard to commercial entities competing with CMOs, the Commission's text did not explicitly define or address the notion of IMEs. It is in the new version of this recital (which is now Recital 5) that the CRM Directive, while referring to problems such as lack of transparency and efficiency encountered by some CMOs, specifies that: "*[T]hese difficulties do not arise in the functioning of independent rights management service providers who act as agents for rightholders for the management of their rights on a commercial basis and in which rightholders do not exercise membership rights*".[1002] It was during the parliamentary discussions that the idea of including these independent entities in the scope of application of the CRM Directive started taking shape, partly due to concerns about the effects of direct licensing by commercial entities attracting the traditional members of CMOs, especially among music publishers. The European Parliament, through its Committee on Culture and Education, the Committee on Industry, Research and Energy, and the Committee on International Trade, played a significant role in shaping the inclusion of IMEs in the Directive. All these committees contributed with their discussions to expanding the scope of the Directive to include provisions on "independent commercial operators", which were later defined as IMEs.

However, these committees offered different and sometimes contradictory views on how IMEs should be regulated, leading to inconsistencies in the final text. The Committee on Culture and Education ('CULT') emphasised in its Opinion the need for "independent commercial operators" to adhere to transparency standards in their rights management activities.[1003] The CULT Committee's recommendations went beyond Gallo's draft, proposing a broader application of some of the Directive provisions to independent commercial operators, including entities located both inside and outside of the Union acting as agents for rightholders (as defined in Amendment 36 in the Opinion of the Committee on Culture and Education). Both the CULT and the Committee on Industry, Research, and Energy recommended in their Opinions the application of various Titles and Articles of the Directive to IMEs, with the purpose of effectively aligning the legal treatment of "independent rights management service providers" (cf. Amendment 18) with the regulatory standards for CMOs. Slightly different was the concept used by the Committee on International Trade, which proposed that such commercial operators should have been defined as "any entity which is authorised by way of any contractual arrangement to manage copyright or rights related to copyright on behalf of rightholders on a commercial basis"[1004] (cf. Amendment 16 of the Committee's opinion).

According to the provision of Article 3, IMEs differ from CMOs because they shall: firstly, neither be owned nor controlled, directly or indirectly, wholly or in part, by rightholders; and secondly (*i.e.*, it is a cumulative criterion), they shall be organised on a for-profit basis. Recital 15 clearly indicates that IMEs shall be subject to regulation to the extent these commercial entities carry out the same activities as CMOs. To this end, while clarifying that the Directive provisions apply to both categories of rights managers, Article 2(4) provides that IMEs should be subject to specific obligations which

2012/0180(COD), Prepared for the European Parliament Committee on Legal Affairs, available at <www.europarl.europa.eu/doceo/document/A-7-2013-0281_EN.html>.

[1002] Ficsor, *Collective Management of Copyright and Related Rights* (n 70) 122.

[1003] Opinion of the Committee on Culture and Education, from 1 July 2013, for the Committee on Legal Affairs on the proposal for a directive of the European Parliament and of the Council on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online uses in the internal market, COM(2012)0372 – C7-0183/2012 – 2012/0180(COD).

[1004] Ficsor, *Collective Management of Copyright and Related Rights* (n 70) 123.

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concern good faith in licensing activities (Article 16); transparency of information to be provided to rightholders, other licensing entities and users upon request (Artt. 18 and 20); disclosure of information to the public, including membership and termination rules, standard contracts, tariffs and amounts due to rightholders (Article 21); compliance with the Directive, under the control of the supervisory authorities appointed by Member States (Article 36); and the processing of personal data in accordance with EU law (Article 42).[1005] Although Article 2(4) specifies certain provisions applicable to IMEs, it is pertinent to recognize that the scope of these provisions is notably limited. Specifically, as clarified by CJEU in recitals 46 and 47 of the recent judgment *Liberi Editori e Autori (LEA) v Jamendo SA*, Article 5 of the CRM Directive, which confers upon rightholders the right to select a CMO, is not enumerated among the provisions listed in Article 2(4) of the Directive.[1006]

Despite the binding character of these provisions for Member States, and the initial statement of Recital 15 emphasising the freedom of rightholders to choose IMEs to manage their rights,[1007] none of these explicitly oblige national lawmakers to allow IMEs to operate in their respective jurisdictions.[1008] This is certainly one of the implementation points where national transpositions have diverged significantly, giving rise to a complex scenario.

Due to the uncertain nature of the obligation for Member States to contemplate IMEs in their jurisdictions, some IMEs had to fight for their own existence and survival in Member States where the law made it difficult or impossible for them to access their local music rights market. In this respect, Italy provides the most remarkable (and radical) example of institutional skepticism towards IMEs, whereby until September 2024 IMEs were not allowed to undertake copyright intermediation activities. This is because Italian law, until recently, reserved all intermediation activities in the field of copyright collective management to the Società Italiana Autori Editori ('SIAE').

Before the CRM Directive, Article 180 of the ICA granted SIAE a legal monopoly on all activities of collective copyright management. This monopoly conflicted with the Directive by significantly restricting creators' freedom of choice of a manager of their choice, at least in the Italian territory. Although the Legislative Decree 35/2017 was enacted with the specific goal to implement the CRM Directive in Italy, it did not touch upon SIAE's legal monopoly, leaving Article 180 of the ICA unaffected. This decision gave rise to debates about the consistency of SIAE's monopoly with the new EU law framework. Although Article 4(2) of the 2017 Italian transposition decree formally allowed rightholders to choose between a CMO or an IME, this choice was made more difficult because of persisting legal monopoly under Article 180.[1009] That is the reason why UK-based

[1005] See, respectively, Art. 16(1), Arts. 18 and 20, points (a), (b), (c), (e), (f) and (g) of Art. 21(1) and Arts. 36 and 42, which apply to all IMEs established in the Union according to Art. 2(4) of the CRM Directive.
[1006] Case C-10/22 *Liberi editori e autori (LEA) v Jamendo SA* (hereafter '*LEA*') [2024] EU:C:2024:254, paras 46 and 47.
[1007] CRM Directive, Recital 15: "rightholders should be free to entrust the management of their rights to independent management entities".
[1008] This view is supported by the judgment of the Court of Justice of the EU in the OSA case in which the court opined that Member States are free to keep statutory monopoly for operation of CMOs established in their territory. See Case C-351/12 *OSA v Léčebné lázně Mariánské Lázně as* (hereafter '*OSA*') [2014] EU:C:2014:110.
[1009] Legislative Decree No 35 of 15 March 2017, 'Implementation of Directive 2014/26/EU on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market', Art. 4(2).

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Soundreef had to operate in Italy through Liberi Editori Autori (LEA), a non-profit organisation formed by composers and publishers whose rights were licensed, outside of Italy, by Soundreef itself.

A few months after the enactment of Decree 35/2017, Italian lawmakers eventually amended Article 180 with a view to opening the market to new entrants.[1010] This amendment was eventually prompted by observations the Italian government received from the European Commission regarding Italy's implementation of the 2014 Directive.[1011] In short, the amendment eventually repealed the legal monopoly originally granted to SIAE by reserving copyright's intermediation to "other collective management organisations" (as defined in Legislative Decree No. 35 of 15 March 2017), thus preventing IMEs from exercising the same activities in competition with CMOs under revised Article 180.[1012]

This legislative choice led to two cases being referred to the CJEU. In the first case from 2018, SIAE objected to Soundreef's eligibility to operate in Italy, arguing that it did not meet the requirements set out under Article 180 ICA. This dispute led to the Italian courts seeking clarification on the compatibility of Italian law with the CRM Directive.[1013] However, before the CJEU could rule on the matter, the parties reached an out-of-court settlement, resulting in the withdrawal of the request.[1014] In a press release dated 10 April 2019, SIAE, Soundreef and LEA announced that they had reached an agreement aimed at resolving all ongoing disputes between the parties and preventing future ones.[1015] In the second case from 2022, LEA sued Jamendo (a Luxembourg-based nonprofit organisation licensing works under Creative Commons) arguing, as SIAE did against Soundreef in the previous case, that Jamendo's activities, as an IME, were not permitted under Italian law.[1016]

Unlike the previous case, the dispute between LEA and Jamendo was ultimately resolved by a CJEU ruling that held that completely prohibiting IMEs from offering their services is incompatible with EU law.[1017] As there was no provision under Italian law regulating the access of IMEs, Italian law was deemed to disproportionately impair IMEs' freedom to provide services under Article 56 of the TFEU.[1018] As held by the CJEU, while a CMO monopoly might be justified for certain categories of

[1010] See Art. 19(1)(2) of Law Decree 148/2017 of 16 October 2017, converted with Law 172/2017.

[1011] Parere della 5° Commissione Bilancio del Senato, nonché la lettera della Commissione europea inviata al Governo italiano in data 10 febbraio 2017. For further information, see AGCM, Decision of 25 September 2018, 13-14, available in Italian at <https://www.agcm.it/dotcmsdoc/allegati-news/A508_ch_istr_sanz_omi_pubbl.pdf>.

[1012] Italian Copyright Law No. 633 of April 22, 1941, as amended by Law Decree No. 35 of 15 March 2017, Art. 180. Carlo Meo, 'Are Italian Rules on Copyright Collective Management in Line with EU Law?' (2023) 72(3) GRUR International 231. For further details, see Giuseppe Mazziotti, 'Il monopolio SIAE e la direttiva Barnier: come stanno davvero le cose?' (2017) Il Diritto Industriale 73.

[1013] Request for a preliminary ruling from the Tribunale ordinario di Roma (Italy) lodged on 12 December 2018 — C-781/18 *Società Italiana degli Autori ed Editori (S.I.A.E.) v Soundreef Ltd* (2019/C 112/26).

[1014] SIAE and Soundreef reached an out-of-court settlement and the request was withdrawn. For a brief description of the settlement's content, see Mihaly Ficsor, 'UFOs over Italy – why OSA is good law and the Italian law is in accordance with the EU norms concerning the status of IMEs at issue in the LEA v Jamendo case' (2023) 42, available at <http://www.copyrightseesaw.net/uploads/fajlok/ufos-over-italy.docx>.

[1015] 'Accordo Soundreef, SIAE e LEA: ecco le regole operative' (Soundreef, 2019) available in Italian at <https://www.soundreef.com/blog/regole-operative-accordo-soundreef-siae/>.

[1016] *LEA* (n 1006).

[1017] ibid.

[1018] TFEU, Art. 56.

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works, Italian law did not grant SIAE such monopoly (any more).[1019] Therefore, the outright ban on IMEs was not justified so that less stringent measures would have been sufficient to protect rightholders' interests.[1020] Upon the ruling in C-10/22, Italian authorities amended Article 180 of the Copyright Law, finally opening the copyright intermediation market to IMEs from 17 September 2024.[1021]

Spain provides a different but equally critical scenario with regard to CMOs and their traditional *de facto* monopoly on the licensing market. In May of 2019, the Spanish Competition Authority (Comisión Nacional de los Mercados y la Competencia, 'CNMC') sanctioned SGAE with a 2.95 million Euro fine for abuse of a dominant position.[1022] This was due to SGAE imposing statutory and contractual conditions on its members that "unjustifiably restrict the freedom of its partners" to decide whether to attribute or partially withdraw the management of their rights.[1023] Unison, an IME established in 2016 and operating effectively in the field of publishing rights since 2020, has been particularly active against CMOs' malpractices which continue to impede new competitors, such as IMEs, from entering the market.[1024] Most notably, in 2022, Unison filed another lawsuit in conjunction with DAMA ('Derechos de autor de Medios Audiovisuales', a Spanish intellectual property rights management organisation) against SGAE for abusing its dominant position in the Spanish market of television and radio fees, as well as for its allegedly universal licensing practices.[1025] This resulted in another sanction by the Spanish Competition Authority towards SGAE in June of 2024.[1026]

This uncertainty and frustration among IMEs over whether they can freely operate under national laws is not limited to Italy and Spain. France likewise experienced litigation involving IMEs, MusicMatic (an intermediary offering 'free of public communication rights' music), and SACEM. In this case, Tapis Saint-Maclou played background music in its stores using phonograms made available under a Creative Commons non-commercial licence. SACEM then made a claim for

[1019] LEA (n 1006) paras 82-83.

[1020] ibid paras 87-99. The Court also concluded that IMEs are not information society service providers under Directive 2000/31, as the Directive does not apply to copyright, and that Directive 2006/123 is also inapplicable to copyright and related rights. See ibid paras 64-67 and paras 70-75, respectively.

[1021] See Article 15(1)(b) of Decree Law of 16 September 2024, No 131, OJ 16/09/2024 No 217, converted with Law No 166 of 14 November 2024.

[1022] CNMC, *DAMA v SGAE* S/DC/0590/16, available at <https://www.cnmc.es/sites/default/files/2491386_0.pdf>. Similarly, it fined the copyright entity also for its dominant position in the granting of authorisations and remunerations through the sale of reproduction and public communication authorisation packages, as well as for the lack of tariff breakdown between the audiovisual and musical repertoire in the hospitality sector.

[1023] ibid. Notably,this decision was annulled by the National High Court in 2023, because it considered that SGAE enjoyed a dominant position only until 2018. See CNMC, Annual Report of 2023, 21,available at <https://www.cnmc.es/sites/default/files/editor_contenidos/CNMC/Memorias/Annual%20Report%20CNMC_2023.pdf>.

[1024] See, for instance, CNMC, *SGAE* R/AJ/003/22, available at <https://www.cnmc.es/sites/default/files/4127039.pdf>.

[1025] Comisión Nacional de los Mercados y la Competencia, *DAMA-UNISON RIGHTS v SGAE* S/0641/18. Furthermore, already in December 2019, the Barcelona Commercial Court No. 3 upheld interim measures requested by Unison, recognising SGAE's continued abuse of a dominant position and requiring them to allow authors and publishers to withdraw their works without restrictions, aligning with both Spanish law and EU law such as the CRM Directive. See Commercial Court No. 3 of Barcelona 1249/2019 Civil/Commercial: Preliminary precautionary measures by UNISON.

[1026] ibid.

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payment under Article L.214-1 of the French CPI.[1027] Here the French Cassation Court concluded that, even under these licensing conditions, the phonograms had been used for commercial purposes. As a result, the use of these recordings was still subject to mandatory collective management that French law reserves exclusively to CMOs.[1028]

In countries like Greece and Portugal, instead, issues for IMEs arose from deviations under national law from the EU regulatory model. This arguably raises tension with the aim of the CRM Directive to liberalise and bring more transparency, harmonisation and legal certainty in this sector. Greece, for instance, established two categories of IMEs: 'simple' IMEs and IMEs with a dominant position.[1029] In particular, Article 50 of Greek Law 4481/2017 regulates the collective management of rights by IMEs that hold a dominant position in the Greek market. The law obliges dominant IMEs to include specific governance structures, such as a general assembly of members and a supervisory board, to ensure their operations align with those of CMOs. However, the criteria for what constitutes a "dominant position" are not clearly defined. Greek law excludes 'non-dominant' IMEs from the scope of legal presumptions necessary for effective operation, such as those outlined in Article 7 of the same act. In addition, these IMEs in Greece are not allowed to manage rights that fall within the regime of mandatory collective management (Article 32 paragraph 1 of Greek Law 4481/2017). It is pertinent to note that the list of IMEs currently operating in Greece, as provided by the Hellenic Copyright Organisation, is entirely empty as of February 2025. This absence of listed entities underscores significant challenges in assessing the regulatory and operational environment for IMEs in Greece.[1030]

A further, remarkable case of a different approach to this matter is that of Portugal. Contrary to a clearly cumulative requirement of the CRM Directive (cf. Article 3(b)(i) and (ii)), Portuguese law provides that IMEs must not be controlled, directly or indirectly, wholly or in part, by rightholders *and/or* shall not be organised on a for-profit basis.[1031] Yet, the same law provision indicates that IMEs in Portugal can still be *owned* by right–holders, in sharp contrast with the wording of Recital 15 of the Directive ("[...] *Such independent management entities are commercial entities which differ from collective management organisations, inter alia, because they are not owned or controlled by rightholders* [...]").

7.3.3. Multi-territorial licensing rules and the so-called 'Passport' system

A further question to consider when analysing the transposition of the CRM Directive concerns its chapter on multi-territorial licensing of online rights in musical compositions.[1032] In response to market developments that followed the 2005 Commission Recommendation and the 2008 CISAC

[1027] French Court of Cassation, *Audiovalley, société anonyme (formerly MusicMatic) v Société des auteurs compositeurs et éditeurs de musique (SACEM)* (11 December 2019) Case No 18-21.211, FR:CCASS:2019:C101021. An English translation of the ruling is available at <https://doi.org/10.1007/s40319-020-00947-6>.

[1028] For a detailed analysis, Bulayenko (n 665).

[1029] Greek Law 4481/2017, Arts. 32 and 50.

[1030] 'Independent Management Entities (IMEs) Established in the Greek Territory' (Hellenic Copyright Organization) <https://opi.gr/en/cmos-imes/imes-established-in-the-greek-territory/>.

[1031] Portuguese Law No 26/2015, Art. 2(e).

[1032] CRM Directive, Title III (Arts. 23–32) "Multi-territorial licensing of online rights in musical works by collective management organisations".

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Decision (see §7.2 *supra*), the CRM Directive sought to regulate the licensing of rights in musical compositions for online uses across multiple national territories at once. As emphasised above, these licences emerged in the digital music industry to meet a fast-growing demand of online music services willing to operate smoothly across multiple EU Member States.[1033]

Title III of the CRM Directive introduced a set of common standards, which was often referred to as a "passport" for CMOs during the discussions preceding and following the adoption of the Directive. This term denotes a set of mandatory technical and legal standards that each CMO must comply with to issue multi-territorial licences for online uses of musical compositions. As stated in Article 23 of the CRM Directive: "*Member States shall ensure that collective management organisations established in their territory comply with the requirements of this Title when granting multi-territorial licences for online rights in musical works.*"

These obligations contain various types of technical and legal requirements that aim at guaranteeing a high level of transparency, efficiency and accountability of CMOs towards rightholders and users.[1034] The main goal of this Title is, in addition to the modernisation and competitiveness of the collective rights management sector, the non-discrimination of rightholders when it comes to their concrete opportunities to rely on high-quality multi-territorial licensing for the exercise of their rights, independently of their specific CMO.

Given the significance and complexity of the multi-territorial licensing provisions (despite being confined to approximately ten Articles within Title III of the CRM Directive) some scholars have argued that this section might have constituted a separate legislative document, distinct from the comprehensive regulation of collecting societies addressed in Titles I, II, IV, and V.[1035] The clear distinction between these two sets of provisions of the Directive,[1036] as revealed by its reading, has led to the hypothesis that the Directive might have been more effectively structured as two separate legislative documents.

7.3.3.1. Technical capacity and CMOs' data transparency obligations

As regards the technical requirements, their level of ambition was exceptionally high when the Directive was proposed, discussed, and then adopted in 2014, and is still remarkable so one decade afterwards. These requirements can be summarised as follows.

[1033] The ability to obtain multi-territorial licences for publishing rights is very important for both music streaming services and, especially after the transposition of Art. 17 of the DSM Directive into national laws, for social media platforms.

[1034] See CRM Directive, Arts. 24 to 31.

[1035] Emanuela Arezzo, 'Competition and Intellectual Property Protection in the Market for the Provision of Multi-Territorial Licensing of Online Rights in Musical Works – Lights and Shadows of the New European Directive 2014/26/EU' (2015) 46(5) IIC 534, 539. This position is confirmed by Dinusha Mendis, 'Directive 2014/26/EU on Collective Management of Copyright and Related Rights and Multi-Territorial Licensing of Rights in Musical Works for Online Use in the Internal Market' in Arno Lodder and Andrew Murray (eds), *EU Regulation of E-Commerce* (Cheltenham, UK: Edward Elgar 2017) 299.

[1036] The CRM Directive consists of two distinct sets of provisions: Titles I, II, IV, and V (comprehensive regulation of collecting societies) and Title III (multi-territorial licensing of online rights in musical works by collective management organisations).

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Firstly, Article 24 provides that CMOs willing to issue pan-EU licences shall have "*[...] sufficient capacity to process electronically, in an efficient and transparent manner, data needed for the administration of such licences, including for the purposes of identifying the repertoire and monitoring its use, invoicing users, collecting rights revenue and distributing amounts due to rightholders. [...]*". This data processing capacity shall concern the accurate identification of the repertoire represented by each CMO and of the works, rights and territories for which this representation occurs. To do so, the CRM Directive creates obligations for CMOs to implement unique identifiers and other technologies being able to resolve data inconsistencies and errors in a timely and effective manner.

Secondly, Article 25 specifically emphasises the need for transparency in the management of multi-territorial repertoire information. It stipulates that CMOs must provide up-to-date information about the online music repertoire they represent to online service providers and rightholders, upon a duly justified request and through electronic means. This information shall include: (a) the musical works represented; (b) the rights represented wholly or in part; and (c) the territories covered. Additionally, CMOs may take reasonable measures to protect the accuracy and integrity of the data, control its reuse, and safeguard commercially sensitive information.

Thirdly, among the key provisions of Title III, Article 26 of the CRM Directive requires Member States to ensure that CMOs granting multi-territorial licences for online rights have procedures in place to address inaccuracies. This includes allowing rightholders, other CMOs, and online service providers to request corrections to data or information, based on reasonable evidence of inaccuracies. Consequently, when claims are substantiated, CMOs must correct the data or information without undue delay.

7.3.3.2. Regulatory requirements: reporting obligations and the "tag-on" regime

Other obligations contained in the Directive's "Passport" concern *(i)* the regular reporting of the use of works and the distribution of the corresponding payments (Article 27-28) and *(ii)* the so-called "tag-on" regime, under which CMOs which legitimately licence their repertoires on a multi-territorial basis must assist other CMOs that do not meet the "passport" requirements (Article 30).

In particular, Articles 29-31 are among the most innovative provisions of the CRM Directive.[1037] To encourage aggregations of online music rights and, thus, to avoid the marginalisation of small or commercially non-mainstream repertoires in digital markets, these provisions permit a CMO that is either unwilling or technically unable to grant multi-territorial licences, to request another CMO to do so by including the repertoire of the former into the licences offered by the latter under non-discriminatory conditions.[1038]

Article 29 outlines the framework for such representation agreements between CMOs. It requires that any agreement whereby one CMO mandates another to grant multi-territorial licences for its online rights in musical works within its own repertoire must be non-exclusive. The mandated CMO is also obligated to manage these rights on a non-discriminatory basis.[1039] The non-exclusive nature of this mandate is essential, as highlighted by Recital 44 of the CRM Directive, since exclusivity in

[1037] See Guibault and van Gompel (n 259) 169.
[1038] For further details, see CRM Directive, Recital 44.
[1039] See CRM Directive, Art. 29(1).

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such agreements would limit the options available to both users seeking multi-territorial licences and CMOs seeking administration services for their repertoire on a multi-territorial basis.

Furthermore, Article 30 establishes an obligation for CMOs to represent one another for multi-territorial licensing. If a CMO, which does not grant or offer to grant multi-territorial licences for the online rights in its own repertoire, requests another CMO, already engaged in granting them for the same category of online rights in musical works, to enter into a representation agreement, the latter must comply.[1040] This reinforces the collaborative framework intended by the Directive, ensuring broader access to multi-territorial licensing. It is also crucial to emphasise that both CMOs must maintain transparency: the mandating CMO is required to inform its members of the key terms of the agreement, including its duration and associated service costs, while the mandated CMO must communicate the principal licensing terms back to the mandating CMO. The latter shall cover aspects such as the nature of exploitation, the structure of licensing fees, the duration of the licence, accounting periods, and the territories involved.[1041] Transparency is also required when a CMO makes a request under Article 30, as outlined in Article 30(6), which specifies that the requesting CMO must provide sufficient information about its own music repertoire in a form that allows the requested CMO to meet the requirements of Title III of the Directive for granting multi-territorial licences. In this context, it is important to mention Article 26(3), which specifies that when a CMO mandates another CMO to grant multi-territorial licences for online rights in musical works, the mandated CMO must provide rightholders with electronic means to submit detailed information about their musical works, rights, and the territories for which they authorise management.[1042]

Finally, among the analysed provisions, the transitory provision of Article 31 stands out for its innovative character by allowing rightholders to withdraw their rights for multi-territorial online licensing (without impacting their other mono-territorial rights) if their CMO was either unwilling or incapable of granting such licences, directly or indirectly, by the deadline of 10 April 2017.[1043] Overall, it is important to specify that, as noted in a European Commission's study from 2021,[1044] the CRM Directive does not impose an obligation on CMOs to offer or grant multi-territorial licences. However, the failure to grant such licences may confer specific withdrawal rights upon rightholders under Article 31. The findings of the above-mentioned study indicate that nearly all CMOs have engaged in this activity in recent years, reflecting an increased responsiveness to the licensing needs of rightholders.

[1040] ibid Art. 30(1).

[1041] ibid Art. 29(2) and 29(3).

[1042] ibid Art. 26(2) and 26(3).

[1043] According to some scholars, it is possible to link Art. 31 with Art. 5(6) of the CRM Directive, as noted by Mendis, who argues that the reading of Arts. 5(6) and 31 suggests that the Directive promotes individual rights management as an alternative to collective rights management by CMOs. In this regard, see Mendis (n 1035) 308.

[1044] See European Commission: Directorate-General for Communications Networks, Content and Technology, 'Study on Emerging Issues on Collective Licensing Practices in the Digital Environment – Final Report' (2021) SMART 2018/0069 Publications Office 38, available at <https://data.europa.eu/doi/10.2759/611658>.

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7.3.3.3. National transposition of the "Passport" rules and supervision of CMOs' operations

A comprehensive analysis of the obligations the Directive imposes on CMOs requires considering Article 22. Under this provision, CMOs are obliged to publish annual transparency reports that place law enforcers, rightholders, other CMOs, users and any other members of the public in a position to monitor and compare, at least formally, the performances of various CMOs. Access to the information contained in these reports freely allows one to verify whether a CMO concretely adheres to the standards set by the CRM Directive, including the above-mentioned "passport" requirements for the licensing of online music rights.[1045] This transparency-enhancing obligation is so detailed that the CRM Directive includes an Annex where Member States find a clear indication and the reporting standards for the minimum levels of information that CMOs must include in these reports.[1046]

One particular front that deserves attention and where the CRM Directive leaves significant discretion to EEA Member States is the monitoring and verification of the compliance of licensing entities with national laws transposing Title III of the CRM Directive.[1047] For the specific purposes of Title III of the Directive, Article 23 provides that Member States shall ensure compliance of CMOs with the EU "passport" rules within their jurisdictions. Here the Directive refers to a more general obligation established under Article 36 ('Compliance'). This provision requires Member States to designate competent authorities for the purpose of monitoring CMOs' compliance with all the national law provisions adopted to pursue the requirements laid down in the Directive.[1048]

The monitoring obligations and enforcement mechanisms established under Article 36 are remarkable. First, Member states are obliged to establish procedures that enable various stakeholders, including CMO members, rightholders, users, and other interested parties, to notify designated authorities of potential breaches of national laws adopted in accordance with the Directive.[1049] Second, Article 36 also empowers these authorities to impose appropriate sanctions or take necessary measures when compliance is not achieved, ensuring that such sanctions are effective, proportionate, and dissuasive.[1050]

Per Article 36(3) of the CRM Directive, by 10 April 2016, Member States had to notify the Commission of their designated competent authorities, for the Commission to subsequently publish this information. As of September 2024, the list of competent authorities available in the Commission's website had been last updated only in February 2020.[1051] This 2020 list shows there

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[1045] See CRM Directive, Recital 36.

[1046] See ibid Art. 22(2): "The annual transparency report shall contain at least the information set out in the Annex." In this regard, it is worth recalling that annual transparency reports shall include special reports on the use of amounts CMOs deduct for social, cultural, and educational purposes. This report shall be part of the annual transparency report and shall also adhere to the Annex's comprehensive reporting standards: See Point 3 of the Annex to the CRM Directive.

[1047] ibid.

[1048] CRM Directive, Art. 36(1).

[1049] ibid Art. 36(2).

[1050] ibid Art. 36(3).

[1051] 'Collective Rights Management Directive - Publication of Collective Management Organisations and Competent Authorities' (European Commission, 17 September 2024) <https://digital-

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were several Member States which had not provided the Commission with a competent authority to monitor CMOs' compliance with the Directive (Article 36) and to exchange information with other competent authorities (Article 37). This was the case for France and Portugal, two of the 10 Member States under our analysis.

National competent authorities per the 10 Member States under Fair MusE's analysis (2025)	
Austria	Supervisory Authority for Collective Management Organisations (Aufsichtsbehörde für Verwertungsgesellschaften)
Belgium	Control service of copyright and related rights management companies (SPF Economie)
Denmark	Copyright and Legal Unit, Ministry of Culture
Estonia	Ministry of Justice
France	Ministry of Culture
Germany	German Patent and Trademark Office (Deutsches Patent- und Markenamt (DPMA))
Greece	Hellenic Copyright Organisation
Italy	Italian Communications Regulatory Authority (AGCOM)
Portugal	General Inspection of Cultural Activities (IGAC)
Spain	Deputy General Directorate for Intellectual Property (Ministry of Education, Culture and Sports)

This list shows that most competent authorities are national regulatory bodies, whose nature is heterogeneous. For example, while Portugal had not provided any information on its national competent authority by 2020, it quickly caught on the trend of other Member States and appointed an organisation (Inspeção-Geral das Atividades Culturais, 'IGAC') that is part of its national Ministries (in this case, the Ministry of Culture), as did Estonia, France, Denmark, Germany, etc. This type of administrative control by public authorities or publicly appointed bodies serves two objectives: (i) the authorisation of CMOs, and (ii) the monitoring of CMOs' operations.

On the authorisation side, it should be noted that as public authorities (such as the Ministry of Culture in France and Spain, the Ministry of Justice or the Trademark and Patent Office in Germany) these apply specific criteria when deciding whether to grant approval for the establishment of a CMO. The criteria include the representativeness of the organisation, the volume of potential users and the suitability of its statutes and the means by which it proposes to achieve its aims both nationally and internationally.[1052] It is also essential to emphasise that supervision by these public authorities goes

strategy.ec.europa.eu/en/library/collective-rights-management-directive-publication-collective-management-organisations-and>.

[1052] CISAC, 'The Supervision of CMOs', available at <https://www.cisac.org/sites/main/files/files/2020-11/CISACUniversity_The_Supervision_of_CMOs_FINAL.pdf>.

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beyond the initial approval, involving continuous monitoring and supervision of the CMO's activities.[1053]

Moreover, the situation in Italy following the implementation of the CRM Directive is distinctive. The enactment of Decree 35/2017 has led to a reallocation of supervisory responsibilities concerning CMOs. Specifically, oversight functions have been transferred to the Italian Communications Authority (Autorità per le Garanzie nelle Comunicazioni, 'AGCOM'), as set forth in Article 40 of the Decree.[1054] However, it is crucial to note that the supervisory responsibilities related to SIAE remain unchanged. These responsibilities continue to be exercised by the Minister of Cultural Heritage and Activities and Tourism, in conjunction with the President of the Council of Ministers, and in consultation with the Minister of Economy and Finance for matters within his specific remit, as stipulated in Article 1(3) of Law No. 2 of January 9, 2008.[1055]

On the monitoring side, as remarked even by the European Commission in its formal assessment of the CRM Directive in 2021, Article 37 of the Directive provides a formal mechanism under which national competent authorities can exchange compliance information, particularly regarding the activities of CMOs in their respective territories.[1056] However, as emphasised in this Commission Report, it became clear that national authorities have not actively used this mechanism. In fact, the Report cites various suggestions from national authorities towards the improvement of this mechanism, such as common databases or a common contact platform for national authorities, both of which would ease this process of information exchange.[1057] This would be important because, without the exchange of data, competent authorities cannot verify how effectively CMOs are operating in their respective territories.

7.3.4. Consequences (pros and cons) of the "Passport" system

The final part of the CRM Directive shows that EU lawmakers were aware of the risks and difficulties entailed by national transpositions and implementation of its provisions, especially the "Passport" requirements. The Directive confers several monitoring tasks to the European Commission. First, the Commission is required to foster a regular exchange of information between the national supervisory authorities, and between those authorities and the Commission itself, on the situation and development of multi-territorial licensing (Article 38(1)).[1058] Moreover, the Commission shall

[1053] ibid.

[1054] Decree 35/2017, Art. 40.

[1055] 'Implementation of Directive 2014/26/EU on collective management of copyright and related rights and multi-territorial licensing' (Dipartimento per l'Informazione e l'Editoria - Italian Government, 15 December 2017) available in Italian at <https://www.informazioneeditoria.gov.it/it/notizie/attuazione-della-direttiva-201426ue-sulla-gestione-collettiva-dei-diritti-d-autore-e-dei-diritti-connessi-e-sulla-concessione-di-licenze-multiterritoriali-per-i-diritti-su-opere-musicali-per-l-uso-online-nel-mercato-interno/>.

[1056] European Commission Staff Working Paper, 'Report on the application of Directive 2014/26/EU on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market' (n 929), 88-89.

[1057] ibid.

[1058] According to the transitory provision embodied in Art. 38(3) of the CRM Directive, the national competent authorities should have submitted to the Commission a report on the development of multi-territorial licensing in their territory by 10 October 2017. This report was expected to include information on the availability of multi-territorial licences in each Member State; the compliance by CMOs with the "Passport" requirements; and an

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conduct regular consultations with representatives of rightholders, CMOs, users, consumers and other interested parties on their experience with the application of multi-territorial licences, sharing all this information with the competent national authorities (Article 38(2)). Finally, the Commission was requested to provide an assessment on the application of this Directive through a report to be submitted to the European Parliament and the Council by 10 April 2021 (Article 40).[1059]

In 2021, the Commission Staff Working Document ('SWD') was published, fulfilling the requirements of Article 40 of the CRM Directive by assessing its impact on cross-border services, cultural diversity, the relationships between CMOs and users, and the operation of non-EU CMOs in the EU.[1060] This report provides very valuable and detailed information for the assessment of the Directive's effectiveness on the functioning of multi-territorial licensing from the perspective of all entities that offer these licences in the EEA, *i.e.*, CMOs, IMEs and other licensing entities (*i.e.*, commercial licensing hubs: see §7.4 *infra*) that do not fall within these classifications. It is important to note that among the various sources upon which this report is based, two studies were commissioned to support its finding. The first study focused on selected issues related to the application of the Directive, specifically addressing governance, transparency, and tariff-setting,[1061] The second study, which explores the evolving dynamics of collective licensing in the digital environment, is particularly relevant to our analysis, as it offers critical insights into how CMOs are adapting to the challenges of multi-territorial licensing under the CRM Directive.[1062]

The next subsections briefly highlight the consequences of rightholders' freedom to choose how to exercise their rights and of the above-mentioned Passport rules for: *(i)* the modernisation of collective rights management, as a whole; *(ii)* the relationships between different music repertoires; and *(iii)* the creation of data infrastructures that are necessary to foster fair remuneration of music creators in digital markets.

7.3.4.1. Modernisation of collective rights management

As evidenced by empirical investigations conducted within the Fair MusE project, the CRM Directive and its Passport system significantly enhanced transparency and accountability within the European

assessment of the development of multi-territorial licensing of rights in musical works by users, consumers, rightholders and other interested parties.

[1059] CRM Directive, Art. 40: "That report shall include an assessment of the impact of this Directive on the development of cross-border services, on cultural diversity, on the relations between collective management organisations and users and on the operation in the Union of collective management organisations established outside the Union, and, if necessary, on the need for a review. The Commission's report shall be accompanied, if appropriate, by a legislative proposal."

[1060] European Commission, 'Report on the application of Directive 2014/26/EU on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market' (n 929).

[1061] European Commission, 'Study on Selected Issues relating to the Application of the CRM Directive' (2021) available at <https://op.europa.eu/en/publication-detail/-/publication/386c0f22-4c16-11ec-91ac-01aa75ed71a1/language-en>.

[1062] European Commission, 'Study on Emerging Issues on Collective Licensing Practices in the Digital Environment – Final Report' (n 1044).

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CMOs.[1063] The majority of intellectual property law experts and of other stakeholders interviewed by Fair MusE (with the exception of CMOs' representatives) noted that, prior to the adoption of the CRM Directive, CMOs were largely perceived as "black boxes" due to their limited transparency and accountability towards their members, other CMOs and their licensees. In this regard, the CRM Directive significantly improved the European landscape by requiring compliance with the above-mentioned legal and technical obligations as a prerequisite for issuing multi-territorial licences, under the supervision of national authorities.

However, the inconsistent application of the Passport rules at the national level clearly emerged from the Fair MusE's investigations, the European Commission's report and the related studies. This lack of uniformity across the Member States has undermined efforts to modernise digital music licensing, thereby obstructing progress towards the enhanced transparency and fairness that the Directive pursued as fundamental objectives. This is a conclusion that can be found in the European Commission's study on the evolving dynamics of collective licensing in the digital environment,[1064] which forms the basis of the 2021 Report. This study emphasises the experiences of online music service providers such as Spotify, Deezer, Apple Music, and YouTube Music, providing valuable insights about compliance challenges related to Title III of the CRM Directive. Several of these providers reported that CMOs, particularly in Eastern and Southern Europe, often lack the technical and organisational capacity to grant multi-territorial licences, as required under Article 24 of the CRM Directive.[1065] Yet, the same CMOs claim to meet these requirements and to comply with high standards of management, repertoire identification, etc., without objections being raised by their respective supervisory authorities.[1066] Smaller CMOs, in particular, face difficulties related to staffing and data processing activities, which hinder their ability to efficiently manage their respective repertoires.[1067] This does not come as a surprise if one considers the broad character of Title III's provisions combined with the absence of effective oversight mechanisms and of a proper EU-wide scrutiny to ensure CMO's compliance with the Passport obligations. Stakeholders therefore recommend clearer guidance from the European Commission on this front and, especially in Member States where competent authorities lack the necessary resources, the intervention of third parties as advisors for a genuinely independent assessment of CMOs' online licensing capabilities.[1068]

A particularly important section on compliance with the Directive's Passport concerns transparency obligations. These include both the specific duties for CMOs to publish the templates for their licence agreements, as well as the rates for each usage, on their websites (Article 26) and the general obligation to publish annual transparency reports (Article 22). As regards the first obligation, while

[1063] Fair MusE researchers held interviews with music industry experts, IP law counsels, CMOs and IMEs' representatives between November 2023 and May 2024.
[1064] European Commission, 'Study on Emerging Issues on Collective Licensing Practices in the Digital Environment – Final Report' (n 1044).
[1065] ibid 83.
[1066] ibid.
[1067] ibid.
[1068] ibid 84.

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some larger CMOs have made commendable progress in enhancing transparency by publishing their tariffs and licensing templates, others have not fully complied with this duty.[1069]

Furthermore, as regards the second obligation, significant issues related to terminological inconsistencies, language, presentation, and the overall structure of the information provided by CMOs have been thoroughly analysed by scholars.[1070] The above-mentioned Article 22 mandates that CMOs publish annual transparency reports, which are required to provide comprehensive information regarding their financial activities and royalty distribution, each distinguished by category of right and type of use. The importance of this obligation is also recognised by CMOs, some of which published annual transparency reports even before the CRM Directive was enacted.[1071] However, the effectiveness of these reports is frequently undermined by issues of inconsistency among different CMOs' reports and lack of clarity therein.[1072] This raises serious concerns about whether these reports, in their current forms, can serve as meaningful resources for rightholders, particularly when conducting an accurate and complete market analysis or comparing the performance of different CMOs.[1073] Ultimately, the ongoing industry attempts to achieve greater standardisation in how CMOs report their key data can restore their original purpose, ensuring greater clarity and accessibility of the contents CMOs are expected to make publicly available.

Moreover, a critical issue emerged concerning IMEs, whose role and regulation under the CRM Directive and its national transpositions were previously analysed in §7.3.2. In this regard, IMEs and CMOs compete within the same market for multi-territorial licences, yet the legislative provisions applied to CMOs are not uniformly enforced for IMEs.[1074] While CMOs must comply with stringent reporting and transparency requirements under Title III of the CRM Directive, IMEs are not held to the same standards. Feedback from national authorities in a study requested by the European Commission and published in 2021 revealed that this regulatory disparity allows IMEs to operate with less oversight, creating an uneven competitive landscape.[1075] As a result, IMEs may enjoy advantages that undermine the fair competition and overall fairness of the market for multi-territorial licensing.[1076] Relatedly, voluntary data exchanges between Fair MusE and CISAC further highlighted the differential treatment between CMOs and IMEs. CISAC noted that CMOs are typically subject to stricter regulation, as their activities, obligations, and supervision are often enshrined in national

[1069] In this regard, Fair MusE's partner SIAE critically remarked that not all Italian CMOs and IMEs have published their tariffs on their websites, an illustration being several LEA's tariffs for which it is necessary to send a request of information.
[1070] See Mihail Miller and Stephan Klingner, 'Transparency Reports of European CMOs: Between legislative aspirations and operational reality – comparability impending factors and solution strategies' (2022) 13 JIPITEC 160, 161-163.
[1071] For instance, during Fair MusE's voluntary data exchanges with KODA, a Danish non-profit CMO, it became clear that KODA has voluntarily published an annual report detailing its activities since at least 1989, despite the absence of a legal obligation to do so.
[1072] See Miller and Klingner (n 1070).
[1073] ibid 163.
[1074] European Commission, 'Study on Emerging Issues on Collective Licensing Practices in the Digital Environment – Final Report' (n 1044) 90.
[1075] ibid.
[1076] European Commission, 'Study on Emerging Issues on Collective Licensing Practices in the Digital Environment – Final Report' (n 1044).

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laws.[1077] Conversely, IMEs are not always bound by the same transparency obligations, which raises concerns about fairness and may not adequately protect the rights of creators.

7.3.4.2. Relationships between different music repertoires

As highlighted in the literature, Title III of the CRM Directive establishes rights management standards to foster an efficient and modern digital music licensing system while also facilitating aggregation of diverse repertoires (including niche and less-known musical works) into the scope of multi-territorial licences.[1078] Despite the Directive's good intent, investigations aimed to determine whether the Passport obligations have impacted the availability of music repertoires and the accuracy of rights remuneration data reveal mixed results.

As emphasised above (see §7.3 *supra*) the introduction of a Passport for the pan-European multi-territorial licensing of rights in musical compositions was supposed to substitute the pre-existing system of RRAs. Under this new system, only those CMOs which possess the necessary capabilities and data infrastructures shall be authorised under the law to grant multi-territorial licences to online music exploiters. This inevitably paved the way for the emergence of a dividing line between CMOs that hold the Passport, and other CMOs that do not qualify for it. Although this second category can still rely on other CMOs for the online representation of their music repertoires, on a voluntary or - as *extrema ratio* - mandatory basis, it was predictable that the passported services would have been a prerogative (or even a specialty) offered only by major or best-equipped European CMOs.

Having drawn this dividing line through the establishment of a Passport - while granting all categories of rightholders absolute freedom to withdraw their rights from local CMOs - allowed major music publishers to concentrate them in the hands of their EU-wide licensing hubs. This obviously strengthened the bargaining power and the dynamism of publishers vis-a-vis online exploiters. Yet, the emergence of these mono-repertoire licensing vehicles proves to be at odds with the logic of the Passport itself, making it even more unfair for the average CMOs in Europe.

If, as a result of the implementations of Article 5 of the CRM Directive, major music publishers shall have the freedom to strike global, direct licensing deals with DSPs and social media services, thus circumventing CMOs, why should not they be subject to the same Passport requirements as CMOs, especially as regards transparency and accuracy of music repertoire data? Why are these licensing entities not subject to any supervisory authority's scrutiny to provide multi-territorial licences, as are all CMOs under Title III of the CRM Directive? These are questions that deserve a proper analysis after having provided an overview of the evolution of commercial licensing hubs that emerged in Europe in the past fifteen years (see §7.4).

Certainly, the removal of territorial fragmentation of repertoires is an achievement of the CRM Directive and of the Commission's initiatives that started reforming the domain of online music licensing. However, this success came at a price, namely, by causing an exceptional fragmentation of music repertoires in digital markets. It is worth recalling that, before rightholders' opt-outs from CMOs were allowed systematically, a music streaming service or a social media platform needed one blanket licence per country to operate. This means that, if a service provider operated in the

[1077] See, for example, Portuguese Law No 26/2015, Chapter III, Section I - Rights and Duties (of CMOs).
[1078] See Guibault and van Gompel (n 259) 167.

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whole EU, it would have needed approximately 27 licence agreements.[1079] As things stand, instead, a service provider like Spotify needs hundreds of distinct licences to clear rights in musical compositions included in large recorded music catalogues made available across EU member states. This is an outcome that seems to be more problematic than the previous territorial fragmentation from a multi-stakeholder perspective:

- Firstly, for online music exploiters clearing rights in all music repertoires they make available has become much more difficult and expensive, in terms of both transaction costs and volumes of licensing fees to be paid to rightholders for a sufficiently broad variety of different music repertoires. It goes without saying that - to the detriment of music diversity - an option at the providers' disposal is that of not clearing rights in non-mainstream music repertoires, which might be not only more difficult to identify and clear but also less attractive commercially, given their weak international appeal and the potentially negligible revenue streams they can generate.
- Secondly, national CMOs clearly paid the consequence of music repertoire fragmentation as soon as they stopped being able to license the valuable repertoires withdrawn by major publishers. Initially, this trend concerned mostly the major publishers' rights in the Anglo-American repertoires, for which the withdrawal of mechanical rights was practically easier and legally less questionable. Over the past few years, with the development of rights aggregation solutions, with the cooperation of a few strategic CMOs, aimed at gathering and assembling all the necessary rights in single "packages", the majors' withdrawal extended to their local repertoires, too. This situation clashes with the reality of small independent publishers who cannot license their repertoires directly. They are still represented by local or small CMOs and, as a result, can no longer take advantage of the solidarity principle enshrined in the concept and practice of collective rights management and the global network of CMOs.
- Thirdly, the unstoppable phenomenon of repertoire fragmentation has placed many composers and lyricists as well as small or independent publishers in a worse and more vulnerable situation compared to the time all music repertoires were licensed through a single, mono-territorial transaction. Without the revenues (and contributions) of the major music publishers, CMOs' administration activities have become more expensive at a time these activities require - also for the purpose to comply with the Passport rules - substantial investments in data infrastructures and effective tools to enable their members to exercise their rights to transparency, under both the CRM and the DSM directives. These financial losses have certainly had a negative impact on the ability of the vast majority of European CMOs to invest in technologies and partnerships that would allow their members to have granular information on how their works are used and by whom in fast-growing digital settings.

To conclude: it seems clear that the main beneficiaries of the policy change instigated by the European Commission - with its 2005 Recommendation and the 2008 CISAC antitrust decision - and consolidated with the adoption of the CRM Directive and its Passport system for CMOs, were the major publishers. This outcome clearly contradicts the policy goal of a more competitive licensing

[1079] In countries where two CMOs for performance rights and mechanical rights operate, such as the then EU member UK, there is likely to be an additional agreement.

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market that the Commission itself advocated and claimed to pursue on several occasions. Moreover, despite the efforts made by the CRM Directive drafters to protect cultural diversity, which is a constitutional objective of the EU, the fragmentation and increasing dis-aggregation of music repertoires has had an adverse impact on the inclusion of all music repertoires, including the 'smallest' ones, in digital music licensing deals.[1080]

This outcome evidences another contradiction in the European Commission's positions. On the one hand, the Commission was unquestionably the main decision-maker who triggered and drastically accelerated the process of repertoire fragmentation and of a tight scrutiny of CMOs' governance and licensing activities. On the other hand, as shown in its 2021 assessment of the application of the CRM Directive, the Commission takes the view that, to safeguard cultural diversity, works from smaller EEA Member States, as well as niche content with limited popular appeal, should be equally available across online music services.[1081]

This is a front where the European Parliament has historically been more consistent than the Commission by opposing, at least initially, the attempt to place rightholders and their repertoires in a *competitive* relationship. To confirm this commitment, and to show specific concerns in the world of music streaming services, in January 2024, the Parliament issued an important resolution where it urged the EU to take measures that can ensure broader access to niche and 'local' content as a necessary complement to the most popular or commercial music works.[1082] In this regard, as emphasised even in a press release following this resolution, the European Parliament strongly advocated the need for EU rules that can ensure greater fairness in the music streaming sector.[1083] However, this can only happen when multi-territorial licensing rules are effectively implemented and apply consistently across the Member States - which, as seen above, is not the case. Moreover, as illustrated in §7.4. (see *infra*), the evolution of the European digital music licensing industry shows a consolidation and progressive reduction of the number of commercial music licensing hubs, whose effect on the small- and medium-sized music repertoires needs to be properly analysed.

7.3.5. Freedom of choice for neighbouring rights

While adopting the CRM Directive, EU lawmakers decided *not* to target neighbouring rights in the multi-territorial Passport system with a view that these rights are licensed by record producers on an individual basis. However, as highlighted above (see §7.2.3 above), this is not true for several remuneration rights granted to performers and producers under statutory licensing schemes whose different functioning and arrangements at the national level do not easily allow a cross-border exercise of these rights. In several Member States, performers' CMOs and phonogram producers' collection agencies are actively involved in statutory remuneration schemes applicable to the making

[1080] See TFEU, Art. 167, and, more specifically, CRM Directive, Recital 3 which highlights how CMOs are promoters of cultural diversity by allowing *all* repertoires to access licensing markets.
[1081] See European Commission, 'Study on Emerging Issues on Collective Licensing Practices in the Digital Environment – Final Report' (n 1044) 121.
[1082] See European Parliament, 'Resolution of 17 January 2024 on Cultural Diversity and the Conditions for Authors in the European Music Streaming Market 2023/2054(INI) (2024) OJ C 20/24' Recital 14, available at <https://www.europarl.europa.eu/doceo/document/TA-9-2024-0020_EN.html>.
[1083] Agnese Krivade, 'Music streaming sector: EU must ensure just pay for artists and fair algorithms' Press Release (*europa.eu*, 17 January 2024) <https://www.europarl.europa.eu/news/en/press-room/20240112IPR16773/music-streaming-sector-eu-must-ensure-just-pay-for-artists-and-fair-algorithms>.

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available of phonograms via TV broadcasters' digital ancillary services (like catch-up and online archives, podcasts, etc.) and IPTV operators. Interestingly, these services fall under the scope of application of the revised SatCab Directive, which makes these exploitations subject to the single law of the country of origin of the broadcaster.[1084] This mechanism, in principle, extends the national management of performers' rights to the whole EU.[1085] Moreover, some performers' CMOs currently manage remuneration rights vis-à-vis OCSSPs, although they do so on a strictly national basis, given the territorial scope of these rights.

In the above-mentioned collective rights management scenario, performers' freedom of choice of a CMO on an EU-wide basis is non-existent. This freedom for neighbouring rights remains purely virtual because CMOs which administer and collect these rights' revenues perform tasks and operations that are strongly tied to their national territories. In this field, rightholders' freedom remains limited and is basically two-fold: *(i)* the freedom to choose an IME instead of, or concurrently with, a CMO, as it happened in Italy, which "liberalised" the sector of performers' collective rights management as of 2012; and *(ii)* the freedom to choose multiple CMOs in different Member States. Because reciprocal cooperation is often poor, performers, albeit only the best-informed ones, regularly let their rights be administered by different CMOs in different Member States so that they can gain higher remuneration. This situation fostered to the emergence of professional agents specialised in the collection of neighbouring rights royalties from CMOs in different jurisdictions.

7.4. Evolution of the European digital music licensing landscape

The emergence of supra-national licensing hubs in Europe coincides with the evolution of the EU copyright policy towards multi-territorial licensing of online rights in musical works. It was in part (though not entirely) this policy change which induced the formation of licensing hubs by major publishers, CMOs and joint ventures between both. Despite the persisting relevance of studies published at the dawn of these music market developments,[1086] this situation deserves a proper recap and an update considering the extreme dynamism of digital music licensing in Europe, the still unsettled issues, and its evolution in the past few years, especially after the national implementations of the CRM Directive.

As this section seeks to clarify, these commercial hubs - as an example of *direct*, although aggregated, licensing of single publishers' repertoires - can easily escape the regulatory framework established by the CRM Directive and the national transpositions illustrated in the previous section. Their main competitors, instead, which were mostly alliances of well-established CMOs in southern and northern Europe, did not enjoy this immunity. As we will see, after initial attempts to create pan-European hubs for their respective aggregated repertoires, in which multiple rightholders were

[1084] DSM Directive, Arts. 2(1) and 3.

[1085] According to the CJEU, the country of origin principle contained in the directive applies not only to the licensing but also to infringement proceedings.This conclusion hinders infringement proceedings being undertaken by CMOs if this entails suing a foreign entity abroad or even outside the EU: Case C-290/21 *AKM v Canal+ Luxembourg Sàrl* [2023] EU:C:2023:76.

[1086] Mazziotti, 'New Licensing Models for Online Music Services in the European Union: From Collective to Customized Management' (n 925); Rudolf Leška (ed), *Managing Copyright: Emerging Business Models in the Individual Creation Process* (Wolters Kluwer 2010).

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represented simultaneously, these alliances ceased to exist and operate, or significantly reduced their activities, with a subsequent consolidation of the power of the commercial hubs.

It is worth stressing from the outset that the structural and operational details of the various licensing hubs we will briefly overview here are not always easy to ascertain. That is because *(i)* all the agreements concluded by these commercial actors are, legitimately, subject to confidentiality; and *(ii)* there is a general reluctance of their executives to talk to and be interviewed by researchers such as those involved in the Fair MusE project. Thus, this section seeks to illustrate the role of these exceptionally relevant actors in the digital music markets by providing both an academic and hand-on analysis of their activities, whose details could be investigated through interviews involving representatives of other music licensors - especially Fair MusE's industry partners and CMOs - and stakeholders, including DSPs and social media services.

Firstly, this section identifies and briefly describes the origin, function and scope of operation of the most relevant multi-territorial online music licensing vehicles being active in Europe. Secondly, the section targets the main differences and issues raised by the operation of these entities in light of their nature, types of repertoires, fields of operation, and effects on the music licensing market. Thirdly, the section identifies pros and cons of the EU Commission-induced change of policy for online music licensing with regard to type and quality of music data and metadata and access to such data, showing that fragmentation of repertoires brings data fragmentation with it.

7.4.1. Main hubs: current landscape, origin, character and scope of business activities

This subsection deals with both *(a)* the commercial hubs created directly by music publishers with a selected number of European CMOs and *(b)* the joint ventures of CMOs that aimed at aggregating their multiple national repertoires, strengthening their online representation and the bargaining power of their respective licensors. As we will see, there has been a considerable evolution of music licensing vehicles in the past few years, with the creation and disappearance of various entities which, shortly after the restructuring of online music rights in 2005-2008, represented different repertoires.

7.4.1.1. Current landscape

At the time of writing, there are three major licensing hubs operating in the field of digital rights in musical compositions with a permanent basis in Europe:

1) International Copyright Enterprise (ICE, a joint venture of the English PRS, the Swedish STIM and the German GEMA);
2) MINT (a joint venture between the American CMO Society of European Stage Authors and Composers, SESAC, and the Swiss 'SUISA');
3) The exclusive initiative between SACEM and Universal Music Publishing Group ('UMPG'), named 'DEAL', under which SACEM can grant licences for the repertoire of UMPG which cover the entire EU territory.

Another major licensing hub, the American Mechanical Rights Agency (AMRA), is owned by Kobalt Music Group and operates from the United States, giving rise to a distinct model of vertically

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integrated, technology-driven licensing. Originally established as a mechanical rights agency, AMRA was transformed (following its acquisition by Kobalt Music in the mid-2010s) into a technology-driven licensing hub operating on a global scale. Unlike the other prominent hubs, AMRA does not originate from collaboration among CMOs but from the strategic expansion of a major independent publisher.[1087]

7.4.1.2. Origin of multi-territorial licensing entities: publishers' vehicles v CMOs' joint ventures

It is well known that, because of the 2005 Commission Recommendation on online music licensing of rights in musical compositions, and the 2008 CISAC Decision of the European Commission, the market for digital music rights management went through an intense phase of restructuring. This tumultuous change entailed a significant evolution of the initiatives that followed the controversial reform the Commission initiated without the involvement of the Parliament and of the Council.[1088] As remarked in the literature, the Commission's twofold initiative aimed at promoting not only competition among CMOs, on the grounds of the services they provide to their members and licensees, but also competition that leverages the diverse strengths of the various music repertoires licensed on a pan-European level.[1089]

This historic change gave rise to the emergence of (at least) two different licensing models:

- A first model was implemented by new licensing bodies appointed as agents for their repertoires at the European level by major international music publishers such as EMI Music Publishing and Sony/ATV Music Publishing. Other significant publishers like Universal Music Publishing and Warner Chappell chose a somewhat different variant of this model, which did not involve the establishment of new organisations but instead designated one or more national collecting societies as exclusive or nonexclusive agents for the publishers' repertoires.[1090]
- A second and opposite model of pan-European licensing model emerged from the regional consolidation of music repertoires enabled by strategic alliances formed among CMOs established in Southern and Northern Europe. This model could be viewed as a response and form of resistance to the above-mentioned attempt of major music publishers and a very few European CMOs to withdraw, and licensing individually, their rights in the most commercially valuable music repertoires.[1091]

[1087] For further details on DEAL and AMRA see, respectively, Universal Music, 'Universal Music Publishing Group and SACEM Sign Agreement for Online Mobile Licensing in Europe' (*UNIVERSAL MUSIC*, 28 January 2006) <http://www.universalmusic.com/corporate/news35520>; and Kobalt Music Group, 'AMRA' (company page) <https://www.kobaltmusic.com/amra>

[1088] See Mazziotti, 'New Licensing Models for Online Music Services in the European Union: From Collective to Customized Management' (n 925) 765.

[1089] ibid 770 ss. More specifically, it was the portion of the CISAC decision annulled by the General Court in 2013 that entailed that the collective management of online and mobile music uses should no longer have relied on licences for the global music repertoire that CMOs granted on a country-by-country basis, thereby holding a *de facto* territorial exclusivity.

[1090] ibid 771-774.

[1091] ibid 774-775.

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This subsection introduces the key models of multi-territorial licensing developed by major international music publishers in cooperation with one or more European CMOs.

In this regard, the Centralised European Licensing and Administrative Service ('CELAS') and the Pan-European Central Online Licensing ('PAECOL') were among the most relevant and complex examples of centralised rights management organisations managing single repertoires.[1092] Specially CELAS owned by GEMA (a German CMO) and PRS for Music (a UK-based CMO),[1093] was formed in 2007 in cooperation with EMI Music Publishing as an exclusive supplier of rights to its repertoire – thus effectively excluding other CMOs from its licensing. Similarly, PAECOL[1094] was founded in 2008 by GEMA to manage the digital licensing of Sony/ATV's Anglo-American catalogue. Both CELAS and PAECOL could provide EU-wide licences, and they were both replaced in 2014 by SOLAR,[1095] as a follow up to Sony's acquisition of the EMI catalogue.[1096] SOLAR was a company established by GEMA and PRS on one side, and Sony/ATV on the other.[1097] It was created to manage the administration of pan-European licences for Sony/ATV and EMI Music Publishing's Anglo-American repertoire, including handling digital services across Europe and other territories. Since 2018, its operations have been carried up by the licensing hub ICE - which will be explained below.[1098]

Two other relevant examples of alliances between major music publishers and prominent CMOs are the Pan-European Licensing Initiative for Latin American Repertoire ('PEL') and the Pan-European Digital Licensing ('PEDL') initiative, which have fostered broader business alliances between both stakeholders.[1099] The PEL initiative was focused on managing the Latin American repertoire of Sony Music Publishing, Peer Music, and various Central and South American CMOs. It was administered by the Spanish collecting society SGAE, which held an exclusive mandate to oversee these repertoires for online and mobile use across the EEA. This initiative extended existing rights management agreements, ensuring broader coverage beyond just Spain for digital music distribution in the EEA.[1100] Conversely, the PEDL initiative took a different approach. Under this initiative, the representation and management of musical works published by Warner Chappell was delegated to several European collecting societies wishing to join the PEDL initiative, as long as certain criteria were met. These included: PRS for Music in the UK; STIM in Sweden; SACEM in France; SGAE in

[1092] ibid 771.

[1093] Sebastian Felix Schwemer, 'Emerging Models for Cross-Border Online Licensing' in Thomas Riis (ed), *User Generated Law: Re-Constructing Intellectual Property Knowledge in the Knowledge Society* 82 (Edward Elgar 2016) 82.

[1094] PAECOL GmbH based in Munich, incorporated under the number HB 173217 from 2008-2019.

[1095] SOLAR Music Rights Management Ltd with its seat in London, incorporated under the number 08983482.

[1096] 'SONY/ATV, PRS FOR MUSIC AND GEMA LAUNCH JOINT VENTURE' (*CISAC*, 25 September 2014) <https://members.cisac.org/CisacPortal/consultArticle.do?id=1868>.

[1097] ibid. The SOLAR Music Rights' Articles of incorporation are available at <https://www.celas.eu/docs/SOLAR%20Music%20Rights%20Management%20Ltd%20(Model%20Articles)%20Regulations%202008.pdf>.

[1098] 'Sony/ATV and SOLAR extend their pan-European digital licence administration agreement' *(ICE Services*, 30 October 2018) <https://www.iceservices.com/sony-atv-and-solar-extend-their-pan-european-digital-licence-administration-agreement/>.

[1099] Mazziotti, 'New Licensing Models for Online Music Services in the European Union: From Collective to Customized Management' (n 925) 772. For further details, see Hellenic Foundation for European and Foreign Policy, 'Collecting Societies and Cultural Diversity in the Music Sector' (2009) 31-33.

[1100] ibid.

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Spain; and BUMA-STEMRA in the Netherlands.[1101] This distinction highlights the differing mechanisms by which the respective initiatives sought to facilitate the management of rights and to broaden the geographical coverage of music licensing within the EEA.

A last relevant example of a new licensing initiative appointed as an agent for the repertoire of major international music publishers was the Independent Music Publishers European Licensing ('IMPEL') initiative. IMPEL was launched by PRS for Music in January 2010 to allow independent music publishers to license their mechanical rights across multiple territories through a single agent, PRS for Music, creating a one-stop shop for licensing online and mobile mechanical rights for their Anglo-American repertoire.[1102] IMPEL was the only initiative back then which enabled independent publishers to make use of the EU-wide licensing model recommended by the Commission in 2005. In 2018, IMPEL began restructuring to operate as a standalone rights management organisation, signing a partnership agreement with SACEM. With a new corporate and governance structure, IMPEL was established as an independent collecting society, and it now operates in compliance with the transparency and efficiency standards required by the CRM Directive.[1103] As the only licensing initiative owned and operated by independent music publishers for their own benefit, IMPEL enables its members to consolidate their repertoires and present them collectively to major digital music service providers under a single rights manager. This collective rights management approach not only enhances negotiating power in the digital marketplace but also increases revenue and accelerates the distribution of income while reducing sub-publishing costs.[1104]

Given the previous subsection on alliances between major international music publishers and one or more European CMOs, this subsection now focuses on the strategic alliances that were formed between several CMOs.

The first and most prominent illustration of an attempt to establish a new licensing entity through an alliance of CMOs was ARMONIA GIE.[1105] Seated in Neuilly-sur-Seine, near Paris, ARMONIA was a French-based Economic Interest Grouping of CMOs from Austria (AKM), Portugal (SPAUTORES), Switzerland (SUISA), Belgium (SABAM), Hungary (ARTISJUS), France and Luxembourg (SACEM), Italy (SIAE) and Spain (SGAE) that licensed on-demand and webcasting rights in music for nearly three dozens of territories and administered its members' repertoire.[1106] It also administered, non-exclusively, the repertoire of Universal Music Publishing and of the Society of Composers, Authors and Music Publishers of Canada (SOCAN, a Canadian CMO). According to information obtained through interviews with industry experts and stakeholders, ARMONIA was formally dissolved on 6 December 2022, pursuant to a resolution adopted at a general assembly meeting held on the same date. The entity was officially removed from the Nanterre Commercial Registry on 26 October 2023,

[1101] Mazziotti, 'New Licensing Models for Online Music Services in the European Union: From Collective to Customized Management' (n 925) 773.
[1102] ibid 773-774.
[1103] Anita Awbi, 'IMPEL Relaunches Independent Collecting Society' (*PRS for Music*, 2 January 2018) <https://www.prsformusic.com/m-magazine/news/impel-relaunches-independent-collecting-society>.
[1104] Cf. IMPEL's webpage, 'About Us' section, available at <https://www.impel-music.com/abouts>.
[1105] ARMONIA GIE, incorporated under the SIREN Number 792784571.
[1106] ARMONIA's membership and territorial extent of its licensing evolved during its operations.

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following the completion of the voluntary liquidation process, which became effective on 15 September 2023.[1107]

A second important example of an initiative based on a strong collaboration between Northern European CMOs was the Nordisk Copyright Bureau. Starting as an attempt to become an European licensing hub for both mechanical and online licensing, as well as for the collection and distribution of royalties, the Nordisk Copyright Bureau has, at the time of writing, become a collecting society in its own right.[1108] It seats in Copenhagen and it associates the following Nordic CMOs: KODA (Denmark), STEF (Iceland), STIM (Sweden), Teosto (Finland) and TONO (Norway).[1109] Although it started by licensing the societies' repertoire for digital environments, according to current information, it ceased to do so and now only licences offline mechanical licences and – for some of the societies – synchronisation licences.[1110]

7.4.1.3. Consolidation of today's major licensing hubs

As emphasised in Chart 1 above, nowadays, there are three major operating licensing hubs formed by music publishers and very few CMOs. Their nature, composition, ownership structure and location in Europe deserves our attention.

Firstly, ICE is a joint venture between PRS for Music, GEMA and the Swedish society STIM.[1111] It administers the largest and commercially most valuable music repertoire, consisting of several catalogues belonging to multiple rights aggregators (see *infra*). Its revenues amount to EUR 1 billion distributed in 2023 among rightholders.[1112] ICE has a complex corporate structure: it is not just a company, but a group of three companies, whose internal allocation of responsibilities remains unclear:[1113]

[1107] Pappers Enterprises offers comprehensive details on the history and operations of ARMONIA GIE in their website. For more information, see <https://www.pappers.fr/entreprise/armonia-gie-792784571>.
[1108] Mazziotti, 'New Licensing Models for Online Music Services in the European Union: From Collective to Customized Management' (n 925) 775.
[1109] Since July 2020, the Baltic societies EAÜ (Estonia), AKKA-LAA (Latvia) and LATGA (Lithuania) are not members of the Nordisk Copyright Bureau. They continue cooperation, along with dozens of other CMOs, based on reciprocal agreements between NCB and respective CMOs. For a list of bilateral agreements, see NCB, 'Reciprocal Collection Agreements' (Last update: 01 July 2020), available at <http://www.ncb.dk/pdf/corp-sister-soc-en.pdf>.
[1110] Cf. NCB's webpage, available at <https://www.ncb.dk/>.
[1111] Cf. ICE's webpage, 'About Us' section, available at <https://www.iceservices.com/about/>. Importantly, the transaction through which PRS for Music, STIM and GEMA established ICE's joint venture was duly notified to the European Commission in November 2014 to comply with Art. 8(2) of Council Regulation (EC) 139/2004 on the control of concentrations between undertakings (EC Merger Regulation) [2004] OJ L24/1. After a thorough assessment of the impact of this business venture in the market for online (i.e., mechanical and performing) rights management, the Commission declared this operation compatible with the internal market and the EEA Agreement: Case M.6800-PRSfM/ STIM/ GEMA/ JV.C (2015) 4061 final, Brussels, 16.6.2015.
[1112] 2023 Annual Report of International Copyright Enterprise Services Ltd. available in the British commercial register at <https://find-and-update.company-information.service.gov.uk/company/08983089/filing-history>.
[1113] Cf. ICE's webpage, 'Corporate information' section, available at <https://www.iceservices.com/corporate-resources/>.

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1. International Copyright Enterprise Services Ltd.,[1114] based in London and owned by STIM, PRS for Music and GEMA in equal shares;[1115]
2. ICE International Copyright Enterprise Germany GmbH, based in Berlin and owned by ICE Operations AB;[1116]
3. ICE Operations AB, based in Stockholm[1117] and owned by STIM, PRS for Music and GEMA in equal shares.[1118]

ICE's overall task is to provide administration services to CMOs and to offer multi-territorial licences to online music exploiters, including streaming service providers and social media services. Besides the above-mentioned SOLAR, ICE also serves Anglo-American Rights European Service Agency (Aresa GmbH),[1119] Warner Chappell Publishing[1120] and its former PEDL scheme.[1121] One of ICE's notable achievements was the negotiation of a global deal with Meta, with undisclosed terms or mechanisms of royalties and reporting.[1122] ICE identified in 2023 the improvement of operational performance and the "reduction of backlogs under the multi-territory digital royalty processing service" as a key issue, which reportedly led to "record low" backlogs in 2023.[1123]

A second major licensing hub currently operating is MINT, a joint venture between the US-based IME SESAC and the Swiss SUISA. The latter actually consists of three companies: the first is SESAC Digital Licensing AG, with its seat in Vaduz, Liechtenstein.[1124] Its ownership structure is very obscure, if one considers that its shareholders cannot be identified through public sources, including the Liechtenstein commercial register.[1125] This entity currently provides licences for publishers, CMOs, composers, records labels and performing artists.[1126] The same is true about the second entity,

[1114] Registration No. 08983089.
[1115] 2023 Annual Report of International Copyright Enterprise Services Ltd (n 1112) 29.
[1116] Registered with the Charlottenburg District Court (Amtsgericht Charlottenburg) under the number RB 162426.
[1117] Corporate registration number 556723-5907.
[1118] The information according to the last general meeting's minutes of 2 October 2023, available in the Swedish commercial register.
[1119] The Anglo-American Rights European Service Agency (formally Aresa GmbH; registered with the Munich District Court (Amtsgericht München) under the number HRB 197896) is a wholly-owned subsidiary of GEMA. In short, Aresa administers the mechanical rights in the Anglo-American repertoire of BMG Rights Management for online distribution in Europe. Specifically, these rights are those belonging to members of societies which allowed the withdrawal and transfer of mechanical rights' management: PRS, ASCAP, BMI, SESAC, AMRA, SOCAN, IMRO, SAMRO, APRA or Global Music Rights). More information on Aresa can be found in §4.1.3.4 below. Cf. ARESA MUSIC's webpage, available at <https://www.aresa-music.com/en/>.
[1120] 2023 Annual Report of International Copyright Enterprise Services Ltd (n 1112) 1.
[1121] Stuart Dredge, 'Warner Chappell Music and ICE Expand Their Partnership' (*Music Ally*, 16 April 2024) <https://musically.com/2024/04/16/warner-chappell-music-and-ice-expand-their-partnership/>.
[1122] Dani Deahl, 'Facebook Signs Music Licensing Deal with European Rights Company ICE' *(The Verge*, 21 February 2018) <https://www.theverge.com/2018/2/21/17036088/facebook-music-licensing-royalties-copyright-ice>.
[1123] 2023 Annual Report of International Copyright Enterprise Services Ltd. (n 1112) 1.
[1124] Registration No. FL-0002.550.490-1. Formerly registered in Eschen, Liechtenstein.
[1125] Public access to the Liechtenstein commercial register is available at <https://www.llv.li/en/business/register-cadastre/commercial-register-hr-/public-access-to-the-register>.
[1126] SESAC, 'Licensing Rights' (*SESAC Digital*) <https://www.sesacdigital.li/english.html>.

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namely, SUISA Digital Licensing AG, registered in Triesen, Liechtenstein.[1127] MINT itself refers to SUISA Digital Licensing AG on its website informally as "Mint SUISA Digital Licensing" and this denomination is also widely used in other academic papers. The third and last one is MINT Digital Services AG, registered in Zürich, Switzerland.[1128] While the shareholders are also not publicly disclosed, MINT's template agreement shows that the company is owned (presumably in equal shares) by SESAC Holdings, Inc. and SUISA.[1129] The latter organisation – according to this source – provides administration services to SESAC Digital Licensing AG and SUISA Digital Licensing AG. Currently, MINT provides mechanical and performance licences to around 70 online music services all over the world for several (undisclosed) CMOs, inter alia, SESAC, SUISA, SOZA, ACUM, AKKA/LAA, Autodia, EAU, GCA, LATGA, Armauthor, AlbAutor, several IMEs, and publishers such as Warner Chappell.

Finally, a third major alliance that must be mentioned as operating today in the European digital music licensing market stems from the agreements between Universal Music Publishing and SACEM, according to which this French collecting society is the exclusive agent for the major publisher's repertoire. Having started in 2006 and re-launched in 2013, Universal Music Publishing and SACEM created a pan-European joint venture initiative with the acronym DEAL (Direct European Administration and Licensing). This initiative provides a pan-European licensing one-stop for both Universal Music Publishing and SACEM's repertoires.[1130] Several agreements were signed under this initiative, including an agreement for YouTube in 2013 and again in 2017,[1131] allowing multi-territorial licences for all types of online media.[1132] In this regard, in 2016, an agreement was signed between SACEM, UMPI and SoundCloud. This agreement enables the inclusion of SACEM's repertoire and UMPI's Anglo-American catalogue on SoundCloud's platform. The pan-European agreement, concluded before the launch of SoundCloud Go in the UK, Ireland, and France, was jointly signed by SACEM and UMPI under their DEAL initiative, ensuring that authors, composers, and publishers are fairly remunerated for the use of their works on SoundCloud.[1133]

Finally, other hubs have emerged as a consequence of the early 2000s restructuring of the market for digital music rights. One particularly relevant example is MERLIN,[1134] a digital rights agency

[1127] Registration No. FL-0002.551.444-2.
[1128] Registration No. CHE-173.015.914.
[1129] SESAC Digital Licensing, AG Publisher Affiliation Agreement for Online Licensing Representation in Territories outside the United States. Article II Letter J, available at <https://www.sesacdigital.li/dl/SESAC_Standardnutzungsvertrag_EN_2022-01-31.pdf>.
[1130] Murray Stassen, 'Sacem and Universal Music Publishing International Ink Deal with SoundCloud' (*Music Week,* 2 June 2016), <https://www.musicweek.com/publishing/read/sacem-and-universal-music-publishing-international-ink-deal-with-soundcloud/064941>.
[1131] SACEM, Conference on Collective Rights Management in South-East Asia (*IPKey*, 2 December 2021) - Presentation slides available at <https://ipkey.eu/sites/default/files/ipkey-docs/2021/IPKEY-SEA_dec-2021_Habib-Achour_Management-of-Copyright-and-Related-Rights-in-the-Field-of-Music.pdf>.
[1132] Music Business Worldwide, 'Sacem and UMPG Sign Global YouTube Deal' (*Music Business Worldwide*, 3 April 2013) <https://www.musicbusinessworldwide.com/sacem-umpg-sign-global-youtube-deal/>.
[1133] Murray Stassen, 'SACEM and Universal Music Publishing International Ink Deal with SoundCloud' (*Music Week*, 2 June 2016) <https://www.musicweek.com/publishing/read/sacem-and-universal-music-publishing-international-ink-deal-with-soundcloud/064941>.
[1134] MUSIC AND ENTERTAINMENT RIGHTS LICENSING INDEPENDENT NETWORK LTD is registered in Dublin, Ireland under the No. FC037131.

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licensing recorded music rights for all global DSPs together with independent music publishers associated with the London-based CMO IMPEL.

Besides such licensing hubs, some publishers authorised certain CMOs to directly administer their repertoire, such as GEMA being authorised by Bertelsmann Music Group ('BMG') to provide pan-European licences.[1135] To this extent, the Anglo-American Rights European Service Agency (ARESA GmbH - referenced *supra*) was created in 2012 as a subsidiary of GEMA, which solely represents the mechanical rights of the Anglo-American repertoire of BMG Rights Management.[1136]

7.4.2. Main issues concerning music licensing hubs and their competition with other licensing entities

The emergence of licensing hubs such as ICE, MINT, and SACEM/Universal (DEAL) represents a significant shift in the landscape of music rights management. Traditionally, CMOs operating within national borders played the central role in managing rights and licensing music, ensuring that rightholders received appropriate remuneration for the use of their works. Especially after the adoption of the CRM Directive and its national transpositions, these organisations function within a system that is characterised by a high degree of regulatory oversight, transparency, and accountability. The CRM Directive, which sought to harmonise the rules applicable to the management of collective rights in Europe, established clear requirements for transparency, corporate governance, and scrutiny over CMOs' activities. By making these measures enforceable at the national level, the directive aimed to strike a fair balance between the needs of creators, the CMOs, and users of musical works, ensuring that no single group was disproportionately disadvantaged.

The rise of commercial licensing hubs certainly raises questions about whether this balance has been preserved or the inequality between major and independent repertoires has been exacerbated. These dominant hubs, created through partnerships between major music publishers and a few CMOs, operate in a manner that is at odds with the non-profit nature of traditional CMOs. While European CMOs are mandated to adhere to strict transparency obligations, the operations of the major hubs are more opaque despite the subjection of their affiliated CMOs to transparency rules under their countries of establishment. Users of music services often face difficulty in determining the scope of the repertoires these hubs control, as the ownership and administration of rights are not easily discernible through public sources. This lack of *direct* transparency is particularly troubling given that these hubs are now key players in the global digital music licensing market, controlling significant portions of musical repertoires and providing back office and data processing services to a fast-growing number of CMOs.

Moreover, the hubs' transactional opacity further complicates the already complex issue of rights fragmentation. In the past, the separation between mechanical rights and public performance rights was more manageable under mono-territorial licensing schemes, where one licence could cover an entire repertoire. Today, the involvement of multiple rightholders —each potentially represented by

[1135] ICE, 'DE: BMG extends digital licensing pact with GEMA to 48 more territories' (25 October 2018) <https://www.iceservices.com/bmg-extends-digital-licensing-pact-with-gema-to-48-more-territories/>.
[1136] See GEMA's website where it lists its subsidiary companies, available at <https://www.gema.de/en/about-gema/organisation/subsidiary-companies>.

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different licensing entities— has worsened this issue by dramatically increasing the number of transactions every online exploiter needs to conclude to provide its music services legitimately. This marks a significant departure from the simpler, more transparent mono-territorial licensing model that previously prevailed.

The role of the CRM Directive appears paradoxical in this context. Although it was designed to increase transparency and efficiency in collective rights management, its implementation inadvertently facilitated the consolidation of licensing powers into fewer hands. By allowing music publishers to withdraw their rights from national CMOs and centralising them within pan-European hubs, the Directive created a new type of licensing entity that, while commercial in nature, is subject to less stringent regulatory oversight than the CMOs themselves. As a result, these hubs operate in a legal grey area, since they are not directly bound by the same obligations to ensure transparency, provide pre-published tariffs, or guarantee licences to all users. Consequently, DSPs often face arbitrary refusals for licences or non-negotiable terms, a practice that would be prohibited under the regulatory framework governing traditional CMOs.

Furthermore, the relationship between these hubs and CMOs poses additional challenges. While rightholders are typically members of CMOs and can exercise some level of control over these organisations through their governance structures, they have no such power over the licensing hubs (if not indirectly, through the affiliated CMOs). This creates a disconnect between rightholders and the entities that now control the bulk of the licensing market. Although these hubs licence CMOs' repertoires, rightholders have little influence over how these hubs operate, including the terms of the deals they strike with online exploiters. This lack of control is compounded by the fact that some CMOs do not hold a majority share in the hubs, further diluting the influence of the rights holders over these critical licensing decisions. This situation undermines the principle of neutral treatment of all rightholders' repertoires, raising concerns about conflicts of interest, especially when a hub is partly owned by a music publisher that stands to benefit from preferential treatment.

The economic model of these licensing hubs also stands in stark contrast to the non-profit mission of CMOs. CMOs are required to reinvest a portion of their revenues into cultural initiatives, including hardship funds, educational programs, and social services for creators. Licensing hubs, by contrast, are profit-driven entities, and the proceeds they generate are not subject to the same cultural obligations. This introduces a level of inequity into the system, as the profits from the licensing of an entire CMO's repertoire may disproportionately benefit a commercial publisher that contributes only a small fraction to that repertoire. Moreover, because the hubs are not obliged to publish their tariffs, they are not required to offer licences to all users on an equitable basis, further exacerbating the potential for discrimination against smaller DSPs or CMOs. The response of several industry experts and of some of the CMOs involved in these companies is that this is not necessarily the worst-case scenario for rightholders and online exploiters, especially if these rights and data hubs operate transparently. The aggregation of rights in multiple musical repertoires and their inclusion in large and exceptionally reliable databases can be mutually beneficial: CMOs gain the necessary bargaining power to negotiate with the largest online services while these services benefit from interacting with a very few entities to obtain an authorisation for multiple repertoires.

Another significant issue is the cross-border operations of these hubs. Many of them are based outside the EU (e.g., in the UK or Switzerland), complicating the enforcement of EU regulations. This geographical displacement raises legal questions about the authority of national CMOs to license

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works abroad, as well as about the ability to effectively police unauthorised uses or late payments from abroad. The mono-territorial system, with its clearer legal jurisdiction, allowed for more effective enforcement of rights, whereas the current system fragments enforcement responsibilities, making it easier for piracy or unauthorised uses to slip through the cracks.

As evidenced even more in depth in Chapter 8, the complex flow of data from music rightholders to CMOs and online exploiters requires sophisticated IT infrastructures that are very expensive to build and maintain. However, not all CMOs or IMEs have the resources and capacity to manage this data effectively, leading to inequalities in the system. Larger CMOs and licensing entities with better data management systems are better equipped to negotiate favourable deals with DSPs, leaving smaller CMOs at a disadvantage. On the one hand, the exceptional data management and processing capacities of the major music licensing hubs broaden the technological gap among CMOs and other licensing entities, reinforcing the dominance of a few powerful companies and limiting the ability of smaller organisations to compete. On the other hand, the fact that these companies have created common and strongly integrated data processing systems is, potentially, a technical and commercial advantage for the whole music publishing sector since it generates economies of scale through a mutualisation of the CMOs' and music publishers' IT infrastructures while reducing the number of interfaces their licensees need to manage on a technical level.

The main questions to address in the future eventually consist in a cost-benefit analysis. The technical and economic advantages entailed by the consolidation of these commercial entities and their licensing services should be considered in light of the broad structural imbalance they caused in the market for music rights and the legal and market challenges that disproportionately affect smaller CMOs and rights holders. The lack of transparency, direct accountability, and equitable access to licenses not only undermines the objectives of the CRM Directive but also threatens to erode the trust of rightholders in a system that was meant to protect their interests.

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8. Data infrastructures and transparency in today's music licensing practices

8.1. Introducing the music data and the need for transparency

Chapter 7 has just illustrated how significant developments in the domain of collective management of rights in musical compositions have resulted in the limited interoperability of the data infrastructures built, maintained and developed by different types of rights managers: CMOs, IMEs and the licensing hubs created by music publishers and some CMOs. Despite the efforts being made at international level by institutions such as WIPO and CISAC, music rights licensors and online exploiters still cannot rely on standardised or fully interoperable data and metadata sets, -which would foster greater transparency and enable streamlined flows of data enhancing clarity in the remuneration of music right-holders. Persistent data faults—attributable to the quality of reports right-holders receive from users, delayed work registrations by composers and publishers, and misalignment between the datasets of the recording and publishing sectors—continue to cause late distributions and lost royalties. It is, once again, only the major publishers and their licensing hubs who have the capacity to object to wrong distribution, for instance, by hiring monitoring services, such as those of Pex,[1137] BMAT,[1138] or Fair Phonic,[1139] to monitor the use of their works.

This final chapter argues that 'fairness' in the digital music market is unattainable without greater data transparency across both ends of the spectrum: *(i)* online music exploiters, who control digital music services or social media platforms and are required under EU law to provide usage data reports to right-holders and monitor, to varying degrees, online music exploitations—thereby informing right-holders about their commercial value; and *(ii)* the music industry as a whole, which is characterized by a multiplicity of rights and right-holders across the publishing and recording sectors, with data infrastructures developed, stored, and managed by different organizations and corporate joint ventures.

As it has been emphasised in the previous sections, individual and collective licensing are two very different - yet structurally intertwined and complementary - ways of exploiting music, even more so in digital settings. Thus, §8.2 firstly illustrates the existing data infrastructures available in Europe for each layer of music licensing, in particular, the publishing and recording rights management markets. To do so, this section provides an analysis of CISAC's and CMOs' efforts to organise their music repertoire databases and shows how the development of mono-repertoire digital licensing created proprietary data silos and hubs that contradict the logic and rationale of the, albeit failed, Global

[1137] Pex is a company that provides AI-powered technology for real-time content identification and rights management, allowing platforms and rights holders to track audio and video content online. See Pex, official website <https://pex.com/>.
[1138] Barcelona Music and Audio Technologies ('BMAT') provides data monitoring services to record labels, to facilitate the management and the tracking of usage and royalties, and to optimise these distribution of revenue. See BMAT, official website <https://www.bmat.com/record-labels/>.
[1139] Similarly to Pex, Fairphonic offers AI-driven copyright recognition technology for digital rights management and monitoring. See Fairphonic, official website <https://fairphonic.com/>.

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Repertoire Database (GRD) project. It continues by showing the centrality of record labels' content identifiers and reporting formats, such as Digital Data Exchange (DDEX), currently used for the alignment of rights clearance structures regarding publishing rights and recording rights. This section ends with a quick overview of the international network that performers' organisations created to exchange recording-related data being used for the allocation of broadcasting rights, private copying levies, single equitable remuneration under the Rental and Lending Rights Directive (2006/115/EC) and, wherever applicable, online remuneration rights. §8.3 explains how different kinds of online exploiters organise their service-related music metadata, and critically reviews their different approaches to music content identification and the different incentives these services had, under the law, to rely on the main music industry's content identifiers and data infrastructures. In particular, this section emphasises that, until the adoption of Article 17 of the DSM Directive, social media platforms had no incentive to build content identification systems and data infrastructures that helped music rightholders monitor the exploitation of their works. Following this, §8.4 investigates why the level of mutual data transparency and the reliance on identical or compatible data sets by stakeholders placed at the two ends of the digital music markets' spectrum is still relatively low. This Section identifies the existing transparency obligations under Directive 2011/77 (annual supplementary remuneration for performers), the 2014 CRM Directive (for both rightholders and commercial users) and the 2019 DSM Directive (within the music industry, primarily) and seeks to understand why these provisions are not being effective. While openly discussing the need for greater transparency towards rightholders by online music exploiters, this Section provides a critical assessment of whether the music industry should rely on proprietary data at all. Finally, §8.5 considers the idea that music repertoire information is a *critical infrastructure* for an industry where licensing presupposes the clearance of multiple rights belonging to thousands of rightholders. In doing so, this Section discusses whether this infrastructure shall become a common public good, available to everyone, entering potentially the European open data framework. It also introduces the discussion on which data, specifically, should be open, and which instead could remain proprietary *or* confidential, shared only under specific agreements between rightholders, distributors and online platforms.

8.2. Music data infrastructures for copyright and neighbouring rights

8.2.1. Authors' rights: the role of CMOs

CMOs have always maintained their own national databases containing data related to works of authors associated with their respective CMO. In a system that was (and still is, at least for the licensing of offline exploitations) fragmented along national borders, authors and related data came mostly from the CMO's country of establishment. This data has been exchanged with "sister" societies based on RRAs. For a long time, a simple 'composer-author-publisher' structure, combined with song titles, was sufficient to identify usage and trace remuneration throughout the offline system. However, the maintenance and identification of data needed to be significantly restructured with the advent of online distribution of music - and the subsequent higher number of new works being created and distributed. The entry of new categories of actors and stakeholders, such as social media platforms, streaming service providers, content aggregators, licensing hubs and IMEs, added further levels of complexity to this challenging data exchange.

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Although CMOs remain standard-setting institutions in music data management, the data ecosystem has become extraordinarily complex with the involvement of additional parties. The evolution of divergent data systems, developed independently by different stakeholders, has exacerbated pre-existing data silos, expanding both their scope and scale. Consequently, resolving issues related to conflicting repertoire information and fragmented data infrastructures has long been a priority for EU institutions, including the European Commission, as well as multiple stakeholders.

Historically, numerous efforts have been made to address the lack of interoperability in copyright data across Europe. The following subsections examine these initiatives, particularly in relation to publishers' and composers' rights, highlighting the incentives that led CMOs to invest in data processing capabilities and develop interoperable infrastructures. As we will see, following the collapse of the multi-stakeholder GRD in 2014, WIPO and CISAC became involved in initiatives such as WIPO Connect and 'Cis-Net.' These initiatives currently support the collective management of copyright and related rights, facilitating data sharing beyond the confines of large proprietary data hubs like ICE and URights. Additionally, CMOs, major and independent music publishers, and hubs such as ICE and MINT are now working to interconnect their datasets through a dedicated working group known as 'TOWGE.'

8.2.1.1. Failed attempts at improving the music data infrastructure

Among the industry-led attempts aimed at improving the quality of copyright metadata across different sectors, the Linked Content Coalition (LCC) deserves a special mention, at least for the originality and innovative character of its structure and goals. The LCC was a global consortium of standards bodies and registries, aiming to develop a standardised framework for rights management across several media sectors.[1140] The LCC's goal was to create a cross-industry standards infrastructure to facilitate the flow of machine-interpretable rights data and metadata.[1141] However, in 2014, the project transitioned into a not-for-profit UK-registered company - Linked Content Coalition Ltd - which was ultimately dissolved in 2020.[1142]

More important, because of its exclusive focus on the music industry, was the GRD project. The GRD was a multi-stakeholder initiative, involving music publishers, CMOs, DSPs and other industry actors. In a nutshell, it was an attempt to establish a central database documenting owners, beneficiaries, and administrators of lyrical and musical copyrights and helping licensees identify song or musical work controllers.[1143] This project started in 2008, when EU Commissioner Neelie Kroes

[1140] Todd A Carpenter, 'Linked Content Coalition Framework for Rights Management' (2014) 26(4) Information Standards Quarterly 13. The founding LLC members included EDItEUR, the International DOI Foundation, the International Press Telecommunications Council (IPTC), MovieLabs, the National Information Standards Organization (NISO), and the Picture Licensing Universal System (PLUS) Coalition. See Todd A Carpenter, 'Linked Content Coalition' presentation at NISO/BISG Forum: The Changing Standards Landscape (27 June 2014) available at <https://pt.slideshare.net/slideshow/14-0627-carpenter-lcc-overview-2/36434461>.

[1141] Rightscom, 'LCC project' <https://rightscom.com/currentprojects/lcc/>.

[1142] For further details on the company Linked Content Coalition Ltd, see 'The Linked Content Coalition Limited: Company No. 08966763' (Companies House, Gov.UK), available in the British commercial register at <https://find-and-update.company-information.service.gov.uk/company/08966763>.

[1143] Chris Cooke, 'PRS confirms Global Repertoire Database "cannot" move forward, pledges to find "alternative ways' (*Complete Music Update*, 10 July 2014) <https://web.archive.org/web/20230519135114/https://www.completemusicupdate.com/article/prs-confirms-global-repertoire-database-cannot-move-forward-pledges-to-find-alternative-ways/>; Klobučník (n 928) 351.

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created the Global Database Repertoire Working Group ('GRD WG').[1144] The GRD was joined by major stakeholders such as Universal, EMI Music Publishing, PRS for Music (UK), STIM (Sweden), SACEM (France), as well as Apple, Nokia and Amazon.[1145] However, whilst an admirable effort, the GRD ultimately failed in 2014.[1146] Although the concept of the GRD appeared straightforward and necessary, the whole project proved too complex to implement. This was partly due to the technical complexity of integrating such vast global rights data, and partly due to the divergent interests of the stakeholders, particularly over issues of governance, control, and data ownership.[1147] From a technical point of view, integrating data from numerous sources, each with varying formats, standards, and quality levels, was extremely complex. In the absence of industry uniform metadata standards, resolving discrepancies in data (e.g., conflicting ownership claims) proved to be a labour-intensive and contentious process which added to the delays and costs. As far as governance was concerned, the participants did not agree on who should govern or operate the GRD and how it should be funded. Concerns over neutrality and potential monopolistic control by certain players inevitably hindered this collaboration, with the emergence of basic trust deficits, particularly between CMOs and online music exploiters. Some CMOs feared losing relevance or control over their territorial repertoire data, while publishers and online music exploiters had different expectations about how data should be handled and monetised.[1148] All these issues exacerbated the governance challenges, as the project participants were reluctant to share or pool their data.[1149]

Having emerged during a period of rapid digital transformation, with music streaming services like Spotify, Apple Music and others becoming dominant players, the GRD's development timeline was outstripped by the pace of digital innovation. Some stakeholders began to question whether the GRD was still necessary, given the rise of alternative databases and initiatives, such as the ICE Copyright Database[1150] (a joint venture between PRS for Music, STIM and GEMA aiming to establish a music

[1144] Klementina Milosic, 'GRD's Failure' (*Berklee College of Music - Music Business Journal*, 08 February 2015) <http://www.thembj.org/2015/08/grds-failure/>.
[1145] ibid. For further details on the key stakeholders originally involved in the GRD Working Group, see Mark Isherwood, 'Global Repertoire Database' (2011), presented at WIPO, Enabling Creativity in the Digital Environment: Copyright Documentation and Infrastructure, WIPO Meeting wipo_cr_doc_ge_11, 13-14 October 2011, Geneva, available at <https://www.wipo.int/export/sites/www/meetings/en/2011/wipo_cr_doc_ge_11/pdf/isherwood_grd.pdf>.
[1146] Jillian J Dahrooge, 'The Real Slim Shady: How Spotify and Other Music Streaming Services are Taking Advantage of the Loopholes Within the Music Modernization Act' (2021) 21 Journal of High Technology Law 199, 222-223. For further details, see Cooke (n 1143).
[1147] ibid.
[1148] The European music industry thus endured a significant financial loss, totalling $13.7 million, as the initial contributions from CMOs and publishers never materialised.The financial structure of the GRD consisted of two main components: initial set-up costs and ongoing operating costs. The initial costs, estimated between €23 million and €32 million, were primarily covered by the collecting societies, as the main initiators of the project, through contributions proportional to their size: see Milosic (n 1144).
[1149] Paul Resnikoff, 'Global Repertoire Database Declared a Global Failure…' (*Digital Music News*, 10 July 2014) <https://www.digitalmusicnews.com/2014/07/10/global-repertoire-database-declared-global-failure/>.
[1150] Industry demand for transparent, authoritative, multi-rights and multi-territory copyright data in a fragmented data landscape led to the creation of ICE's Cube platform. Cube provides transparency to customers by showing how data is processed under common authority rules. It engages rights holders in resolving data conflicts and leverages cloud-based automation, scalability and flexibility to improve copyright and online processing performance, ensuring efficient and accurate rights management. See ICE, 'Cube: Our New Copyright Platform' <https://www.iceservices.com/services/copyright/cube-our-new-copyright-platform/>.

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copyright licensing hub)[1151] or URights (a SACEM-IBM global platform to manage online usage of music works).[1152] Certainly, the idea of a centralised, authoritative database remains attractive. However, the above-mentioned deep-rooted issues of trust, governance, and resource allocation suggest that voluntary collaboration can be insufficient to overcome entrenched industry fragmentation. As in the case of the Mechanical Licensing Collective ('MLC') in the US (see *infra* § 8.2.1.4), a regulatory mandate for participation in the development and maintenance of a music repertoire database is a solution to consider also in the EU.

8.2.1.2. WIPO Connect

To support the operations of CMOs—particularly newly established ones—and to facilitate the management and exchange of their collected data, WIPO launched 'WIPO Connect' in 2015.[1153] This IT solution, developed by WIPO, aids in the collective management of copyright and related rights and comprises two main components: a local module ('WIPO Connect Local') and a central module ('WIPO Connect Shared').[1154]

WIPO Connect Local is a web application, hosted either locally or in the cloud, designed to assist CMOs in their daily operations. It supports functions such as registering rights holders, managing documentation and licensing agreements, identifying and matching works in usage reports, and calculating royalty distributions based on those reports.[1155] Meanwhile, WIPO Connect Shared provides cloud-based synchronisation with WIPO Connect Local installations, enabling the seamless exchange of data with industry databases, the automation of industry identifier assignments, and the dissemination of local repertoires to foreign CMOs. This promotes data interoperability and streamlines international collaboration.[1156]

8.2.1.3. CIS-Net

CISAC (cf. §7.2) operates the CIS-Net exchange, a network of databases containing over 100 million musical works.[1157] CIS-Net is not an authoritative database containing centralised data by itself. Rather, it is a decentralised network of individual CMOs' databases, which are interconnected to form a repository of musical works information.[1158] Its goal is to facilitate the exchange of rights and metadata information between CMOs and IMEs around the world, allowing its members to access

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[1151] 'ICE' (PRS for Music) <https://www.prsformusic.com/what-we-do/who-we-work-with/ice>; cf. ICE's webpage, 'About Us' section, available at <https://www.iceservices.com/about/>. For a detailed discussion of ICE, see § 7.4.1.3.1 of this Study.

[1152] 'URights, an authors' rights management platform for online music' (*SACEM*, 28 November 2018) <https://societe.sacem.fr/en/news/our-society/urights-authors-rights-management-platform-online-music>.

[1153] WIPO Connect was firstly created in 2015 to succeed the WIPO Copyright Information System (WIPOCos), a 2010 rights management software. See 'WIPO Connect: Internal Oversight Division Pre-Evaluation Review' (WIPO, 12 July 2024) <https://www.wipo.int/export/sites/www/about-wipo/en/docs/oversight/evaluation-report-wipo-connect.pdf>.

[1154] WIPO, 'WIPO Connect, Identifiers and Metadata' (Webinar, 15 March 2023) WIPO/WEBINAR/CR/2023/4, available at <https://www.wipo.int/meetings/en/details.jsp?meeting_id=75868>.

[1155] WIPO, 'WIPO Connect', <https://www.wipo.int/global_ip/en/activities/wipo_connect/index.html>.

[1156] ibid.

[1157] Cf. CISAC 'CIS-Net', <https://www.cisac.org/services/information-services/cis-net>.

[1158] ibid.

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the data about musical works and the related rightholders through a web-based search engine that enables real-time searches.[1159] The CIS-Net network is composed of local nodes managed by individual societies, regional nodes developed by groups of societies (e.g., LatinNet), and the Works Information Database ('WID') Center - CISAC's central database of musical works for performing and mechanical rights.[1160] CIS-Net's design ensures that even CMOs with limited technical resources can participate, to achieve real and comprehensive data sharing.

A centralised element of CIS-Net's database is the ISWC number, for which CISAC acts as registration authority. As explained already, this number is typically, though not necessarily, assigned to every musical work registration, and it plays a pivotal role in the operations of each CMO. Consequently, CISAC mandates all its members to adopt the system. As of now, CIS-Net benefits from the contributions of 112 CMOs for domestic repertoires and 62 for international repertoires, facilitating over 9.7 million unique searches in 2019.[1161] One of CIS-Net's key advantages lies in its decentralised and democratic structure, where no single entity owns a global authoritative database. Instead, each CMO maintains its own database, which is shared with others on the CIS-Net platform. This approach addresses some of the aforementioned shortcomings of the GRD.[1162] According to CMOs' representatives interviewed for the Fair MusE project, CIS-Net provides a level of information that is suitable to exchange and share music repertoire data between CMOs, IMEs, and third parties, such as online music exploiters and music publishers. Although CIS-Net is accessible only by its affiliated participants, CISAC has built and made available several interfaces for data exchange with music publishers and DSPs in order to enable them to cross-reference their respective databases with identifiers like ISWCs and IPIs.

In conclusion, CMOs claim that building and operating a single, centralised "master" repertoire database - as the GRD would have been - would be not only extremely costly, but also unfair and unnecessary to carry out their operations and the related data processing activities. CMOs essentially claim that a single database would eventually be advantageous only for the most commercially valuable repertoires. That is because the financial investments and costs to process huge volumes of music data would inevitably be attributable to the exploitations of large and successful music repertoires, with a negative impact on less prominent and less resourceful authors and publishers.

8.2.1.4. The Mechanical Licensing Collective and its musical works database under the 2018 US Music Modernisation Act

An exceptionally relevant legislative attempt to intervene in the digital music sector in order to create a better alignment between music rights, the musical works, the sound recordings and the related data happened in the US under the Music Modernisation Act ('MMA'), enacted in the US in 2018.[1163]

[1159] 'CISAC Announces Launch of CIS Net Using FastTrack Technology' (*BMI News*, 28 January 2004) <https://www.bmi.com/news/entry/20040129_cisac_announces_launch_of_cis_net_using_fasttrack_technology>. The online interface can be accessed through <https://cisnet.cisac.org/>.

[1160] CISAC's webpage, 'CIS-Net' section (n 1157).

[1161] ibid.

[1162] Milosic (n 1144).

[1163] The MMA was a landmark legislative effort aimed at modernising copyright law to better address the challenges of the digital age. Its key components include: 1. Title I (Musical Works Modernisation Act), which established the MLC and the blanket licensing system for digital mechanical rights; 2. Title II (Classics

The MMA established the MLC which functions as a nonprofit organisation having the institutional task to modernise and streamline the licensing and royalty payment process for mechanical rights in musical works. The MLC is designated by the US Copyright Office to oversee the new blanket licensing system for digital mechanical rights. These rights pertain to reproductions of musical works made through streaming services. Interviews conducted for the Fair MusE project showed that the establishment of the MLC was a response to both the growing concerns about the inefficiency of licensing systems for music streaming services,[1164] and the several class actions that arose in 2015 and 2016[1165] against streaming service providers due to unpaid royalties to musicians.[1166] Some of these significant unpaid royalties resulted from incomplete or inaccurate ownership data by the Harry Fox Agency,[1167] seemingly after its sale to private equity.[1168]

Building and maintaining a comprehensive musical works database is one of the MLC's core responsibilities. The database built by the MLC is a public, comprehensive, and transparent musical works database that aims to: *(i)* serve as a centralised repository for ownership and rights information on musical works; *(ii)* link musical works to their associated sound recordings and rights holders; and *(iii)* ensure that composers and publishers are accurately and efficiently remunerated.[1169] The publicly accessible character of this database allows stakeholders across the music industry to verify

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Protection and Access Act), which extended federal copyright protection to pre-1972 sound recordings, providing them with royalty rights; 3. Title III (Allocation for Music Producers Act), which created a mechanism for music producers, mixers, and sound engineers to receive royalties from digital performances of sound recordings.

[1164] Interview with Rachel E Landy, formerly Government Affairs and Public Policy - YouTube (Online interview with Fair MusE conducted on Microsoft Teams, 28 November 2023).

[1165] Interview with Allen Bargfrede, formerly Chief Business Officer at Verifi Media (Online Interview with Fair MusE conducted on Microsoft Teams, 9 November 2023).

[1166] Interview with Rachel E Landy (n 1164). One example of these class actions include Spotify being sued for $150 million in December 2015, which was then settled in 2017 for $43.4 million. See Forbes, 'Spotify Settles $43 Million Class Action Copyright Lawsuit' (1 June 2017) <https://www.forbes.com/sites/legalentertainment/2017/06/01/spotify-settles-43-million-class-action-copyright-lawsuit/>.

[1167] Interview with Rachel E Landy (n 1164).

[1168] Established in 1927, The Harry Fox Agency is a mechanical licensing organisation that is responsible for licensing and collecting mechanical royalties on behalf of music publishers in the US. Since 2015, the Harry Fox Agency has been owned by SESAC, a US based for-profit Performing Rights Organisation. Following the introduction of the MMA in 2018, the Harry Fox Agency became a vendor of the MLC and therefore shares its musical works data and assists with matching and royalty processing efforts. To date, the Harry Fox Agency represents nearly 50,000 affiliated publishers and licences more than 2,500 record labels. See Harry Fox Agency website, <https://www.harryfox.com/history>.

[1169] Mechanical Licensing Collective, 'Data Programs - Bulk Data Access Subscription' <https://www.themlc.com/data-programs-all>. The MMA provides this key responsibility as it states "the mechanical licensing collective shall make the [musical works] database available in bulk, machine readable format, through a widely available software application." The MLC musical works database is called the 'Bulk Data Access Subscription' which is freely accessible by DSPs, music publishers, CMOs, record labels, metadata companies, and others in the industry. In November 2019, the MLC started working with DDEX, with the participation of 30 other organisations, on the development of a technical standard to support the bulk data format requirements - the established standard is called 'Bulk Work and Recordings Metadata' (BWARM) which the MLC musical works database follows. To make its data machine-accessible, the MLC has created a Public Search API (Application Programming Interface) that allows computer programs to access its database. The Public Search API enables targeted searches of musical works using various criteria, such as title, writers, and publishers, and provides detailed information about musical works stored in the MLC's database.

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rights ownership and facilitate more accurate royalty payments. Interestingly, the MMA requires streaming service providers to collectively finance the MLC's operations, including the creation and maintenance of its database, licensing activities, and royalty distributions.[1170] This funding model reflects the understanding that DSPs benefit from a centralised system that reduces the complexity and liability associated with licensing as well as the removal of potential liability for non-payment of mechanical royalties.

While primarily serving composers and music publishers, on the one hand, and digital music providers, on the other hand, the MLC and its database both offer a transparent and authoritative source of information about musical works and their rights holders to the broader music industry. From a 'fair remuneration' perspective, the MLC aims to ensure that songwriters and other rights holders are compensated appropriately for the use of their works in the streaming industry.[1171] The MLC centralises musical works' data and processes, seeking to address long standing inefficiencies in royalty payments stemming from data mismatches and other inconsistencies in the way the use of musical works is reported to their respective rightholders. In terms of industry collaboration, the MMA stemmed from extensive negotiations between music rightholders, DSPs, and the US policy and law makers, with near unanimous support from all sectors of the music industry.[1172]

The creation of this scheme for the licensing of mechanical rights in musical compositions was certainly a significant step toward adapting copyright law to the realities and challenges of the digital music economy. However, this solution is limited to the US music market and territory, as the MLC's scheme is deeply entrenched in the US music licensing and collective rights management tradition. As highlighted above, the urge for the creation of this licensing scheme came from the problems DSPs encountered in clearing the rights in all musical compositions that were made available through their services and the ensuing liabilities they incurred.[1173] Moreover, the limitation of the scheme to the mechanical rights originated from the historic split, in the US, between the licensing of reproduction rights by music publishers - on an individual basis and through the Harry Fox Agency - and that of "performing" rights by collecting societies such as American Society of Composers,

[1170] MMA, Title I, s 115 states*:* "The operational costs of the MLC will be paid for by digital music providers through voluntary contributions and an administrative assessment set by the Copyright Royalty Judges. The MLC and the DLC are authorised to participate in proceedings before the Copyright Royalty Judges to establish the administrative assessment."

[1171] Prior to the enactment of the MMA, streaming platforms were required to obtain licences on a song-by-song basis from individual copyright holders, as per 17 USC § 115. Coupled with this, musicians suffered (and still suffer) from the streaming business model that devalues the price of music consumption. The mechanical royalty rate for streaming is a far cry from the mechanical royalty rate that was most common in the 1990's CD era. For instance, although Spotify has not publicly shared its per-stream rate, it approximately amounts to 0.33 cents ($0.0033) per stream. See Jeffri Yonata, 'How Much Does Spotify Pay per Stream: Everything You Need to Know' (*Headphonesty*, 9 November 2021) <https://www.headphonesty.com/2021/11/how-much-does-spotify-pay-per-stream/>. Against this backdrop, the MMA sought to correct these problems as the MLC aims to ensure that fair market value remuneration (a market-based willing buyer / willing seller standard) actually reaches the relevant right holders. For further discussion, see Tanner Kramp, 'Race Against the Machine: Why the Music Modernisation Act is But the First Step in a Musician's Battle to Reclaim the Value of Their Works,' (2023) 64 Boston Law Review 219, 231-234.

[1172] U.S Copyright Office, 'The Creation of the Music Modernization Act' <https://www.copyright.gov/music-modernization/creation.html?loclr=eamma>.

[1173] See U.S. Copyright Office, 'Copyright and the Music Marketplace: A Report of the Register of Copyrights' (February 2015) <https://www.copyright.gov/policy/musiclicensingstudy/copyright-and-the-music-marketplace.pdf>.

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Authors and Publishers ('ASCAP'), BMI and SESAC. This means that streaming service providers still need to clear the performing rights in the music repertoires they exploit with US-based CMOs. The difference after the establishment of the MLC is that the performing rights licences shall be paired with those for mechanical rights obtained through the MLC. Moreover, the licensing scheme is binding only for the streaming services and excludes the social media industry that, at least in the US, is still protected from copyright liability under the 1998 Digital Millennium Copyright Act ('DMCA').[1174]

The success and effectiveness of the MLC licensing scheme essentially depend on the accuracy and comprehensiveness of its database, as well as the ongoing collaboration and interoperability with other databases and data infrastructures built and shared by CMOs, for the music publishing rights, and record labels, for the recording rights. Therefore, the MLC's database does not target - at least directly - nor resolve the main challenge of settling disputes over ownership data and does not ensure a fair treatment for smaller or independent creators because these rightholders might lack the resources to navigate the complex music licensing system. This appears to be a legitimate concern, as evidenced by interviews conducted for the Fair Muse project where music business experts emphasised that the percentage of unclaimed and unpaid works in the US has not materially decreased in the 5 years since the MLC launched.

8.2.1.5. New initiatives (including CIS-Net 2.0 and Nexus)

It is increasingly clear that the rights in musical compositions are difficult to enforce and to license in digital settings, in the absence of a proper data connection with the sound recordings which incorporate the works and, even more so, with the usage data reports that online exploiters should be made available to rightholders. To increase their knowledge about usage of their repertoires and to ensure better, more transparent and fine-tuned licensing activities, CMOs have launched several data exchange programmes with streaming service providers and publishers for many years. Some of these programs were launched and coordinated by CISAC, which makes sure the level of information provided to their members is constantly being implemented with new types of data. This collaboration allows music users to implement ISWC and IPI codes in their databases, both at the time the work is created or at a later stage. CMOs, on the other hand, are in charge of matching usages against their works' (*i.e.*, "copyright") databases and of supplying correct ISWC-ISRC links back to the tech companies (typically, streaming service providers).

A significant initiative undertaken by PRS for Music is the new Nexus portal, launched in 2023.[1175] This portal shows a way forward in its holistic but simple approach, which is obviously convenient for authors and small publishers.[1176] The Nexus Portal is an online tool that can be searched by their

[1174] The congress passed the DMCA to address copyright issues in the digital age. The law introduced three key updates: (1) protecting online service providers from liability for users' copyright infringement under a notice-and-takedown system; (2) granting legal safeguards for copyright owners against unauthorised access to their digital works, such as hacking or bypassing encryption; and (3) prohibiting the falsification, removal, or alteration of copyright management information, like author names or work titles. This Act also implemented the WCT and the WPPT.

[1175] PRS for Music, 'Nexus Programme' <https://www.prsformusic.com/works/nexus-programme>.

[1176] Currently the following data are collected through Nexus: Recording ID (ISRC), recording title, the year of the first publication of the recording, duration for the recording, recording artist(s) featured in the recording,

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members (composers, lyricists and publishers) to access their music metadata, including the ISWCs, the ISRCs, and tune codes.[1177] It encompasses a database of PRS for Music's almost three million works, allowing for the verification of data linked to all these musical creations.[1178] In practice, Nexus eases the process of matching metadata to sound recordings, which has been traditionally slow, reducing errors and delays in royalty distributions.[1179] Yet, like CIS-Net, it remains available only to PRS's members, with no accessibility by the general public and interested third parties, who could further help achieve greater accuracy and transparency of the database to the benefit of the entire music ecosystem.

8.2.2. Neighbouring rights: record producers' and performers' data infrastructures

8.2.2.1. Record producers' rights data: IFPI's role and the emergence of DDEX as an industry standard

As already mentioned in the Introduction of our Study, IFPI[1180] plays a crucial role in setting standards for the clearance of music recording rights, being the registration authority for the International Standard Recording Code (the ISRC).[1181] However, IFPI does not directly assign ISRCs to sound recordings. Instead, it has designated National ISRC Agencies in each country which are authorised to assign ISRCs to sound recordings within their respective territories. These National Agencies serve as intermediaries between IFPI and the local music industry, ensuring that each sound recording or music video is granted a unique ISRC, which is used to identify the recording across the global music ecosystem.[1182] Furthermore, music majors and other record producers have an economic incentive to coordinate the exploitation of recording and musical works rights and the related data infrastructures because these companies include music publisher's branches through which they control, fully or in part, musical works (identified through the ISWC).

Despite their complementarities and simultaneous exploitation in the recorded music market, the rights clearance structures for sound recordings and musical works are not perfectly aligned. These two layers of rights operate independently, managed and controlled by different entities and often exploited through distinct mechanisms: record labels typically manage their rights individually or via rights aggregators, while music publishers and composers rely, to varying degrees, on collective management. The structural misalignment between music publishing and recording rights frequently results in data mismatches, discrepancies in cross-border licensing data, and even erroneous

Work ID (ISWC), tunecode (PRS unique identification between Recordings and Works), the registered work title, and the writer(s) name(s)/IPI Number as well as the role of the writer(s).

[1177] PRS for Music, 'Nexus Programme' (n 1175).

[1178] ibid.

[1179] ibid.

[1180] Further details on IFPI as a global association representing phonogram producers can also be found in §7.2 of this Study.

[1181] IFPI was appointed as the ISRC Registration Authority in 1989 by the International Organisation for Standardisation ('ISO'), which authorised IFPI to create and manage a unique identifier for each sound recording and music video recording. See International ISRC Registration Authority, 'International Standard Recording Code (ISRC) Handbook' (*IFPI*, 2021) 4th edn, 5 <https://www.ifpi.org/wp-content/uploads/2021/02/ISRC_Handbook.pdf#Heading321>.

[1182] Vishal Lout, 'ISRC – International Standard Recording Code: A Need of Today's Music Industry – A Study' (2025) 14(1) Sangeet Galaxy e-Journal 20. A list of the officially appointed ISRC Registration Agencies can be found at the following link: <https://isrc.ifpi.org/en/contact/national-agency-contacts>.

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allocation of royalties and other revenues. This issue is particularly evident in the context of streaming and social media exploitations, where music exploiters have implemented their own metadata standards to identify and track the use of musical works and sound recordings—challenging the role of IFPI's and CISAC's major identifiers. Several experts and stakeholders interviewed for Fair MusE emphasised that a significant portion of data-related issues for musical works stems from record producers distributing recordings without supplying musical work information at upload, or providing data that is incomplete, incorrect, or missing at the point of entry into the digital ecosystem.

To address this structural issue and ensure better coordination in the above-mentioned data infrastructures, the DDEX format was created as an international standard-setting organization for data in the music and entertainment industries in 2006.[1183] Based on the monitoring of sound recordings usage, DDEX emerged after the Music Industry Integrated Identifiers Project ('MI3P') noted the potential benefits of aligning the information used by different players in the music ecosystem. The consortium that created DDEX includes record labels, music publishers, CMOs and streaming service providers, all of which are expected to benefit from a higher interoperability of music metadata regarding rights ownership, licensing and usage information, and their standardised communication.[1184] By establishing a standardised framework for metadata exchanges, DDEX enhances the identification of works, facilitates the monitoring of their usage, and improves the distribution of royalties—an essential set of functions in a music industry marked by multiple copyright holders, fragmented rights ownership, and simultaneous exploitation on diverse online platforms.[1185] DDEX specifies its messages using the technically capable XML technology, but also allows for more basic information to be carried in a "flat file" format to meet the needs of smaller implementers. Furthermore, all the elements contained in the DDEX messages are rigorously defined in the DDEX Data Dictionary, so that both the sender and the recipient have a shared understanding of the intended meaning.[1186] DDEX's standards are open for use by anyone at no cost, with no need to be a member of the organisation.[1187] Still, DDEX's members have been increasing, currently counting with major music industry players such as Sony, Universal Music Group, Spotify, and Warner/Chappell Music Publishing.[1188] At the time of writing, DDEX standards are extensively adopted and in an active development process.

It is important to add that, in practice, such standards are used in the usage reports that each music streaming service provider must deliver to rightholders (most commonly CMOs). However, as confirmed in Fair MusE's interviews with several European CMOs, the DDEX format may not be

[1183] DDEX, 'About Us' section, available at <https://ddex.net/about-ddex/>.
[1184] ibid.
[1185] Emma Griffiths, 'Understanding DDEX and the Next Frontier for Metadata Standards' (*Synchtank*, 23 July 2024) <https://www.synchtank.com/blog/ddex-and-the-next-frontier-for-metadata-standards/>.
[1186] DDEX, 'Data Dictionaries', <https://kb.ddex.net/reference-material/data-dictionaries/>; Paul Jessop's submission in response to Library of Congress - US Copyright Office Notice of Inquiry Docket 2013-2 "Technological Upgrades to Registration and Recordation Functions" (20 May 2013) <https://www.copyright.gov/docs/technical_upgrades/comments/County-Analytics.pdf>.
[1187] DataArt, 'Bridging the Gaps in Music Streaming with Data Pipelines: Repertoire Metadata, DDEX and Transactional Reports' (*DataArt*, 2021) 11 <https://www.dataart.com/media/jssfaiux/dataart-bridging-the-gaps-in-music-streaming-with-data-pipelines.pdf>.
[1188] ibid.

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readable by all CMOs' systems. Therefore, there is a transformation of the input data, expressed through DDEX's format into the format used by the respective CMO. This format is processed by the CDM Format (previously called CCIS),[1189] also maintained by DDEX.

8.2.2.2. Performers' (remuneration) rights data: the role of SCAPR and of the IPD

As emphasised in Chapter 7, the cross-border cooperation between performers' CMOs within the EU is much less developed than that of composers' CMOs. This is linked to two main structural factors: *(i)* the lack of harmonisation of performers' rights to remuneration in the EU; and *(ii)* the complex and diverging licensing and remuneration schemes regarding these rights in the various EU Member States. This situation has inevitably hindered the reciprocal and cross-border exchange of data, repertoires, and the allocation of royalties among the European performers' CMOs. These data exchanges are significantly smaller than in the domain of musical compositions controlled by composers' and publishers' CMOs. Therefore, the fact that, until recently, performers' CMOs did not conclude reciprocal agreements with other European CMOs, let alone with societies from non-EU countries, should not come as a surprise.[1190]

The landscape improved significantly, at least in terms of data available in the industry, with the emergence of SCAPR, an international network representing 61 performers' CMOs from 45 countries.[1191] As already noted previously in Chapter 7 (§7.2), SCAPR is a not-for-profit organisation based in Brussels that acts as a global platform to promote practical cooperation between performers' CMOs, facilitating the exchange of data and ensuring fair remuneration for performers across borders.[1192] SCAPR has achieved this through the creation of two key tools: the International Performers Database ('IPD') and the Virtual Recording Database ('VRDB').[1193] The VRDB is a centralised digital system initiated in 2014 that allows SCAPR's member CMOs to identify performances in sound recordings and audiovisual works, and to exchange performer information to ensure accurate and efficient royalty distribution.[1194]

[1189] DDEX, 'Benefits of CDM' <https://kb.ddex.net/implementing-each-standard/claim-detail-message-suite-(cdm)/cdm-explained/benefits-of-cdm/>.

[1190] As already noted previously in §7.3,, the "Passport" system only applies to the licensing of musical works, without extending to any other subject matters, such as the music performances embodied into sound recordings. In fact, the 2014 CRM Directive did not even try to tackle the issue of multi-territorial licensing of neighbouring rights, although the matter would require greater attention (and harmonisation) across the EU.

[1191] SCAPR's official website, "About Us" section <https://www.scapr.org/about-us/>.

[1192] ibid. See also AEPO-ARTIS, *Performers' Rights Study 2022* (2022) 18 <https://www.aepo-artis.org/wp-content/uploads/2022/11/AEPO-ARTIS_Performers_Rights_Study_2022_digital.pdf>.

[1193] ibid. SCAPR, 'Tools & Projects' section <https://www.scapr.org/tools-projects/#VRDB2>. These databases are supervised by a dedicated Database Committee.

[1194] ibid. See also Music Business Worldwide, 'We Have Lagged Behind Other Industries in Identifying Opportunities to Collaborate' (*Music Business Worldwide*, 21 June 2022) <https://www.musicbusinessworldwide.com/we-have-lagged-behind-other-industries-in-identifying-opportunities-to-collaborate/>. Furthermore, in an interview with AEPO-ARTIS, conducted by Fair MusE on 9 January 2025, it was highlighted that SCAPR has made significant efforts to integrate the databases of all international CMOs (not just European ones) into a centralised system known as the Virtual Recording Database ('VRDB'). This tool allows constant and comprehensive access to the global repertoire. The International Standard Recording Code ('ISRC') is also connected to this database, as major organisations such as Universal tap into it, providing and extracting information. There are also agreements between the

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More relevantly, SCAPR's introduction of IPD established a data infrastructure for performers' remuneration rights that, to some extent, parallels CISAC's CIS-Net. IPD serves as a centralised tool that allows performers' CMOs to share and access information on their respective members, seeking to facilitate their accurate identification and their revenue shares.[1195] This tool also plays a crucial role in documenting and managing the mandates granted by performers to their CMOs, authorising these organisations to collect royalties on their behalf.[1196] This database includes data on performers' contributions and connects various rights, such as broadcasting rights,[1197] private copying levies,[1198] single equitable remuneration rights for rental and lending[1199] and, if applicable, online remuneration rights.[1200] Since the primary objective of the IPD is to ensure the accurate identification of individual performers involved in audio recordings and audiovisual works, each performer included in the IPD is assigned an International Performer Number ('IPN'), a unique identifier of performers across CMOs and their rights management systems.[1201] Thus, it is understandable that WIPO considers the IPD as an infrastructure promoting data interoperability and transparency in the international management of performers rights.[1202]

Despite the above-mentioned improvements, the position of so-called 'session musicians' remains particularly vulnerable because their identification is not adequately supported by the data incorporated into the performers' international database. Performers' data are often missing because of the non-availability - in terms of lack of written evidence - of their contractual agreements with the record producers (which need to be replaced, often, by performing artists' self-declarations), the practice of contractual buy-outs, and the non-standardised revenue collection schemes caused by the non-harmonisation of these rights across the EU.

To conclude: the persistently poor exchange of data for performers is inevitably linked to both their territorial and non-harmonised character, as well as to the fact that performers' remuneration is subject to mandatory collective administration under national laws. Under these conditions, there cannot be much room for competition between CMOs and IMEs in the neighbouring rights sector (not as much as in the field of composers' and publishers' rights, at least). The flow of performers' rights data between various territorial organisations remains low, including in those cases where performers' organisations have reciprocal agreements based on the so called "category B" template,

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record industry and SCAPR to mutually improve the database, benefiting both parties. See interview with AEPO-ARTIS (Online Interview with Fair MusE conducted on Microsoft Teams, 9 January 2025) at 18:32.

[1195] SCAPR, 'IPD' <https://www.scapr.org/tools-projects/ipd/>.

[1196] SCAPR, 'Tools & Projects' section (n 1193).

[1197] For further discussion relating to broadcasting rights, see §2.2.2 of this Study.

[1198] InfoSoc Directive, Article 5(2)(b). For further discussion relating to private copying levies, see §2.3.3 of this Study.

[1199] Art. 5 of the 2006 Rental and Lending Rights Directive. For further discussion relating to single equitable remuneration for rental and lending, see §2.3.1 of this Study.

[1200] Rémy Desrosiers (SCAPR), 'Rights Data and Identifiers for Performers' webinar, WIPO/WEBINAR/CR/2022/1 (Geneva, 19 January 2022), available at <https://www.wipo.int/meetings/en/details.jsp?meeting_id=67429>.

[1201] PPL, 'IPN' <https://www.ppluk.com/membership/more-information/ipn/>. A performer is assigned an IPN upon their initial registration with a performer's CMO, and this identifier is subsequently linked to related recordings as they are registered with the organisation. See Serona Elton, 'Standardized Identifiers and Electronic Data Interchange Rules for Music', in Seán M O'Connor (ed), *The Oxford Handbook of Music Law and Policy* (Oxford Academic 2020).

[1202] SCAPR, 'Rights Data and Identifiers for Performers' webinar (n 1200).

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under which both societies keep the money collected in their country of operation without a mutual exchange of data and revenues. The level of data exchange is still insufficient even when organisations conclude so-called "category A" agreements, which are supported by international organisations such as IFPI.[1203] Thus, it is not uncommon that, even under these agreements, neighbouring rights societies can only deliver and exchange rough data with one another. This does not allow a precise distribution of the revenues among the rightholders - and can even end up in the CMOs' blackbox.

8.3. Rights holders' v online exploiters' data and metadata infrastructures

On the grounds of empirical investigations and feedback received from multiple industry experts and stakeholders, Fair MusE assumes that rightholders, including composers and performers and their CMOs, need more detailed insights into the value generated by the online exploitation of their work across the entire digital music ecosystem, from platforms like Spotify and Apple Music to social media giants like TikTok.[1204] Without a deeper understanding of where and how the commercial value of music arises within each service's business model—particularly within social media's "attention" markets—it is impossible for rightholders to assess whether their remuneration is genuinely fair. This shortfall undermines the ability to provide, as required by EU law, remuneration that is both 'appropriate and proportionate.' Therefore, achieving a higher level of transparency, interoperability and standardisation in music data management will not only help to reduce existing remuneration discrepancies and identify value gaps, but also promote a fairer and more sustainable environment for all stakeholders in the digital music ecosystem.

8.3.1 Content identification, usage reports and music data: the market structure

As emphasised above, the music industry as a whole is still striving to improve the consistency and interoperability of its data and metadata infrastructures. Without such improvements, the largest music platforms will continue to produce usage reports that fail to accurately identify rightholders. At the same time, the problem of lack of music data transparency is hard to resolve or mitigate on the side of online music exploiters. Such exploiters include music streaming services and social media platforms, each of which has developed a different approach to music content identification and remuneration. Streaming service providers have historically relied upon, and respected, the above-

[1203] See Mihaly Ficsor, *Collective Management of Copyright and Related Rights* (n 70) 83, who discusses these categories of agreements, explaining that "Category A agreements" involve the transfer of performers' shares to the respective country, where the distribution is completed according to its systems. However, non-identifiable shares, which may be substantial, remain in the collecting country and are typically devoted to social or cultural purposes for the benefit of performers. On the other hand, "Category B agreements" do not involve any transfer of payments between contracting organisations, with all income remaining in the country where it is collected. This income is then used according to the rules of the collecting organisation, either for social or cultural purposes, or distributed to local performers as compensation for unreceived remuneration from other countries. Ficsor also mentions a new type of agreement, known as "Category C agreements", which combine elements from A and B (by ensuring that at least part of the remuneration is distributed according to the principles of Category A).

[1204] For more information on the issue of lack of data transparency in the music sector, both as regards DSP and UGC platforms, see Chapter 4.1. of Fair Muse's D2.3 Deliverable - Roles of EU competition law and platform regulation across online music platforms.

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mentioned music industry's main identifiers and are consistently reported by their contractual counterparts as providing relatively fairly data on music usage. Social media platforms, on the other hand, had no technical and commercial incentive to "follow" the music industry and to build content identification systems that had an "external" and potentially cross-service (or cross-platform) relevance and dimension. This was due to their broad copyright liability immunity until the adoption of Article 17 of the DSM Directive. Similarly, their music exploitation transparency vis-à-vis their licensors is lacking in granularity when compared to streaming services.

The first layer of rights management and data infrastructure that matters for the purposes of content identification and, therefore, fair remuneration of music rightholders, is that of record labels. Record producers provide the main product being exploited in digital markets: sound recordings. The use of sound recordings and the related data can be considered the minimum common denominator and the digital music industry standard for purposes of data collection on both the rightholders' and the exploiters' fronts. These rights are exploited either individually by the major labels, or "collectively" by indie labels through prominent rights aggregators. The second layer is that of performers' rights, which are normally transferred to record producers at the time of recording productions against contractual royalties or lump-sum payments. For these rights, the current data infrastructure being developed by performers' organisations, through an international network (SCAPR), mostly refer to remuneration rights enforceable dominantly in offline markets. Yet, this infrastructure would become more relevant for digital exploitations in so far as performers were granted online remuneration rights, as already provided in countries like Spain, Belgium (*sub judice*) and Germany (in the social media industry).

As things stand, the backbone of music data collection and the global industry standard to ensure data alignment between publishing and recording rights and to exchange the related information remains the DDEX format,[1205] as explained above. Stemming from the 2014 CRM Directive and, even more so, from both Article 17 and Article 19 of the 2019 DSM Directive, licensees, including both social media platforms and streaming service providers, have the obligation to regularly provide rightholders with relevant and updated information on the exploitation of licensed works, including the revenue that such exploitation is generating. This revenue is often connected to data such as the number of streams a song had, or the amount of ad-generated revenue a work benefitted from. However, as far as things stand, there is no comprehensive music database but merely a way to connect databases and verifying data (*i.e.*, CIS-Net). Moreover, mechanisms of repertoire data exchanges are structurally hindered by limited transparency obligations imposed to IMEs and the music publishers' hubs, which create data silos and do not easily ensure data flows.

8.3.2 Social media platforms and their data and metadata infrastructure

The situation of social media services is much more complex than that of streaming service providers in terms of data collection because social media are structurally characterised by the simultaneous presence and exploitation of both professional and amateur contents (*i.e.*, "hybrid" use). Moreover, due to their past broad immunity from copyright infringement claims, until recently most of these service providers had no contractual relationship with the music publishers and record labels and

[1205] Paul Jessop's submission in response to Library of Congress - US Copyright Office Notice of Inquiry Docket 2013-2 "Technological Upgrades to Registration and Recordation Functions" (20 May 2013) 13 <https://www.copyright.gov/docs/technical_upgrades/comments/County-Analytics.pdf>.

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used to scrape all metadata of files uploaded to their services replacing them with their own metadata. Nevertheless, the genetically hybrid and, not necessarily professional character, of large volumes of music contents on social media platforms, together with their legal lack of copyright 'control' on these materials, linked to broad liability exemptions induced these service providers to develop their own music data infrastructures.

YouTube's Content ID marked the first and most significant advancement in this direction, accelerated by the 2007 Viacom litigation. Here, Viacom, a major media and entertainment company, sued Youtube for allowing copyright infringement by letting users upload Viacom's copyrighted content without the necessary authorisations.[1206] Content ID was launched by Google as a unique software system that automatically scans uploaded videos on Youtube against a database of copyrighted material (audio or visual files) submitted by rightholders to track matches as potential copyright violations.[1207] Content ID can track audio files, video files and even melodies when covered/imitated; when matches are found, the copyright owner can either block the relevant content, monetise it or track viewer data to receive the corresponding data analytics.[1208] The metadata used by Content ID is directly related to the information uploaded by rightholders; however, no specific metadata standards can be publicly found. Rightholders may include data on song titles or author's names, but the completeness or accuracy of this information varies.[1209] Regardless, Content ID is still used to this day by Youtube and it has helped millions of rightholders in tracking the use of their works within the platform.

Unlike YouTube, the social media platforms Facebook and Instagram - currently owned by Meta - developed their own rights management systems much later than Google, incorporating similar metadata frameworks to monitor and manage the use of copyrighted music. Facebook initially used Audible Magic to ensure content identification and remunerate music rightholders (among others) through metadata including the title, artist, album, and copyright details of the detected sound recordings.[1210] Subsequently, Meta developed its own 'Rights Manager' system for Facebook and Instagram platforms, which lets rightholders upload reference files and, similarly to what happens in Google's Content ID, specify their own ownership details.[1211] This also helps Meta identify the use of copyright works across its platforms and give rightholders the possibility of controlling the distribution and exploitation of their works.[1212]

[1206] Notably, Viacom did not win the case, since YouTube was protected under the Digital Millennium Copyright Act's safe harbor provisions, exempting liability for UGC if, upon notification, the content is promptly removed. See *Viacom Intern., Inc. v YouTube*, Inc., 676 F. 3d 19 (2nd Cir., 2012).

[1207] See 'Content ID on YouTube' (Youtube video) <https://www.youtube.com/watch?v=9g2U12SsRns>.

[1208] ibid.

[1209] See YouTube Help, 'Best practices for references' (Google Support) <https://support.google.com/youtube/answer/107008?hl=en> and YouTube Help, 'Content eligible for Content ID' (Google Support) <https://support.google.com/youtube/answer/2605065>.

[1210] Audible Magic is a digital rights management company that provides content identification services to social networks. Audible Magic's technology includes audio and video fingerprinting, cover identification, music recognition, and TV and movie recognition. See Audible Magic, official website <https://www.audiblemagic.com/>.

[1211] Facebook, 'Rights Manager' <https://creators.facebook.com/tools/rights-manager>.

[1212] Furthermore, both Facebook and Instagram provide processes for copyright owners or their authorised representatives to report copyright infringement by submitting a specific form. See Instagram, 'Reporting Copyright Infringement on Instagram'

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Following this, TikTok also strived to track copyright in UGC. The platform enables professional rightholders to upload reference files and define ownership details, similarly to Meta's or Google's systems, allowing it to automatically identify the use of copyright works across TikTok.[1213] To do so, rightholders must submit a proof of their rights, which can be, *inter alia*, in the form of a certificate of registration, a licence agreement, a power of attorney, or documents and statements that demonstrate copyright ownership.[1214] Each specific track, including (snippets of) songs or audio clips, is assigned a unique Sound ID. This is a system that TikTok uses to identify music tracks by analysing the audio's unique characteristics and subsequently comparing them to the reference files.[1215] In theory, this allows copyrighted works used in UGC to be detected. Nevertheless, "Sound ID fraud" remains one of the biggest IP law challenges that TikTok faces. Users often manipulate the metadata of their uploaded content to escape copyright claims, which is a barrier to the fair remuneration of artists worldwide.[1216] For a platform that has grown to an estimated 34 million videos uploaded daily, totalling approximately 12.4 billion videos annually,[1217] and with 168,141 copyright removal requests just in the first half of 2022,[1218] it is crucial that copyright identification and tracking systems are accurate and comprehensive. This can only happen with consistent and complete metadata being used across all platforms and streaming services.

Social media rights management tools are crucial to ensure that Article 17 of the DSM Directive does not remain an empty promise. It is evident that the obligation for 'OCSSPs' to seek licences for user-uploaded works requires an adequate infrastructure of rights management technology and data infrastructure to properly support it.[1219] Nevertheless, there is no standard in fingerprinting technologies of UGC platforms, such as YouTube's Content ID or TikTok's and Meta's own rights manager systems, and this makes it difficult for social media companies to provide granular music usage reports to be inputted in DDEX standards via the intermediation of distribution companies. In contrast, streaming services, such as Spotify[1220] or Apple Music, have traditionally relied on

<https://help.instagram.com/126382350847838?helpref=faq_content>. See also Facebook, 'How do I report copyright infringement on Facebook?' <https://www.facebook.com/help/325058084212425>.

[1213] TikTok, 'Intellectual Property Policy' (*TikTok*, 7 June 2021) <https://www.tiktok.com/legal/page/global/copyright-policy/en>.

[1214] TikTok, 'Authorisation to Use Content on TikTok in the EU' <https://www.tiktok.com/legal/report/licensing-form>.

[1215] Courtnay Moriarty, 'Sound ID Fraud on TikTok: Exposing How Uploaders Avoid Copyright Claims' (*Pex Blog*, 21 November 2024) <https://pex.com/blog/sound-id-fraud-on-tiktok-exposing-how-uploaders-avoid-copyright-claims/>.

[1216] ibid.

[1217] Jack Shepherd, '25 Essential TikTok Statistics You Need to Know in 2025' (*The Social Shepherd*, 1 January 2025) <https://thesocialshepherd.com/blog/tiktok-statistics>.

[1218] Ashley King, 'TikTok Copyright Takedowns More Than Tripled in 2022 — What Will 2023 Look Like?' (*Digital Music News*, 23 October 2023) <https://www.digitalmusicnews.com/2023/10/23/tiktok-copyright-takedowns-tripled-in-2022/>.

[1219] Mazziotti, 'The Role of Market-Driven and Legislative Solutions to Online Music Licensing in Europe' (n 928) 33.

[1220] Spotify for artists, 'Music Metadata Guidelines' <https://support.spotify.com/us/artists/article/metadata-formatting-guidelines/>. Music metadata includes information such as the artist name, producer, songwriter, song title, release date, genre, track duration, and other relevant details. In particular, publishing metadata relates to the attribution of authorship and the distribution of shares among songwriters. Inaccurate or incomplete metadata can negatively impact the proper

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comprehensive metadata to ensure accurate licensing, usage tracking and distribution of royalties.[1221] Streaming services directly rely on record companies' ISRCs to track the use of sound recordings, and they rely on ISWCs to identify the underlying musical compositions.[1222] Platforms such as Meta, YouTube or TikTok, however, were born primarily as UGC platforms. Thus, their systems were designed to detect sound recordings using the reference files uploaded, as explained above, in a way that the ISRC and ISWC codes applied for professional music productions are (much) less prevalent. ISRCs are more commonly used, particularly by YouTube, but it is often so only if rightholders provide it in the reference file.[1223] Therefore, even though the convergence of these systems indicates a trend towards more sophisticated metadata across *all* social media platforms and streaming services, the accuracy of rights management and the fair remuneration of artists remains far from a reality until the metadata used by both types of DSPs is consistent and interoperable.[1224]

8.3.3. The role of data brokers, content identification and distribution companies

Given the complexities of managing high volumes of music data and metadata, music data brokers and processors who offer their services to CMOs, record labels, publishers and DSPs have become pivotal in the music industry. BMAT, for instance, is a company that performs data monitoring on behalf of record labels daily, reporting music usage across various platforms and matching the works used with the correct rightholders.[1225] Similarly, PEX specialises in real-time content identification, using AI technologies to track the use of video and audio content across online platforms. PEX offers its services to rightholders, music distributors and publishers, helping them ensure compliance with accurate copyright attribution, licensing and authorised uses of copyright works.[1226] Verifi Media, a partner of Fair MusE, offers competing services by having developed a multiparty data management platform that enables users to compare datasets and adopt changes based on data quality scoring.[1227] Various other competing service providers exist, namely Fairphonic,[1228] Salt,[1229] and Copyright Delta[1230] - the latter which focuses on integrating automated copyright music tracking and royalty distribution services with the gaming industry through its AI & Gaming Portal.[1231]

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compensation of creators for their contributions. See Nate Baker, 'Metadata: What It Is and Why It Matters' (*Spotify for Artists*, 2018) <https://artists.spotify.com/blog/metadata-what-it-is-and-why-it-matters>.

[1221] Russell Karp, 'User-Generated Content and Music Rights Management with DDEX' (*DataArt*, 6 May 2024) <https://www.dataart.com/blog/ddex-and-music-rights-management-in-user-generated-content-by-russell-karp>.

[1222] Apple for artists, 'Music Metadata' <https://artists.apple.com/support/1119-music-metadata>; Spotify for artists, 'Music Metadata Guidelines' (n 1220).

[1223] Chaitanya Malhotra, 'What Metadata and Information Do I Need to Provide to Register My Music with YouTube Content ID on Deliver My Tune?' (*Deliver My Tune*, 8 September 2024) <https://blog.delivermytune.com/what-metadata-and-information-do-i-need-to-provide-to-register-my-music-with-youtube-content-id-on-deliver-my-tune/>.

[1224] See Karp (n 1221).

[1225] BMAT (n 1138).

[1226] Pex (n 1137).

[1227] VerifiMedia <https://www.verifi.media/>. See also PitchBook, 'Verifi Media Overview' <https://pitchbook.com/profiles/company/184677-76>.

[1228] Fairphonic (n 1139).

[1229] Salt Music, official webpage <https://saltmusic.io/>.

[1230] Copyright Delta, official webpage <https://www.copyrightdelta.com/>.

[1231] Copyright Delta, 'AI Signup' <https://www.copyrightdelta.com/ai-signup>.

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In essence, these data brokers fill in a gap in the digital music ecosystem by resolving its metadata blockages or missing information cases, both of which impede a correct attribution of copyright and, thus, block a full payout whenever a work is used online. These issues persist because metadata often contains incomplete ownership information regarding the musical works, and it contains mistakes regarding split copyright shares. This shows how the lack of structural data interfaces between sound recordings and the underlying musical works makes the tracking and reporting services offered by these data companies even more necessary.

In a similar vein, digital music distribution services occupy an important digital market segment by supplying music metadata to different streaming services and social media platforms, and intermediating usage reports between music rightholders and service providers such as Spotify, Apple Music, Youtube, Deezer, TikTok and others. Companies such as TuneCore, DistroKid, FUGA and CD Baby act as a pipeline especially for independent artists to reach global streaming platforms without relying on traditional record labels.[1232] With regards to metadata, distribution companies play a key role for the entire digital music industry by ensuring that music metadata that is being distributed within certain platforms adheres to the necessary standards. These companies also offer other essential services, including marketing support, and tools for royalty collection and performance analysis, while allowing artists to maintain control over their content and monetise their work. As the independent music sector grows, these platforms help streamline the global music distribution process, making it easier for artists (who act simultaneously as composers, performers and record producers) to expand their audience and maximise earnings without the constraints of legacy label deals.[1233]

Among distribution companies, each of them has its core business. FUGA is a leading music distributor with about 600 B2B clients such as labels, distributors, artists services companies, management companies or broader artist services platforms as well as DIY platforms. The company offers a comprehensive content management system that facilitates smooth distribution of music to major platforms. Having developed advanced technology that powers a significant portion of the music industry, FUGA enables real-time deliveries and access to detailed digital performance data.[1234] Another important company in this market sector is TuneCore, which represents

[1232] An independent (or "indie") artist is someone who creates, produces, and distributes their own music without the support of major record labels. These artists typically enjoy more creative freedom, unburdened by commercial pressures, but this often results in a smaller audience compared to mainstream artists. To manage their distribution, indie artists often turn to independent distributors, who assist in submitting music to various DSPs and additional platforms such as karaoke services, retail stores, and exercise machine services: see Sam Poole, 'The Power of the Independent Distributor and Artist' (*Sugo Music Group*) <https://sugomusic.com/independent-distributor-and-indie-artist/#What_is_an_Independent_Artist>.
Independent distribution companies, like those mentioned in the Study, cater exclusively to independent artists. For further insight on this topic, see Bill Rosenblatt, 'The Global Digital Music Landscape: An Overview of Distribution, Copyright, and Rights Administration for Music in the Digital Age' (WIPO Committee on Intellectual Property and Development, April 2024) 29-30 <https://www.wipo.int/export/sites/www/cooperation/en/docs/digital-music-landscape.pdf>.
[1233] Bill Rosenblatt (n 849) See also Amit Sher, 'Best 11 Music Distribution Services to Use in 2025' (One Submit) <https://www.one-submit.com/post/best-music-distribution-services>. See also Amuse, 'The Best Music Distribution Services in 2024' <https://www.amuse.io/en/content/the-best-music-distribution-services/>.
[1234] FUGA, owned by Downtown Music Holding Ltd, has its headquarters in the Netherlands. FUGA's platform supports complex catalogue management and new release planning, providing full control for its clients. It also

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approximately 10% of the 20 million songs on iTunes. This distributor allows artists to retain 100% of their royalties from digital platforms, although it takes a 20% commission on revenue generated through social media platforms. TuneCore's pricing model includes a variety of annual subscription plans, with fees higher than those of competitors like DistroKid and CD Baby, making it ideal for artists who prioritise revenue control and quality over quantity.[1235] Comparatively, DistroKid has become a preferred choice for independent musicians seeking fast and affordable distribution. The platform charges no commission on earnings, allowing artists to keep 100% of their royalties, minus any taxes or fees. DistroKid also provides a payment splitting feature, enabling artists to automatically distribute earnings among collaborators. While additional features, such as a custom release date or label name, incur extra fees, DistroKid remains one of the most cost-effective and efficient options for artists focused on speed and simplicity.[1236] CD Baby is another player among the largest independent music distributors. The platform offers an affordable distribution option with a one-time fee of $9.99 per release, with no recurring subscription costs. CD Baby also provides tools for promoting music, ensuring artists can reach global audiences while managing their careers independently.[1237]

8.4. Transparency obligations and their implementation

This section draws upon existing transparency obligations established horizontally under EU law and applicable in the music ecosystem. Through this, the section aims to investigate why - despite the mandatory character of these provisions - the level of transparency and the reliance on similar or interoperable data sets by the music industry's stakeholders and the online exploiters is still relatively low. To do so, §8.4.1 deals with the duties of transparency created for the music industry to the benefit of individual composers and performers and, on the opposite side of the spectrum, of online exploiters. Symmetrically, §8.4.2 focuses on the obligations created for digital music exploiters, including the social media platforms qualifying as 'OCSSPs' under the DSM Directive.

offers 'White Label,' a software solution allowing clients to provide custom-branded distribution and analytics dashboards for their artists and sub-labels. See FUGA 'Music Distribution' section <https://fuga.com/products-services/music-distribution/>.

[1235] TuneCore was founded in 2005 and is based in New York, US. As part of Believe since 2015, TuneCore continues to empower DIY independent artists by offering global reach while allowing full ownership of their sales and rights. TuneCore Music Distribution services help artists, labels and managers sell their music through Spotify, Apple Music, Amazon Music, Deezer, Tencent, TikTok and more than 150 download and streaming stores worldwide, while retaining 100 percent of their sales revenue and rights for a low annual flat fee. See TuneCore, official website <https://www.tunecore.com> and see also Believe, 'TuneCore: for DIY artists' <https://www.believe.com/tunecore>.

[1236] DistroKid was originally known as 'Fandalism' which was a social media website for musicians. In 2013, their services transcended to music distribution, and they became known as DistroKid. DistroKid offers for an annual fee of $19.99 (€20.99), unlimited uploads and distribution, typically getting music onto platforms such as Spotify and Apple Music within 48 hours. See DistroKid, official website <https://distrokid.com>.

[1237] CD Baby, founded in 1998, is based in Portland, Oregon. In June 2023, CD Baby transitioned to a digital-only model in June 2023, discontinuing its physical media services. See CD Baby, 'Music Distribution Services' <https://cdbaby.com/music-distribution/>.

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8.4.1. Transparency obligations of CMOs and music rightholders under EU law

8.4.1.1. Directive 2011/77

The expectation to enhance transparency on the earnings derived from the commercial exploitation of music became more tangible under EU law at the time Directive 2011/77 extended the term of protection of sound recordings from 50 to 70 years.[1238] We know that, despite the flaws of this statutory revenue-sharing model, this provision was extremely important to foster the consolidation and improvement of the data infrastructure for session musicians - whose entitlements are often controversial due to the lack of evidence regarding their contribution to a sound recording.

8.4.1.2. CRM Directive

Similar, although much broader, provisions are contained in Chapter 5 of the 2014 CRM Directive, entitled 'Transparency and reporting.' Articles 18-22 significantly raised the transparency level of operation of CMOs based in the EEA. These provisions oblige CMOs to make available to their members (Article 18) as well other CMOs under representation agreements (Article 19), not less than once a year, all the relevant information regarding the rights managed by them and the revenue these rights generate, with an express indication of the management deductions applied. This is to ensure that each rightholder to whom the CMO has attributed rights revenue or made payments within that period has a complete knowledge of: 1) their authorised contact details for identification; 2) the rights revenue attributed to them; 3) the payments categorised by category of rights and type of use; 4) the period of usage for which payments were made (unless user reporting prevents this); 5) the deductions for management fees; 6) other deductions made for legally mandated purposes; and 7) any outstanding rights revenue.[1239]

CMOs are also obliged, under Article 20, to make available to rightholders, other CMOs and any users, upon request, by electronic means and without undue delay, at least the information regarding the works or other subject-matter they represent, the right they manage, directly or under representation agreements, and the territories covered. Although this provision arguably imposed a transparency obligation that facilitated the exchanges of data between CMOs representing the same type of rightholders, it failed to do so between CMOs representing *different* types of rightholders, particularly regarding sound recording data and record producers' rights.[1240]

Finally, CMOs are bound to provide detailed information to the public at large by making available, under Article 21, their statutes, membership and termination conditions, standard licensing contracts and applicable tariffs, general policies on management fees, deductions and non-distributable amounts and their lists of representation agreements. Article 22 obliges them to publish comprehensive transparency reports to be made available through their websites, on an annual basis, no later than eight months following the end of that financial year, and to keep such reports available on those websites for at least five years.

[1238] As highlighted above, Article 1(2)(c) of this Directive obliged Member States to create a right to annual supplementary remuneration for performers consisting of 20% of the additional revenues earned by record producers due to the term extension.
[1239] CRM Directive, Art. 18(1)(a)-(g).
[1240] ibid Art. 20.

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8.4.1.3. Stakeholders' perception of the CRM Directive's transparency obligations

Depending on their role and their positions among the music industry's stakeholders, Fair MusE's interviewees expressed different views on the impact of the above-mentioned provisions, starting with Article 18. Generally, composers' and performers' representatives confirmed that the 2014's Chapter on transparency of CMOs has had a positive impact on the overall market conditions, allowing individual rightholders to have access to much clearer and more timely information about their rights management. Composers and artists generally praised the implementation of this directive as a source of greater freedom and certainty based on an increased accountability and reliability of CMOs as regards the scope of their activities and the related data. CMOs, especially via their international and European representatives, found the directive itself and most of the national transpositions generally positive for their businesses day-to-day operations and for a progressive transformation of their enterprises into data companies.

However, interviews and other empirical investigations evidenced a clear split between CMOs on very critical issues such as the scope of the transparency obligations and their non-enforceability vis-à-vis publisher and other repertoire-specific licensing hubs. As emphasised in Chapter 7 (see §7.4 above), these hubs were able to escape, both territorially and legally, the requirements and transparency requirements and obligations laid down under Articles 18-22. On this front, it seems worth stressing that the big divide created in Europe by the evolution of digital music licensing and the increasingly competitive relationships among them that arose in the past two decades prevented the majority of European CMOs from partnering with major music publishers in digital markets. Most CMOs simply did not have the resources and a sufficiently lucrative local music repertoire to significantly transform their core businesses, to the point that many of them brought their repertoires and the related data into the rights packages, repertoires and proprietary databases held and handled by a dominant rights and data hub like ICE. These "second tier" CMOs complained to Fair MusE's team about their increased management costs due to the CRM Directive's transparency obligations and the overall disparity of treatment the directive triggered, forcing them, or giving them a strong incentive, to join - at least for the handling of their repertoire information - the largest music data hubs.

Other interviewees find that the CRM Directive's transpositions failed to create an EU-wide, common level playing field on data transparency. IME's advocates, for instance, strongly criticised the difficult market conditions they found in countries such as Italy, Spain and Greece, where their innovative data businesses were not allowed, formally or de facto, to operate. Other stakeholders such as large music publishers, independent intellectual property lawyers and, even more so, tech companies pointed at the inevitable politicisation and disharmony of the scrutiny performed by national supervisory authorities regarding CMO's effective compliance with transparency obligations.

8.4.1.4. Article 19 of the DSM Directive

Finally, as illustrated previously in this Study (see Chapter 4), Article 19 of the 2019 DSM Directive sought to radically increase the degree of transparency on the exploitation of copyright and related rights. It did so by obliging Member States to transpose an obligation for contractual counterparties of individual creators, as well as their sub-licensees (including online exploiters), to provide authors and performers with up-to-date, relevant, and comprehensive information on the exploitation of their works and performances, at least once a year. This provision creates a legal interface by providing

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that, where Article 18 of the CRM Directive is applicable, the main transparency obligation laid down in Article 19 of the DSM Directive (cf. paragraph 1) shall not apply in respect of agreements concluded by CMOs or by other entities subject to the national rules implementing the CRM Directive. Moreover, the DSM Directive strengthens the prescriptive force of its own transparency standards by giving Member States the possibility of prioritising the application of transparency rules included in relevant collective agreements in so far as such rules meet the criteria provided for in Article 19 (cf. paragraph 1 to 4). This means that the protection enshrined in Article 19 is even more important for those individual creators who negotiate and assign their rights on an individual basis, without the assistance of collecting societies or union-like organisations engaging in collective bargaining. For performing artists assigning their rights to a record producer, directly, or to a leading artist, acting as a "performer-producer", Fair MusE interviews show that financial transparency is a market (and technological) reality only for performers remunerated through royalties (so-called 'featured performers'). To the contrary, for session musicians, performers' organisations claim that, despite the improvements in their international database, transparency is non-existing whenever their remuneration is linked to the commercial success and revenues of a given recording.

8.4.2. Transparency obligations of the exploiters

8.4.2.1. Article 17 of the CRM Directive

From a historic perspective, Article 17 of the 2014 CRM Directive was the first EU law provision to codify an obligation on Member States to legally require 'users' to provide CMOs with information on the use of the rights they represent and licence on the market.[1241] As this provision emphasises, the users' obligation refers to the disclosure of data that is necessary for the collection of rights revenue and for the distribution of payouts to rightholders. Article 17 provides that this data should be transferred to CMOs within a pre-established time frame and format. However, the same provision indicates that "[W]hen deciding on the format for the provision of such information, collective management organisations and users shall take into account, as far as possible, voluntary industry standards."[1242]

Despite its formal transpositions into Member States' laws and the codification of this transparency principle in favour of collectively represented rightholders, the empirical investigations conducted for the Fair MusE project reveal a striking contradiction between the law and the reality of digital music exploitation in Europe. The modes with which music streaming service providers (or DSPs) and the largest social media platforms approach periodical negotiations with CMOs are significantly different. From the interviews conducted with leading DSPs, it emerged that each service provider effectively transfers detailed usage reports to each CMO. These reports usually consist of one report per each country of operation and per each of the services provided (for instance: Spotify family, Spotify premium, Spotify student). This information results in exceptional volumes of data received and processed directly by CMOs or, alternatively, through data processing hubs such as ICE's, which can rely on sound recordings' metadata and the DDEX industry standards.

[1241] See CRM Directive, Art. 3(k), which defines users as "any person or entity that carries out acts subject to the authorisation, remuneration or compensation of rightholders, excluding consumers."
[1242] CRM Directive, Art. 17.

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Very different is the conduct of the largest social media services, some of which still refuse to provide nuanced data in a way that would make their use of licensed musical works intelligible, or at least clearer, to CMOs. As emphasised above, these broadly uncooperative services organised their music metadata in an openly self-referential and antagonist way which reflected the lack of clear copyright liability standards under EU law (see §8.3.2 *supra*). For a long time, these companies refused to properly cooperate with CMOs, offering them one-off remuneration fees in exchange for the use of all their repertoires without providing any music usage details. Empirical evidence shows that social media companies aimed at prioritising the conclusion of direct licensing deals only with the commercially most important music publishers, their (very few) licensing hubs, and the most successful record producers.

8.4.2.2. Articles 17 & 19 of the DSM Directive

It is precisely because of this sheer obscurity and secrecy characterising the European digital music ecosystem that the attempt made by the 2019 DSM Directive to increase the level of data transparency should be taken seriously. This Directive sought to tackle persisting issues regarding the online use of copyright works from two different angles. The first concerns the right set out in Article 19 that entitles authors and performers to receive up-to-date, relevant information on how their works and performances are exploited—including the modes of exploitation, the revenues generated, and the remuneration due (cf. Chapter 3). If the original contractual parties or their successors in title fail to provide this information, sub-licensees (i.e., users) must do so (see Chapter 4).[1243] The second concerns the data disclosures imposed under Article 17(8)(2), which targets social media qualifying as OCSSPs. According to this provision, these service providers are obliged to give rightholders access to *(i)* adequate information on the functioning of technologies these service providers implement to ensure the unavailability of unauthorised content under Article 17(4), and, even more importantly, *(ii)* information on the use of the content covered by licensing agreements concluded with rightholders.[1244]

8.4.2.3. Digital Services Act and Digital Markets Act

Clearly, the obligations created under Article 17 of the DSM Directive with regard to data disclosure and data collaboration set out a regulatory precedent for subsequent EU law initiatives in the broader domain of platform regulation. The most important of these regulations are certainly the DSA and the Digital Markets Act ('DMA').[1245] From different angles, both Acts aimed to curb the power of the largest tech companies and create a more level playing field between platforms and their users. In both regulations horizontal EU law provisions set out greater transparency obligations which are also applicable to online music exploiters to the benefit of music rightholders.

The DSA contains several transparency provisions that aim to increase the accountability of online platforms, including UGC platforms and DSPs exploiting music. Most notable for their potential to increase transparency in the digital music sector are the obligation to clearly communicate the

[1243] Art.19(1) and (2) of the DSM Directive,
[1244] Art. 17(8)(2) of the DSM Directive.
[1245] Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act, DMA) [2022] OJ L 265/1.

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platform's terms and conditions and reasons for content restrictions,[1246] as well as the obligation to annually report on content moderation policies.[1247] The DSA's recommender system transparency requirements[1248] are also of significance, as the visibility and 'consumption' of songs are affected by platforms' music recommendation schemes. Furthermore, following the principle that more power justifies greater responsibility, music exploiters that fall under the category of VLOPs (currently Facebook, Instagram, TikTok and YouTube) are subject, upon designation, to additional transparency obligations. These include the provision of additional information on advertising, more regular reporting on content moderation, offering recommender systems not based on profiling and allowing access to data to researchers to study systemic risks in the EU.[1249]

Further transparency obligations were introduced with the entry into force of the DMA, albeit for a handful only of economically powerful digital undertakings designated by the European Commission as 'gatekeepers'. As things stand, these provisions are binding for Meta's Facebook and Instagram, Alphabet's YouTube and ByteDance's TikTok, all of which are music-intensive services. The duty to provide business users with access to the data they and their end users generate through their activity on the platform is most noteworthy among these obligations.[1250] Such an obligation can, arguably, benefit authors, performers and potentially other music rightholders and their representatives, giving them continuous and real-time access to data on music consumption metrics and audience.[1251]

8.5. Data infrastructures as a critical resource in Europe to foster fair remuneration of music rightholders

Lastly, this section explores how publishing rights' and recording rights' data infrastructures could be integrated and made interoperable with tech companies' digital use reports through a data-sharing solution or a public repository enabling both ends of the industry spectrum to have access to granular information on - respectively - content repertoires and types, volumes and economic outcome of the music exploitations. First, §8.5.1 depicts and summarises the business reality resulting from Fair MusE's investigations. Second, §8.5.2 briefly explores the legal protection of data and trade secrecy in the EU and presents the EU Open Data Strategy, which is designed to enable data to flow freely across the EU Member States and various sectors, including the media, cultural heritage and, potentially, the creative industries. Afterwards, §8.5.3 reviews the most significant proposals that have been made to resolve the current data ownership and control dilemma and the subsequent stalemate. Finally, §8.5.4 considers several ways to improve in the production, maintenance, and alignment of music rights management information through the development of

[1246] Art. 14 of the DSA complemented by the obligation to state reasons of Art. 17 of the DSA.
[1247] Art. 15 of the DSA.
[1248] Art. 27 of the DSA.
[1249] Chapter 3, Sect. 5 of the DSA.
[1250] Art. 6(10) of the DMA.
[1251] For further analysis on the potential of platform regulation to increase transparency in the digital music sector, refer to Chapter 4.3 of Fair MusE's D2.3 Deliverable - Roles of EU competition law and platform regulation across online music platforms.

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metadata skills by music rightholders and a broader adoption of advanced technologies and cross-sector data integration tools, including AI and Blockchain.

8.5.1. State of the art in music data sharing: empirical findings

Today's platform-dominated economy shows that, in terms of leverage and bargaining power, a handful of big online music exploiters hold a position of power vis-a-vis music rightholders. This is especially evident in the conflict between the largest social media's metadata infrastructures and the music industry's standard content identifiers, which is now being reduced by the implementation of Article 17 of the DSM Directive. Access to basic information is still missing at the two ends of the digital music market's spectrum. The fact that the DSM Directive helped fill data gaps between the information standards followed in the streaming sector and those of the social media industry might have made the market fairer, but it has not yet properly resolved the issue of music data's integration and interoperability. Online exploiters still keep the information on the music exploitations by their users or subscribers substantially undisclosed. Therefore, these companies wield considerable power over their music licensing counterparts, especially the weaker ones, represented by the less powerful CMOs and the independent publishers and record labels. This situation is due to the largest platforms' market and technical position, which makes these digital services indispensable for the remuneration and promotion of music works and recorded music to the public.

In such asymmetrical contractual relationships, inherent transparency issues can be heightened by the lack of trust towards the stronger party combined with the reported absence of proper auditing as regards the information that the online exploiters - as users and licensees of the music repertoires - should share under the CRM and the DSM directives. On the one hand, the most vulnerable rightholders - *i.e.*, composers, performers and their respective CMOs and publishers - claim that their expectation to earn fair remuneration technically depends on the concrete chances for their repertoires to be identified and the accurate inclusion of their works and their identifiers (ISWCs) into the data infrastructures (ISRCs) used by the recording industry. On the other hand, DSPs and social media companies complain that the licensors of rights in musical compositions fail to provide the details of their repertoires and of the rightholders in every composition being used via their services, given the extreme fragmentation of these data infrastructures.

The key aspect of this unaccomplished data exchange mechanism is the practical intermediation, strategically performed by record labels who produce the main products licensed on the market (*i.e.* the records). To do so, and to be remunerated, to transfer and to receive from online exploiters all the revenues and the usage data, they use specialised distribution companies - whose data is reported through the DDEX formats. Distribution companies intermediate also, as a general rule, between DSPs and composers, performers and publishers in order to process and conduct the matching of data against DSPs' data, which adds yet another parameter of complexity and opportunity for data and their identifiers' mismatches.

Fair MusE interviews with stakeholders, especially CMOs and individual creators' advocates, raised the issue of social media service providers offering "flat rate" deals to all music rightholders for the clearance of all their rights. Under these agreements, the exploiters can elude reporting on the actual use of sound recordings and music repertoires in detail. This is not only a plain violation of the granular transparency obligations laid down in the CRM and DSM Directives, but also an

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infringement of creators' rights to an adequate and proportionate remuneration (Article 18 of the DSM Directive),[1252] whose payment is ultimately reduced to a tip or a sort of "indulgence".

In conclusion, a standardised and interoperable data infrastructure would avoid or reduce the current data mismatches and other inconsistencies across the digital music's value chains. These inconsistencies do not currently permit granularity or certainty in the transfer of revenues and usage data from the tech sector to the music industry. A "neutral" resource should allow music exploiters and distribution companies to correctly identify music repertoires and the related rightholders by smoothly liaising with the various organisations that represent such rightholders and collect revenues on their behalf. This resource shall also collect and make available greater details/data coming from DSPs, social media platforms and record labels, including the music catalogues they offer, the musical works and records concretely used in their services and the royalties they distribute. Otherwise, exercising any form of control over a fairer allocation of the proceeds earned online will continue to be impossible.

8.5.2. Legal protection of data, trade secrecy and the EU Open Data Strategy

A major decision concerns whether a (currently missing) data-sharing music data interface shall be an initiative subject to a proprietary model, made accessible only for the stakeholders involved - starting by the CMOs, the recording industry and the online exploiters - or a public or publicly funded resource or repository made available to the general public. While assessing these options, all the interests at stake, including both the music sector's and the tech sector's prerogatives, shall be fairly balanced so as to determine which data should be opened or shared freely and what information, instead, can remain proprietary or confidential. An essential element of this data infrastructure is that all the various layers of music rights should be contemplated and 'vertically' integrated.

The first option would consist essentially of a business-to-business data-sharing model, which needs to face obstacles arising from a very complex regulatory landscape, including legal protections of data and trade secrecy as a business justification not to share data with business partners in the EU. The EU's regulatory environment on this front is shaped both horizontally and vertically through directives that seek to strike a balance between the goal of data disclosure and use in business activities and the (potentially conflicting goal) of protecting the same data from unauthorised use. Key pieces of legislation on this front include the General Data Protection Regulation ('GDPR'), the DMA, and the Data Governance Act, all of which address data handling across multiple industries. Other regulatory instruments are, instead, sector-specific, as in the case of the Open Data Directive, which mandates the reusability of public sector data.[1253] As far as confidential business information is concerned, the regulatory landscape includes the 2016 Trade Secrets Directive whose broad

[1252] Lump-sum payments can be accepted as proportionate remuneration, according to Recital 73 of the DSM Directive. However, they are to take place in exceptional circumstances and where the particularities of the specific sector have been considered. See also Chapter 5.1 of Fair MusE's D2.3 Deliverable 'Roles of EU competition law and platform regulation across online music platforms.

[1253] See Regulation (EU) 2016/679 Of the European Parliament and of The Council on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) OJ L 119/1; DMA (n 104); Regulation (EU) 2022/868 of the European Parliament and of the Council on European data governance and amending Regulation (EU) 2018/1724 (Data Governance Act) OJ L 152/1.

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applicability in the domain of data makes it relevant for the purpose of identifying cross-sector data-sharing solutions.[1254]

The European Commission requested and funded a comprehensive study on this topic.[1255] The findings of this study are very useful here because of its mixed-method approach, which included both theoretical (*i.e.*, literature reviews) and empirical investigations (*i.e.*, surveys across key sectors: automotive, pharma/life sciences, energy/utilities, financial services; and interviews with experts). The authors emphasise that companies hesitate to share confidential and commercially valuable ('CCV') data due to fears of losing competitive edge and control over their data.[1256] This relates to Arrow's "information paradox" whose logic shows that, to capture value from data, companies share data, often with collaborators and customers. However, in doing so, they must reveal their data for the other party to understand what they are purchasing or paying for.[1257] In a nutshell: the very act of revealing reduces its value, as the other party now has sufficient information to have less need of the data.

In terms of mechanisms to protect confidential information, the Commission's study highlights that the protection provided to business data to protection of data through copyright law and, in particular, *sui generis* database rights, despite its relevance, offers either a limited or uncertain scope of protection.[1258] Yet, surprisingly, respondents to surveys and interviews consider IP protection regimes suitable for their purposes, although they typically rely on supplementary non-disclosure agreements.[1259] In this regard, the study confirms that the protection of trade secrets prevents misappropriation of confidential and commercial valuable data by third parties and, despite its perceived unreliability across Europe, is regarded by firms as a safety net when contractual protections fail. Besides the difficulties in tracking and controlling the use of CCV data on a cross-border basis with the US and China, the study reports significant issues in the effective enforcement of the Trade Secrets Directive at national level, despite its attempt to build a harmonised framework for the enforcement of these rights.

The study indicates that, while trade secrets law can create a safer environment for B2B data-sharing in Europe, even in the digital music sector, business actors need greater clarity from national courts and the CJEU on the definition of "trade secrets" and the "reasonable steps" they undertake to protect confidential information. Otherwise, the relationship of trade secrecy's law with other general

[1254] Directive (EU) 2016/943 Of the European Parliament and of The Council on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure (Trade Secrets Directive) OJ L 157/1.
[1255] Alfred Radauer and others, 'Study on the legal protection of trade secrets in the context of the data economy: final report' (European Commission 2022) <https://op.europa.eu/en/publication-detail/-/publication/c0335fd8-33db-11ed-8b77-01aa75ed71a1/language-en>.
[1256] Tanya Aplin and others, 'The Role of EU Trade Secrets Law in the Data Economy: An Empirical Analysis,' (2023) 54 IIC 826, 831; see also Radauer and others (n 1255) 57-58 and Appendix C Case Studies 1 and 2.
[1257] ibid 832. See Kenneth Arrow, 'Economic welfare and the allocation of resources for invention' (1962) Universities-National Bureau Committee for Economic Research. Committee on Economic Growth of the Social Science Research Council 609.
[1258] ibid. See also Radauer and others (n 1255) Appendix C Case Study 8; Database Directive, Art. 7.
[1259] ibid 832.

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(*erga omnes)* legal protections, such as copyright and database rights, will continue to be blurred and too difficult to address through contracts.[1260]

As for the second option, which consists of a public or publicly funded, freely accessible data-sharing resource or repository, its development could be based upon the EU's Data Strategy.[1261] Introduced in 2020 with the aim of positioning the EU as a leader in the data-driven economy through the creation of an EU single market for data, this initiative is designed to allow data to flow freely across the EU Member States and its various sectors, which will eventually lead to the creation of the "Common European Data Spaces".[1262] These spaces were originally expected to develop in specific strategic economic areas which are of public interest, including: health; agriculture; manufacturing; energy; mobility; financial; public administration; skills; the European Open Science Cloud; and the crosscutting key priority of meeting the Green Deal objectives. The concept of 'data space' is designed to deploy data-sharing tools and data-pooling services which include data governance structures, compatible with relevant EU legislation, that can determine, in a transparent and fair way, the rights concerning the access to and the processing of the data, and can improve the availability, quality and interoperability of data – both in domain-specific settings and across sectors.[1263] To this end, the European Commission is seeking to stimulate investments in projects, infrastructures and proposed regulations aimed at facilitating cross-border and cross-sectorial data exchanges. In fact, recently adopted legislation, such as the 2022 Data Governance Act and the 2024 Data Act, already aim at providing clear, fair and practical governance mechanisms to control the use and access of data, including for the cultural and creative industries.[1264]

It seems obvious now that these data spaces could emerge also in the media, cultural heritage and creative content businesses such as the digital music sector. As explored in the next section, a music-specific data space or infrastructure could either result from the improvement and inter-connection of the above-mentioned existing databases and metadata infrastructures, or it could be established, from scratch, via industry-driven or regulatory initiatives.

[1260] ibid 840.

[1261] European Commission, 'A European Strategy for Data' (Brussels, 19 February 2020) <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52020DC0066>.

[1262] In 2021, the 'data.europa.eu' portal was launched as a single access point for open data to support the supply and reuse of data under the legal policies of the EU Institutions and the respective EU Member States. The portal acts as a bridge between data providers and data users within the EU and currently holds approximately 1.8 million datasets compiled from 35 countries. From this vast collection of datasets, the Agriculture, fisheries, forestry and food sector leads with contributing 22% of the total datasets, the Justice and legal sector provides 18.5% of these datasets, the Environmental sector provides 12.5%, and the Public sector shares 10%. Statistics on data.europa.eu for sector contributions of data sets to implement the EU Data Strategy <https://data.europa.eu/catalogue-statistics/currentState/category?locale=en>.

[1263] Staff Working Document on Data Spaces (14 February 2022) <https://digital-strategy.ec.europa.eu/en/library/staff-working-document-data-spaces>. This document describes the state of play of the Data Spaces as of 2022.

[1264] See Data Governance Act (n 1253); Regulation (EU) 2023/2854 of the European Parliament and of the Council on harmonised rules on fair access to and use of data and amending Regulation (EU) 2017/2394 and Directive (EU) 2020/1828 (Data Act) [2023] OJ L2854/1.

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8.5.3. Working solutions for the current music data ownership dilemma

It is important to recall that the InfoSoc Directive and the CRM Directive established a solid foundation for the legal recognition and protection of copyright-related data and the related information. In 2001, by acknowledging the emerging role of the internet, the InfoSoc Directive contained an EU-wide definition of "rights management information" (cf. Article 7) attached to the copyright works that are being made available or distributed online.[1265] The InfoSoc Directive introduced not only the legal protection of technological measures, but also that of the metadata attached to the content made publicly available. After that, the 2014 CRM Directive established sound principles of data governance by boosting the data processing capacity of CMOs, in particular in the area of music rights and multi-territorial licensing. Empirical investigations conducted for the Fair MusE project evidenced that the implementation of the 2014 CRM Directive was a turning point for the establishment of digital data exchanges among rightholders, CMOs, and online exploiters. Meanwhile, in parallel with these legal developments, the music industry also worked on strengthening data governance through international rights-management and information-pooling initiatives such as CIS-Net, DDEX and others.

This legal recognition of the function, ownership and economic value of music metadata under EU law reinforces the idea that a music data 'space' or 'infrastructure' would have greater chances to succeed if it did not force any rightholders to relinquish control over the data generated by their core management businesses. The same conclusion can be reached for distribution companies and music exploiters considering how things stand in the domain of data ownership and the protection of trade secrecy. Therefore, industry stakeholders and policy makers need to properly reflect on which data, specifically, can be shared or exchanged across the music industry value chain, and which information, instead, can remain proprietary or confidential without undermining the overall purpose and functioning of the data-sharing space.

8.5.3.1. A metadata search and enhancement tool

The failed attempt to build a GRD, with a non-negligible financial support provided by the European Commission, evidenced that proprietary databases do not offer a solution. This is because, for the above-mentioned reasons, data holders are unlikely to allow searches or extractions of their collected data. Centralised database projects like the GRD are thus likely to fail, as the quality of the metadata is unstable and rights in copyright works are a tradable asset, meaning that rights ownership can change frequently.[1266] In the context of proprietary databases, a possible solution is the adoption of a music metadata search and enhancement tool that acts as an interface (like a "buffer") and safeguards the interests of the database owners, protecting them from parties who

[1265] See Art. 7(1) of the InfoSoc Directive 'Member States shall provide for adequate legal protection against any person knowingly performing without authority any of the following acts: (a) the removal or alteration of any electronic rights-management information; (b) the distribution, importation for distribution, broadcasting, communication or making available to the public of works or other subject-matter protected under this Directive or under Chapter III of Directive 96/9/EC from which electronic rights-management information has been removed or altered without authority, if such person knows, or has reasonable grounds to know, that by so doing he is inducing, enabling, facilitating or concealing an infringement of any copyright or any rights related to copyright as provided by law, or of the sui generis right provided for in Chapter III of Directive 96/9/EC.'

[1266] Martin Schaefer, 'Why Metadata Matter for the Future of Copyright (*Kluwer Copyright Blog,* 27 November 2020) <https://copyrightblog.kluweriplaw.com/2020/11/27/why-metadata-matter-for-the-future-of-copyright/>.

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want to free-load from their stock or information.[1267] In this system — similar to CISAC's CIS-Net in the domain of composers' and publishers' rights — the search tool queries all connected databases and ranks the results using a sophisticated and transparent algorithm, such as the one developed by Verifi Media before it ceased operations in February 2025. According to a study conducted for the German Ministry of Justice, a model based on the idea of a music metadata search and enhancement tool could be based on certain prerequisites that would make it function (and be adopted) properly: (i) neutrality, so that the infrastructure itself does not affect the market power between the stakeholders involved; (ii) independence of all the connected databases that are linked to the search tool; (iii) a mutual incentive to exchange metadata without exchanging money; and (iv) the existence of technical protections ensuring that the connected databases are not drained so as to create an external "mega- database."[1268]

8.5.3.2. A centralised music metadata repository

Another metadata-driven proposal to enhance the visibility and licensing potential of European repertoires — including for AI developers — is the creation of an EU-wide metadata repository working as a public copyright data infrastructure.[1269] This initiative, which draws partly on both the options highlighted in the previous section, would aim at integrating data from smaller and less prominent repertoires to duly reflect and preserve cultural diversity. Although not music industry-specific, this proposal builds on the data-sharing obligations under Article 17 of the DSM Directive, which clearly addresses the music sector. The proponents argue that Article 17(4)(b) provides a legal basis for mandating standardised and interoperable metadata on the protected works, the rights, and their rightholders. Such a centralised EU repository aggregating metadata could break existing silos maintained by CMOs, rightholders, and online platforms.[1270] However, unlike the music metadata search and enhancement tool proposed in Germany, this model would require music licensors, content distributors, and licensees to fully disclose their music metadata to build a centralised, "physical" repository that, according to the proponents - very optimistically - could be administered by a public body like the European Union Intellectual Property Office ('EUIPO').

Building a brand new (centralised) metadata repository and placing it under the supervision of an EU impartial body is certainly useful and thought-provoking. Nevertheless, the main argument of this proposal does not seem fair - in terms of balance between the stakeholders' interests - and fully correct when it comes to the concrete goals and "direction" of Article 17. Affirming, as the repository's proponents do, that Article 17(4)(b) requires the supply of standardised and interoperable metadata,

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[1267] ibid.

[1268] The German Ministry of Justice and Consumer Protection commissioned a study for a model based on the metadata search and enhancement tool from a working group at the University of Potsdam. EMR Platform: Conception of a European, Decentralised Copyright Platform for Music <https://lswi.de/assets/images/presse/zentrum/Copyright-Conference.pdf>. Schaefer (n 1266) endorses this model, arguing that the idea of this music metadata search and enhancement tool can go far beyond the music industry alone and can be applied throughout the whole copyright sector (and even beyond). He believes that large international public organisations or NGOs would be best suited to set up this framework and make it function as in the model outlined above.

[1269] Senftleben and others, 'Ensuring the Visibility and Accessibility of European Creative Content on the World Market: The Need for Copyright Data Improvement in the Light of New Technologies and the Opportunity Arising from Article 17 of the CDSM Directive' (n 786) 82.

[1270] ibid 81-82.

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such as details about the copyright-protected works, the exclusive rights, and the rightholders' contact information,[1271] is only partly true. If this central EU repository ended up containing and aggregating only the notifications made by the copyright holders in the attempt to enforce their rights vis-a-vis the social media platforms, the resulting dataset would eventually be built and subsided just by one of the digital market, *i.e.*, the creative sector.

In the online music sector, in particular, this Study has shown that the obligations of social media companies under Article 17 to make their best efforts to obtain a licence for the contents made available to the public have effectively changed their rights clearance policies and attitude, instigating data collaboration and exchanges in *both* industry directions. For more than a decade social media companies took advantage of broad copyright liability exemptions under the US DMCA and the EU e-Commerce Directive as hosting providers, building their own services' and platforms' metadata and content IDs while disregarding - or even removing, and then replacing, in violation of the obligations laid down under Article 7 of the InfoSoc Directive – the creative sectors' rights management information standards.

Therefore, to be fair and acceptable for all stakeholders, the costs of harmonising and improving copyright metadata should not fall on the creative industries or be paid by taxpayers' money. This would be an (un)intended present for Big Tech, to the dismay of thousands of small enterprises and music creators who struggle to find proper digital recognition, given their less prominent or niche music repertoires in a highly diverse and exceptionally fragmented sector like the European music ecosystem. Considering the purpose of Article 17, and the greater accountability that has been built under EU law from then onwards, especially for VLOPs under the 2022 DSA, it would seem fair to require tech companies to bear the costs of creating and maintaining a data repository supporting content identification (or "moderation"), less biased recommender systems, and eventually a fairer remuneration of all rightholders, including smaller enterprises and creators from niche or minority backgrounds. At the end of the day, this is also the model adopted, in its own specific domain, by the MLC in the US, where the publicly owned music data repository is funded by the DSPs as the main beneficiaries of such a beneficial resource.

8.5.4 Improvement in the production, maintenance, and alignment of music rights management information

The above-mentioned sections evidence that, given their key function in complex digital markets, rights management processes incur significant costs, particularly due to the inefficiencies in handling metadata and resolving disputes. The lack of standardisation exacerbates these costs, especially for smaller entities like independent record producers, small publishers and composers and performers from minority backgrounds. In the music industry, in particular, an additional layer of metadata complexity is "structural", given that rights have two distinct strands: the recording ("master") rights and the authors' ("publishing") rights. Each of these layers has its own data standards as well as their own databases and data initiatives, which challenges the interoperability of the relevant data.

[1271] ibid 81.

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8.5.4.1. Development of metadata skills

As shown in a study requested by the European Commission and published in 2022, there is room for significant improvement in the production, maintenance, and alignment of music rights metadata.[1272] The main argument on this front is that, if creators and stakeholders had a more solid background in creating and managing metadata, this would make the aforementioned data-sharing initiatives efforts easier and more effective. As recalled in the Study, the "pain points" are those of matching, duplicating and capturing metadata, especially in a two-layer rights industry where the main problem is the necessity to match the rights management information pertaining to the musical compositions with the data contained in the sound recordings *ex post*. It follows that:

1. Matching data is a costly process that may only be sustainable above a certain number of streams per month, and even then not 100% complete or accurate.[1273]

2. Duplicating data is sensitive because it can cause confusion and delay, costs to fix, revenue misattribution, and loss of trust in the overall data system.[1274]

3. Capturing data is problematic because of the costs of data curation to be performed by very qualified personnel and through sophisticated systems. In particular, legacy data for older works is easily subject to errors, requiring extensive manual corrections. In the meantime, the delayed capture of rights management information causes the loss of potential revenue, increases the likelihood of data conflicts and disputes down the line, and ultimately delays and halts payments, possibly resulting in costly litigation.[1275]

Given this complexity, the launch of several initiatives in the area of education and expertise regarding metadata should not come as a surprise and should be welcome.[1276] Metadata educational programs can instill best practices at early stages in the creative process as much as formal

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[1272] Directorate-General for Communications Networks, Content and Technology, 'Study on Copyright and New Technologies: Copyright Data Management and Artificial Intelligence' (2022) SMART 2019/0038.

[1273] ibid 61.

[1274] ibid.

[1275] ibid. Instances of low interoperability or automation between payments systems at any point of the upstream sequence of many transfers leads to slow payments and high costs of remuneration. From a data management perspective, this means that more metadata will need to be reliable, exhaustive, and up to date and that more reconciliations will need to be performed between business models.

[1276] Among these, for instance: the Working Party on IP at the Council of the EU, which prepares legislation and presents its findings to the Council - see 'Working Party on Intellectual Property' (Europa.eu, 11 January 2024) <https://www.consilium.europa.eu/en/council-eu/preparatory-bodies/working-party-intellectual-property/>; the Finnish Ministry of Education and Culture's project around the copyright infrastructure, which invests and develops in training programmes on copyright data and copyright infrastructure - see 'Report examines how and to what extent CMOs are able to process personal data in the copyright operating environment' (Ministry of Education and Culture Publication, 18 October 2022) <https://okm.fi/en/-/report-examines-how-and-to-what-extent-cmos-are-able-to-process-personal-data-in-the-copyright-operating-environment?>; the UK project Music 2025, which examines issues facing the music industry in improving data management - see Music 2025, 'The Music Data Dilemma: issues facing the music industry in improving data management' (UK Intellectual Property Office, June 2019) <https://assets.publishing.service.gov.uk/media/5d07940ced915d0a8216b12b/Music-2025.pdf>; and the Content Authenticity Initiative, funded by Adobe in 2019 to improve digital content's transparency - see Content Authenticity Initiative's website at <https://contentauthenticity.org/>.

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education and guidance of professionals having to handle content and rights metadata when developing or using rights and royalties systems.

8.5.4.2. Adoption of advanced technologies and cross-sector data integration tools

Finally, metadata creation, validation, and correction can be radically improved and automated through several advanced technologies, including AI. Blockchain is probably the most explored technology on this front considering its capacity to provide transparent and tamper-proof tracking of rights ownership and usage. For this purpose, these attempts are considering the use of the European Blockchain Services Infrastructure ('EBIS').[1277] One of these initiatives is the EBIS pilot project Open Rights Data Exchange ('ORDE'), whose core objective is to establish a secure, standardised, and transparent way to exchange and verify rights-related data (e.g., IP licences, usage permissions, digital entitlements) across borders, platforms and sectors. In this system, rightholders register rights and in return receive registration tokens. Rights users query rights management information and receive trusted rights data. This project identifies that leveraging Web3 to establish a verifiable rights data network can enable rights holders to declare their creative works, secure their rights across and obtain registration certificates containing machine-readable rights management information. Additionally, this network will let online platforms and other users of those rights retrieve and process accurate, interoperable data needed for licensing, distributing, and compensating digital media.[1278] So far, ORDE has focused on creating a baseline data model, piloting these models with real stakeholders, and drafting a governance framework. While still in development, ORDE has already produced technical specifications, tested a proof of concept with select partners, and laid out plans for broader scaling. The ultimate goal is to foster trust, innovation, and efficiency in the handling of rights data throughout the EU.

Another remarkable initiative aimed at improving cross-sector data integration is the Open Rights Data Framework ('ORDF'), which plans to unify sector-specific systems and identifiers. Integrating cross-sector standards like ISRC (recorded music), ISAN (audiovisual), and ISBN (publishing) would reduce silos and increase efficiency.[1279] If properly developed, the ORDF would have the advantage of contributing to a single market for data by increasing interoperability, providing more trustworthy rights information, and restoring a level playing field between major actors (gatekeepers) and SMEs.

Finally, it is worth highlighting 'Open Music', a nonprofit initiative led by the Berklee College of Music, founded by Berklee's Institute for Creative Entrepreneurship in collaboration with the MIT Media Lab

[1277] EBIS webpage, <https://ec.europa.eu/digital-building-blocks/sites/display/EBSI/Home>, see also European Commission 'European Blockchain Services Infrastructure' <https://digital-strategy.ec.europa.eu/en/policies/european-blockchain-services-infrastructure>. EBIS consists of a peer-to-peer network of interconnected nodes running a blockchain-based services infrastructure. Each member of the European Blockchain Partnership (EBP) – the 27 EU countries, Norway, Liechtenstein and the European Commission – will run at least one node. This network will allow public organisations to develop applications that connect to and make use of the EBSI infrastructure. Eventually, it will be extended to private organisations.

[1278] See EBIS, 'Open Rights Data Exchange: Framing data management practices in the creative industries to improve authoritative and updated information on rightsholders, terms and conditions, and licensing opportunities' <https://ec.europa.eu/digital-building-blocks/sites/display/EBSI/Open+Rights+Data+Exchange>.

[1279] Directorate-General for Communications Networks, Content and Technology, 'Study on Copyright and New Technologies: Copyright Data Management and Artificial Intelligence' (n 1272) 109 and Annexes 6-7.

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and a consortium of leading media industry and academic institutions.[1280] Its mission was to identify inefficiencies in the music ecosystem that, if addressed, could unlock additional revenue streams for music creators. Launched in 2016, the initiative sought to develop an open-source protocol to ensure the uniform identification of music rights holders, ultimately fostering fair and transparent compensation for all participants in the music industry. By tackling the long-standing challenge of fragmented rights data, it aimed to foster greater efficiency, trust, and equity in the digital music marketplace. The initiative quickly expanded to include over 200 members, including major industry players such as Sony, Universal, and Warner, alongside platforms like YouTube, Spotify, Pandora, Netflix, Alibaba, Sonos, Sirius, and Viacom.

Berklee's Open Music also designed and released the Open Music Application Programming Interface ('API'), a key tool for enabling interoperability between industry platforms. This API was intended to facilitate the seamless exchange of data between the recording and music publishing sectors, as well as the databases of streaming services, music licensing agencies, and supervision companies. Unfortunately, despite its ambitious goals and promising progress, the Open Music Initiative was shuttered due to budget constraints exacerbated by the Covid-19 pandemic, marking the premature end of an effort that sought to transform the landscape of music rights management.

[1280] See Berklee College of Music, 'Open Music Initiative,' <https://college.berklee.edu/focused/ice/open-music-initiative>.

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9. Conclusion

9.1. Summary of findings

9.1.1. Notion of 'music creators', purposes and scope of the Study

The Introduction of this Study established the conceptual and legal framework for understanding the role of "music creators" in contemporary copyright law and the European music industry. It argued that the term "music creators" should be correctly understood to ensure legal and policy discussions remain focused on those who engage in the authorship, performance, and production of musical works as professionals and with an expectation of fair remuneration for their work. The Study distinguishes this category from the increasingly popular concept of "content creators," a term that, while adopted in digital culture of social media, dilutes the historical and legal concept of authorship and ultimately justifies the broadly uncompensated dimension of today's creativity. By reclaiming the traditional understanding of authorship, the Study reinforces the importance of copyright law in preserving professional creative labour in music.

At the heart of this introductory chapter was an exploration of the tripartite structure of music copyright resulting from its emergence and consolidation: musical compositions, performances, and sound recordings. These three elements form the basis of music copyright law, each linked to specific categories of rightholders — composers and lyricists, performers, and record producers. The Study traces the historical and legal evolution of these rights, from early European copyright statutes, which originally focused on written musical compositions, to the subsequent recognition of performances and sound recordings as distinct and protectable subject matter. A key argument was the necessity of distinguishing between these legal concepts to ensure that copyright protections remain meaningful in today's digital economy. While traditional compositions were historically protected through notation-based copyright, the advent of recording technologies transformed music into a more complex legal object that required additional layers of rights to protect performances and recordings. This development continues to shape contemporary discussions on digital licensing, fair remuneration, and the role of CMOs.

As this Study shows, today's music creators' rights require an in-depth examination following the digital transformation of the music industry. The transition from ownership-based to access-based consumption models has significantly altered the industry's value chain, creating new challenges for copyright enforcement, licensing and remuneration. These structural changes necessitate an evaluation of the EU copyright *acquis* to ensure that online platforms do not unduly extract value from music creators without fairly compensating them.

9.1.2. Exclusive and remuneration rights

Chapter 2 explored the legal frameworks governing music creators' rights within the EU, emphasising the interplay between international treaties, EU Directives, and national laws. This analysis shows that copyright protection plays a crucial role in fostering creativity and innovation among music creators by ensuring they can control the dissemination and the commercial exploitation of their original works, even more so throughout the internet. This protection has been

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deemed essential for safeguarding artists' fair remuneration and artistic reputation, both of which are crucial for the financial sustainability of the music industry. In outlining the international and EU legal frameworks that shaped copyright legislation across EU Member States, this Chapter highlighted the foundational role of the Berne Convention, the Rome Convention, the TRIPS Agreement and the WIPO Internet Treaties in establishing minimum protection standards for authors, performers, and record producers. These international treaties were instrumental in harmonising copyright laws within the EU, providing a common ground for the first overarching legislative measures at the EU level.

Historically, the EU's music copyright acquis started with the adoption of the 1992 Rental, Lending and Neighbouring Rights Directive on the harmonisation of performers' and record producers' rights and that of the rental and lending rights. This early EU copyright harmonisation phase dealt mostly with types of rights and commercial exploitation that required harmonisation of laws to fix disparities across the Member States and pursue the goal of building an Internal Market. This was the case of the neighbouring rights of performers, record producers and broadcasters covering radio and TV broadcasts, satellite communications and cable retransmissions. A further central aspect of this phase was the harmonisation of the term of protection for copyright and related rights in 1993, with a general term of protection (from 50 to 70 years *post mortem autoris*) which instigated an equivalent extension in the US in 1998.

The 2001 InfoSoc Directive harmonised and consolidated the very broad array of exclusive rights that are of essential relevance for music creators: reproduction (or 'mechanical'), communication to the public (or 'performing'), distribution, rental, and lending rights. The Study explored the genesis, development and interpretation of all these rights in the EU, together with the main exclusive right of creators that remain outside of the scope of the EU copyright harmonisation: the right to control derivative works (with 'synch rights' being one of its manifestations in the music business). Furthermore, EU law and related case law embraced a concept of originality that requires an "author's own intellectual creation" for copyright to subsist in a work, reflecting a human-centred approach that ensures individual creators are (and shall remain) the primary beneficiaries of copyright protection. Despite the increasingly blurred roles of composers, performers and record producers in digital settings, and the fact single persons can simultaneously fall within each of these legal concepts, Chapter 2 recalled how the distinction between the rights of authors (and music publishers: so-called 'publishing' rights), on the one hand, and those of performers and record producers (so-called 'recording' or 'master' rights), on the other hand, remains crucial to understand the duality of the music industry and its complexities as far as the rights management and remuneration systems are concerned.

Following a classical distinction between economic and moral rights, the chapter reviewed creators' moral prerogatives. These rights remain unharmonised at the EU level, although they are mandatory at the international level for all the EU Member States as Contracting Parties of the Berne Convention and other international agreements where these rights are contemplated. Moral rights include the right of attribution and the right to integrity. As this chapter explains, both remain essential to protect the personal and artistic connection between creators and their works, even more with the advent of powerful AI technologies threatening to replace human creativity. The rights to attribution and integrity of copyright works are deeply ingrained in the continental-European *droit d'auteur* legal tradition. Moreover, as personality rights, these rights can strengthen the dimension of authors' rights as fundamental rights under the EU constitutional framework. Nevertheless, the current lack of

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harmonisation at the EU level entails the existence of exceptionally different legal approaches to these rights in current or former member states of the EU, such as Ireland and the UK, where the protection is much weaker than in continental Europe.

The Chapter's broad review of creators' rights would not have been complete without the inclusion of several remuneration rights that EU law has granted to performers and record producers for the rental and lending and for the broadcasting and communication to the public of phonograms. Considering the high investment and risks in the recorded music business, these rights aim to subsidise the rights holders involved, embracing a logic of support to the cultural sector that goes beyond the formal granting of exclusive rights under a principle of freedom of contract. This logic was the same as in Directive 2011/77, which extended the term of protection of sound recordings from 50 to 70 years from the time of their publication. In this case, as Chapter 2 emphasised, the 2011 Directive expressly protects the most vulnerable music rightholders - *i.e.,* the performers remunerated through lump-sums (session musicians) - by reserving to them a fixed percentage (20%) of the additional revenues earned by the record producers through the term extension.

9.1.3. Copyright exceptions, text and data mining, and AI

Chapter 3 examined the legal tensions at the intersection of copyright, AI, and digital innovation, with a focus on European copyright exceptions, private copying levies, and text-and-data mining. The chapter underscored the deep-rooted structural differences between European and US copyright frameworks, emphasising how these divergences shape both market realities and judicial interpretations. The European model's reliance on an exhaustive list of exceptions, coupled with the three-step test, has fostered legal certainty but has also hindered its adaptability to the rapid technological changes brought about by AI and digital media consumption.

A critical finding of this Study is the role played by the CJEU in shaping the enforcement of copyright exceptions through the fair balance principle. In landmark cases such as *Deckmyn* and *Pelham I*, the CJEU has sought to reconcile copyright protection with fundamental rights, particularly freedom of expression. However, its approach has sparked academic debate, with some scholars arguing that the principle of 'fair balance' ultimately "over-constitutionalised" copyright, favoring rightholders' interests at the expense of competing public policy goals. Others, including the author of this Study, maintain that this harmonised judicial interpretation is necessary to maintain legal certainty and uphold the integrity of the EU copyright system.

The Chapter also explored the economic implications of private copying levies, demonstrating how they function as a compensatory mechanism in the absence of enforceable licensing within the user's private sphere. However, the inconsistent implementation of levies across EU Member States has led to market distortions, particularly in the pricing of consumer electronics. Moreover, as streaming and cloud-based media consumption become dominant, the legal and economic justifications for private copying levies are increasingly questioned, with ongoing litigation potentially redefining their scope.

In the realm of AI, the two TDM exceptions under Articles 3 and 4 of the DSM Directive have become a focal point of legal contention. The Chapter highlighted the difficulties surrounding the implementation of these provisions, particularly the ambiguities in defining a valid rights reservation for purposes unrelated to research. The *LAION* case, as ruled by the Hamburg Regional Court, has

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brought attention to the challenges of implementing machine-readable opt-outs and the lack of standardisation in rights reservations, leaving music rightholders vulnerable to unauthorised data scraping.

The chapter's final section critically examined the unprecedented legal challenges that the widespread and increasingly mainstream use of GenAI models poses to music rightholders. The chapter relied on the lawsuits recently filed by the German collecting society GEMA against OpenAI and Suno to illustrate the significant economic stakes involved. The primary concerns surround the training phase of GenAI, where justification may be sought under the TDM exception provided for in Article 4 of the DSM Directive. Other concerns regard the output phase, where a legal distinction between derivative works (to be authorised by copyright holders) and independent AI-generated creations remains unclear and ultimately depends on the treatment of transformative use under copyright exceptions. This section thus acknowledges that remuneration schemes and licensing models could serve as a viable solution but warns that the lack of data infrastructure to track AI's use of copyright works raises serious barriers to equitable revenue distribution.

Chapter 3 ended with the attempt of the EU AI Act to address some of the above-mentioned concerns through new transparency and copyright compliance obligations. The requirement for GenAI providers to implement a copyright policy and disclose the datasets used for training models is a laudable step forward. However, there is confusion in the understanding of these obligations, as evidenced in the second version of the AI Office's draft for a General-Purpose AI Code of Practice. The current version of this draft undermines the copyright-related obligations by introducing vague and diluted compliance standards, potentially weakening rightholders' protections. Ultimately, this chapter stressed that, while copyright law must evolve to address AI-related challenges, this evolution must be guided by principles that eventually ensure that creators' rights remain protected. Without clear enforcement mechanisms and interoperable data infrastructures, there is a persisting and tangible risk that AI companies continue to exploit legal loopholes to the detriment of musicians, authors, and other creators. Policymakers must strike a careful balance between fostering innovation and ensuring that AI-driven transformations in the creative industries do not erode the fundamental rights of those whose works underpin these new technological advancements.

9.1.4. EU copyright contract law in the DSM Directive

Chapter 4 dealt with the copyright contract law provisions introduced by Chapter 3 (Articles 18-23) of the DSM Directive. A main principle of this exceptionally promising piece of legislation is that individual creators - namely: authors and performers - can only thrive when their right to fair remuneration is effectively safeguarded. In this respect, the chapter examined the implications of Chapter 3 of the 2019 Directive, which specifically addresses 'fair remuneration' in exploitation contracts for authors and performers. As a main policy goal, these provisions seek to redress the financial and informational imbalances in the music industry, exacerbated by the digital economy and emerging technologies. As this part of the study explained, Article 18 of the DSM Directive serves as a cornerstone of Chapter 3's legal framework, despite not being included in the original Commission's legislative proposal, tabled in 2016. Against this backdrop, the Chapter began by tracing the provision's origins and juxtaposing two key influences on the legislative process: the FIPC and the Reda report. In doing so, it highlighted the extensive consultations and stakeholder engagements that shaped Article 18's and, ultimately, Chapter 3's final version.

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Since the practical impact of Article 18 remains highly dependent on its transposition into domestic legal systems, the Chapter drew on Fair MusE's analysis of the ten Member States considered in its research project. Rather than identifying a unified approach across national laws, the desk research highlighted growing legal fragmentation, driven by substantial differences in how national lawmakers interpreted "appropriate" and "proportionate" remuneration. Some countries' transpositions provided no further criteria to determine when remuneration is actually "fair," thereby prioritising the contractual freedom of the negotiating parties. By contrast, countries such as Germany, Greece, and Italy, adopted a more protective stance for rightholders, with national laws offering clear reference points on this matter, such as limiting the counterpart's option to pay rightholders (including session musicians) a lump-sum.

Fair MusE's analysis of the ten national transpositions further evidenced the exceptionally important role of collective agreements in securing fair remuneration for creators, as several Member States' laws presume remuneration established through such agreements to be fair. As highlighted in this Chapter, collective bargaining has historically been, and continues to be, a crucial mechanism for setting remuneration standards. This is particularly the case in the music industry, where CMOs play a central role; a role that was further bolstered by DSM Directive's provisions (cf. Articles 8 and 12) which, under specific circumstances, grant CMOs the power to issue extended licences, covering musical works and sound recordings belonging to non-members. Furthermore, the Chapter shed light on three Member States that have maintained or introduced statutory remuneration rights, making arguably the most radical attempts to foster fair remuneration. These include Spain's residual equitable remuneration right for performers, which has been in force since 2006 (when Spain implemented the 2001 InfoSoc Directive) and Germany's remuneration rights concerning OCSSPs. Belgium also introduced a new non-transferable and non-waivable remuneration right for authors and performers vis-à-vis streaming services and OCSSPs, whose compliance with EU law is currently challenged before the CJEU because of a preliminary reference requested by the Belgian Constitutional Court. All these statutory rights aim to ensure that contractually weak parties such as authors and performers can receive fair compensation directly from online exploiters, reflecting a concerted effort to address the challenges posed by the digital economy. However, the divergent approaches taken by Member States raise concerns about further fragmentation of remuneration rights within the EU, posing a challenge to the objective of a genuine 'Digital Single Market.'

After examining Article 18 and its national transpositions, the Chapter moved into the analysis of the DSM Directive's Chapter 3 provisions that are intended to complement Article 18's overarching 'fair remuneration' objective. As shown in this section, the effectiveness of the copyright contract law mechanisms enshrined in Article 20 ('best-seller clause') and Article 22 (rightholders' revocation right) largely depends on the contractual counterpart's compliance with the general transparency obligation established in Article 19. As emphasised also in Chapter 8 as regards the availability of granular music data in online exploitation reports, Article 19's transparency obligation has a significant potential, especially when national lawmakers take it seriously. This is the case of the Italian transposition, which grants the national supervisory authority for communications (AGCOM) the power to impose administrative fines on contracting counterparts who fail to provide transparent information about the exploitation of musical compositions or sound recordings to the respective rightholders. In addition, Member States' newly established or pre-existing out-of-court dispute resolution bodies (Article 21) offer authors and performers an effective procedural avenue for enforcing their information rights. Turning to the implementation of Article 22, the ten Member States



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adopted different conditions for exercising the revocation right. Germany, Portugal, and several other Member States establish a fixed period before a licence can be revoked, avoiding the vague concept of a "reasonable time" under Article 22. Other national legislators, such as Belgium's and Greece's, opted for a more nuanced approach, permitting only the revocation of a licence's exclusivity, leaving the rest of the agreement intact. Finally, a third group of EU countries, including Spain, specifically addresses licence revocation in more complex cases involving multiple rights holders who have contributed to a licensed musical composition or sound recording. Beyond these notable divergences, the chapter concluded that the national transpositions of Articles 19–22 of the DSM Directive reveal significant uniformity, prompted by a (mostly) verbatim implementation of the EU model law.

Finally, based on Fair MusE's own empirical investigations as well as studies conducted by influential industry associations, the Chapter concluded that the implementation of Chapter 3 of the DSM Directive has fallen short of its (exceptional) potential. While the DSM Directive represents a significant step forward in promoting the economic wellness of individual creators, ongoing efforts are necessary to address the persistent structural imbalances between contractual counterparts in the music sector. Despite the meaningful progress made toward defining and fostering fair remuneration, different degrees of music creators' collective representation and the consequent inability to properly exercise the right to transparency against music exploiters still make remuneration expectations very different from country to country.

9.1.5. The fairness-enhancing dimension of the EU copyright liability regime for social media services

Chapter 5 explored fairness in the music sector through the lens of the relatively new EU copyright liability regime for social media services under Article 17 of the DSM Directive. To better grasp the necessity of this provision, the Chapter started by recalling that, since the mid 2000s, the emergence of social media services led to a constantly increasing "platformisation" of digital content distribution. The emergence of these content-sharing platforms happened at a time the music industry had just restored proper markets for sound recordings via fully licensed music download and, later on, streaming services after nearly a decade of uncompensated peer-to-peer music sharing. The concern of a "value gap" emerged, in particular, by comparing the licensing fees paid by legitimate music exploiters and the broadly uncompensated exploitation of music on platforms that were reluctant to negotiate licences with creators and their representatives due to the uncertainties characterising the copyright liability regime created for 'hosting service providers' under Article 14 of the 2000 E-Commerce Directive.

The Chapter continued by introducing the European Commission's proposal for a directive on copyright in the Digital Single Market. The analysis focused specifically on Article 17's predecessor (Article 13) which shall be viewed as a policy response to the aforementioned challenges. Despite the academic and public criticism surrounding the legislative process and the adoption of Article 17 for its alleged adverse impact on end users' and tech companies' fundamental rights, this chapter offered a more favorable assessment of this provision on the grounds of interviews and the results of other empirical investigations. The chapter argued that Article 17 ultimately seeks to strike a fair balance between competing rights and stakeholders' interests. As argued in Chapter 5, the evolution from the proposed Article 13 to the final version of Article 1 clearly pursues this fairness objective.

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First, Article 17's eventually well-defined scope of application ('OCSSPs' instead of 'ISSPs'), along with the exemption of specific services, increases legal certainty for online platforms while targeting only those that actually cause the 'value gap.' Simultaneously, the introduction of the "best efforts" standard—which replaced the strict liability approach under the proposed Article 13—and of additional proportionality criteria, foster a case-by-case analysis of each service provider's specific capabilities when assessing its liability for copyright-infringing user uploads. Second, with its strong focus on obliging OCSSPs to engage in licensing negotiations, the final provision delivers a long-overdue legislative response to the bargaining power asymmetry between music rightholders and large tech companies. Lastly, by incorporating fundamental rights safeguards such as a set of mandatory copyright exceptions and an obligation for platforms to provide a complaint and redress mechanism, Article 17 also aims to protect the rights and interests of social media users.

The Chapter ended by examining two key CJEU rulings on social media platforms' copyright liability: *(i)* the *YouTube* and *Cyando* cases, which concerned the pre-DSM legal framework and *(ii)* Poland's challenge to Article 17(4), which offered to the CJEU the possibility of reviewing the compatibility of the overall provision with the EU constitutional framework. The first ruling clarified that online platforms like YouTube must take appropriate measures to prevent unauthorised uploads of copyright works while ensuring that users' fundamental rights are not unjustifiably infringed. The second ruling upheld Article 17's validity and emphasised—as this Chapter did —that the DSM Directive's liability framework is indeed adequate to achieve a sought-after fair balance between the interests of rightholders, online platforms, and their users.

9.1.6. Article 17's national transpositions: trends, effects and unsettled issues

Building on the findings of the previous chapter, Chapter 6 analysed the extent to which the ten Member States investigated by the Fair MusE project maintained Article 17's fairness-enhancing effects in their national transpositions.

This Chapter found that, due to the almost verbatim implementation of this provision in the vast majority of Member States and considering its level of detail, Article 17 has had much stronger harmonisation effects than the "open" provision of Article 18. At the same time, the chapter observed substantial variations in certain jurisdictions where slight divergences start by the national definitions of "Online Content-Sharing Service Provider". In the chapter's comparative analysis, for instance, Spain stands out as one of the main outliers, having introduced significant amendments to the definition provided in Article 2(6) of the DSM Directive and having strengthened Article 17's protections to the benefit of rightholders. Such national deviations, as shown in this chapter, raise the risk of legal fragmentation, which, in turn, creates further obstacles to the establishment of EU-wide copyright content moderation practices.

After that, Chapter 6 closely examined the implementation of the "best efforts" standard for the assessment of OCSSPs' compliance with the obligation to negotiate licences under Article 17(4)(a). It became evident, especially on the grounds of Fair MusE's empirical investigations, that this provision effectively enhanced music rightholders' bargaining power and helped them finalise licensing agreements with all the commercially most relevant and music-intensive social media services. However, despite its good intentions, Germany's over-regulating national transposition - certainly the most "creative" among the ones analysed for this Study - paradoxically placed the most vulnerable rightholders in a disadvantaged position by requiring social media platforms to actively

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approach only large repertoire rightholders for licensing negotiations. Compounding the issue, German law enables OCSSPs to reject an otherwise reasonable licensing offer if it does not cover a sufficiently broad repertoire of musical works or sound recordings. The Chapter relied on several case studies of prominent music licensing disputes to show that the owners of major repertoires and the most prominent CMOs already possess some leverage to secure acceptable licensing agreements. For rightholders owning or representing smaller music rightholders - instead - their licensing struggle continues unless they join the above-mentioned licensing hubs. Given this imbalance, this chapter concluded that the "best effort" standard —subject to national courts' assessment— serves as a crucial balancing mechanism especially for these vulnerable music rightholders.

A further step of this chapter was the analysis of the "notice-and-stay-down" regime under Article 17(4)(b) and (c) of the DSM Directive, which has been implemented uniformly across Member States, with the exception of Spain. In discussing this regime, the chapter considered the role of automated content recognition technologies, which are paired with rights management systems and were progressively adopted by all the largest social media platforms, starting with YouTube's pioneering 'Content ID.' Beyond the function of preventing unauthorised uploads of copyright infringing materials, the *de facto* mandatory implementation of these technologies has created strong incentives for music rightholders and platforms to collaborate in terms of repertoire data and metadata exchanges, ultimately paving the way for more robust and granular copyright data infrastructures. Yet, the Chapter acknowledged that the structural use of upload filters must be carefully balanced against the need to safeguard users' fundamental rights. To this end, a comparative analysis of the transpositions unveiled distinct legislative priorities among Member States. Austria and Germany introduced detailed, yet legally controversial, *ex ante* safeguards for short excerpts of, for instance, sound recordings to protect users' freedom of expression on social media platforms. On the opposite front, the Italian and Spanish approach prioritises rightholders' interests at the expense of users' rights by mandating inaccessibility of contested content until a complaint is resolved.

To conclude, Chapter 6 argues that, despite the existing national deviations, Article 17 has concretely helped music rightholders exercise and enforce their rights across social media platforms. Moreover, the chapter emphasises the existence of a strong historic policy link between Article 17's pioneering, copyright-specific 'platform regulation' infrastructure and that of more recent, horizontal and broader regulations such as the DSA and the DMA. It is rather obvious that, unlike these regulations, Article 17's success in addressing and reducing the so-called 'value gap' to the benefit of music creators' fairer remuneration - will depend on the enforcement of this provision at national level.

9.1.7. Music licensing in Europe: collective rights management and beyond

Chapter 7 explored the evolving landscape of music licensing in Europe, focusing in particular on the rights in musical compositions (or 'publishing' rights) and the crucial role of CMOs. The Chapter began by tracing the historical evolution of collective rights management, which dates back to the 19th century when CMOs were first established to manage public performance rights. Over time, considering the progressive expansion of creators' rights across new media, these organisations became central players in the music industry, facilitating the licensing of rights on behalf of large

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numbers of composers and music publishers, reducing transaction costs and fostering an efficient collection and distribution of royalties.

The Chapter considered how the advent of digital technologies and the internet created new technical, political, and legal challenges for CMOs. In the special situation of the European Union, which is neither a federal state nor a unified digital market, the digitisation of recorded music markets, with a subsequent dematerialisation of music exploitations, instigated a shift from territorial to multi-territorial licensing of music rights. As the Chapter recalled, this shift was strongly pursued by the European Commission through regulatory interventions that sought to dismantle the territorial exclusivity of CMOs and foster a competitive relationship among them to improve the quality of rights management in the digital music rights market. These efforts culminated in the adoption by the Parliament and the Council of the 2014 CRM Directive, whose main goals were the enhancement of CMO's transparency, efficiency, and accountability to facilitate the licensing of rights across multiple jurisdictions. A key innovation of this directive was the introduction of a so-called "Passport" system to establish mandatory technical and legal standards that CMOs must comply with, at national level, to issue multi-territorial licences.

Alongside these regulatory developments, the emergence of IMEs introduced new dynamics into the music licensing landscape. Unlike CMOs, IMEs operate on a commercial basis and are neither owned nor controlled by rightholders. Although they provide an alternative to traditional collective management, these companies are subject to a comparatively less stringent regulatory framework. This disparity raises questions about transparency and fairness in the music market, especially if one considers that EU Member States have taken divergent approaches to regulating IMEs. In its comparative analysis, this Chapter showed that there were countries like Italy which originally banned IMEs; others that imposed significant restrictions on their operations and others that have adopted a more permissive stance.

Another critical issue that emerged from the discussion was the fragmentation of music repertoires and its impact on the aggregation of music rights and the related data for licensing purposes. The shift to multi-territorial licensing in the EU has led to the rise of prominent rights management and music data processing hubs that offer pan-European licences by aggregating and clearing rights coming from music publishers and multiple CMOs. While hubs like ICE, MINT, and the alliance between SACEM and Universal have built significant capabilities and streamlined the licensing process for streaming and social media services, they have also exacerbated pre-existing inequalities between the internationally most appealing repertoires and the more local, less lucrative or niche ones. It is clear that, for these repertoires not to be marginalised even more than they are, their rightholders and licensors should have greater chances to be identified in digital exploitations of their works. This can happen only through robust data infrastructures fostering interoperability between different licensing entities' data and improving accuracy in the overall rights clearance and usage report process (cf. Chapter 8). Thus, the chapter concluded that, while the CRM Directive has successfully fostered transparency and competition by transforming CMOs and other copyright licensors in data companies, it also triggered and consolidated imbalances and disparities of treatment among them that might require adjustments in the existing legal framework.

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9.1.8. Data infrastructures and transparency in today's music licensing practices

Chapter 8 sought to expand the analysis performed in the field of collective management of publishing rights to better understand the fairness-related challenges posed by data-driven exploitations to the whole music industry. In addition to publishing rights, this chapter considered the fundamental business and technical dimension of recording rights to better illustrate the obstacles and inefficiencies that prevent music rightholders' fair remuneration. The Chapter argued that today's digital economy has fostered an increasingly fragmented system of music rights management. In this system, the data of the music publishing and recording sectors are not properly coordinated and 'vertically' integrated so that the related data infrastructures cannot easily enable a fine-tuned identification and transparent remuneration of all music repertoires. This situation exacerbated pre-existing inequalities in royalty distribution. Data transparency has become a central pillar of fairness because music creators cannot effectively claim their earnings without reliable access to accurate rights and usage information.

The multiplicity of rightholders, the various levels of rights ownership in the industry and the lack of coordination of the related data infrastructures are a structural challenge in today's digital music licensing practices. Different entities — including CMOs, IMEs, record labels, and online music exploiters — maintain their own proprietary databases and do not grant access to each other if not to a limited extent. This results in systemic inefficiencies and limited interoperability when music exploitation requires data matching and simultaneous use. While initiatives such as CISAC's CIS-Net and the recording industry's DDEX formats have sought to standardise data exchanges, the industry remains still fragmented between its two layers. Moreover, as shown in Chapter 7, there is an increasing fragmentation in the domain of composers' and publishers' rights that does not foster standardisation of detailed repertoire information.

The Chapter traced recent attempts to resolve these inefficiencies. These attempts concerned mostly publishing rights, which are by far the most fragmented and difficult to enforce, considering that musical compositions are abstract works whose exploitation depends on their performance and embodiment in sound recordings. The Global Repertoire Database (GRD) multi-stakeholder initiative, started in 2008 under the auspices of the European Commission, aimed to create a centralised repository of musical works data. The GRD's failure was not just technical, being based on the creation of a single "physical" database, which would have been hard and very costly to maintain. Its failure stemmed also from deep-rooted governance disputes, as stakeholders were unwilling to relinquish control over their data. Another remarkable initiative for the improvement of music data transparency, although limited territorially to the US, is the Mechanical Licensing Collective (MLC). Established by the Music Modernisation Act in 2018, the MLC created a freely accessible database for mechanical rights in musical compositions managed by the Copyright Office and funded by its main beneficiaries, the DSPs (i.e., the music streaming services). As it was argued, this model is interesting and unique, in its field, because US law introduced an obligation for music rightholders to confer their rights and the related data to the MLC if they wish to receive royalties from DSPs based on this compulsory licensing system.

A critical theme explored in this Chapter was the way the music industry helps online music exploiters trace and report the use of sound recordings and musical compositions for purposes of remuneration. Streaming services such as Spotify and Apple Music generally adhere to industry metadata standards, starting by its main content identifiers, i.e. ISRCs and ISWCs. Social media

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services, instead - considering their long-term immunity from copyright liability and the fact that they were designed to host non-professional user-generated content (UGC) — developed their own proprietary content identifiers and rights management technologies, such as YouTube's Content ID and, at a much later stage, Meta's Rights Manager, based on their own user-uploaded metadata. As a result, these systems often lacked transparency for music rightholders, making it difficult for them to effectively track and monetise music usage. Article 17 of the DSM Directive indirectly addressed data management asymmetries by imposing licensing obligations on UGC platforms. Fair MusE's interviews with dozens of experts and stakeholders unveiled a positive impact of this obligation on the negotiations and the licensing agreements these users conclude with CMOs, licensing hubs, IMEs as well as major and indie labels. However, stakeholders and industry experts confirmed that enforcement and usage reporting challenges still persist in the social media industry, especially for the remuneration of publishing rights, which are more difficult to identify and remunerate than recording rights.

The Chapter stressed that, without an industry-led or regulatory data-sharing initiative aimed at enabling music creators (and their licensors) to identify and trace the exploitation of their works, rightholders will keep being "blind" and disadvantaged when negotiating licences with digital music services. Given the central role of licensing data in fostering appropriate and proportionate remuneration, the chapter explored the potential for integrating music metadata into different kinds of data infrastructures. A first type of infrastructure could be a business-to-business data-sharing mechanism (or data "pool") acknowledging the legally protected character, and therefore the ownership, of databases and confidential information. This solution would be based on freedom of contract and give rise to a proprietary asset controlled by private entities, with the consequence that some of the interested parties, licensors and rightholders might not be contemplated in the initiative. A second solution could be a public, freely accessible and EU-wide music metadata infrastructure which could guarantee transparency and accuracy of the shared information and avoid (or at least reduce) data mismatches, fostering fairer revenue distribution. However, it was argued that, for this second type of solution fair, it should properly address the above-mentioned value gap and the potentially abusive dominance of very large online platforms. This means that the responsibility and the costs for establishing and maintaining this data infrastructure should be carefully shared, through a public-private partnership model, among the public sector, the music rightholders and - as in the example of the US-based MLC - the online exploiters, to be viewed as the main beneficiaries of this enhanced rights-clearance tool. This model, supported by EU regulatory oversight, presents a viable path forward, ensuring that music repertoire data serves the broader interests of fairness, transparency, and equitable remuneration rather than being leveraged solely for commercial advantage by dominant market players.

But who should be incentivised, through cooperative agreements, or legally obliged, through a regulatory measure, to provide data rather than maintaining isolated proprietary databases? Having provided a quick overview of the existing transparency obligations laid down under EU law, and having concluded that none of them has been properly discharged in the past decade or so, the chapter concluded that all stakeholders should be actively involved. On the one hand, streaming and social media services must be required to share relevant metadata, particularly regarding repertoire usage and the remuneration paid to rightholders. On the other hand, music publishers, CMOs, and record labels—particularly the "major" industry players and licensing hubs— should actively engage

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in the development and funding of this infrastructure, on the assumption that a more neutral and standardised system would ultimately benefit the entire music industry.

9.2. Preliminary policy recommendations

The drafting and submission of a 'White Paper' providing policy recommendations on how to promote fairness in Europe's music ecosystems will be one of Fair MusE's outcomes and 'key exploitable results.' The White Paper is expected to summarise, exemplify and draw upon the research conclusions coming from Fair MusE's WPs 2, 3 and 4 to highlight achievements and flaws of recent attempts to define and promote fairness in music ecosystems, also from a cultural diversity perspective. Given the significance of the present Study and of all the research performed in WP2 (*Assessing the Role of Regulation*) for the preparation of the final Paper, this section offers preliminary policy recommendations regarding domains and unsettled issues for which EU regulatory interventions might prove to be necessary or suitable.

9.2.1 Authorship, creativity, and technology-aided (AI-generated) works

The notion of 'creators' has been used to broadly define those individuals who compose, perform and produce music professionally. Record producers, who are companies, have been added to the notion, despite their nature as enterprises, since they are original rightholders under copyright law and their interests and position in digital markets is much closer to individual authors and composers than those of commercial exploiters and users of their works. By broadening the notion of 'creation' and authorship,' digital platforms and new creativity-enhancing technologies (including GenAI) have blurred the lines between rigidly compartmentalised categories of rightholders. The subdivision of music rightholders in authors/composers, performers and record producers is a consequence of progressive layers of regulation and constant adaptation of copyright law to the emergence of new technologies. Even though this classification is somehow irreversible, considering copyright protection's term and legacy exploitation contracts, policy makers should consider that (i) distinguishing between professional and non-professional music creation is increasingly difficult, especially in the social media industry and (ii) it is increasingly common that independent artists perform all roles in music production and fall, as a result, under the notion of composers, performers and record producers.

After a precipitated, last-minute attempt to regulate AI within copyright law in the 2024 EU AI Act, EU policy makers should address the growing role of AI-generated music (i.e., compositions, performances and recordings) and its implications for authorship, originality, and remuneration in all copyright-related discussions.

9.2.2 Music creators between harmonised and un-harmonised rights: what should come next?

EU law has harmonised the vast majority of music creators' rights through several directives adopted from 1992 onwards. Since then, at a global level, the EU contributed to the international harmonisation of intellectual property rights, and in particular of the strengthening of creators' rights under copyright law. From an EU internal market perspective, the copyright directives presented in this Study built a robust legal framework aiming to place composers, performers and record

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producers in a position to exploit their respective works in settings where their rights are increasingly vulnerable because of the pervasive power of computer and communication technologies, including AI. In doing so, the EU has left significant rights 'unharmonised,' with the consequence that these legal protections depend on national law and case law and can significantly diverge across different jurisdictions. Among creators' exclusive rights, the right to authorise the making of derivative works is the most relevant example, considering the existing market for so-called "sync" rights and the enhancement of transformative uses due to new technologies. Among remuneration rights, prerogatives of remarkable importance such as the revenues from broadcasting rights for performers and record producers and from private copying levies schemes are still subject to different national regulations that make the development and maintenance of repertoire and rightholders' data more difficult and costly. These are domains where the EU should consider adopting further harmonisation measures as an alternative to a proper (although, at the moment, very unrealistic) unification of copyright law.

Consistently with the principle of reciprocity laid down in international copyright agreements, revenues stemming from remuneration rights granted to creators within the EU should *not* be shared with nationals of countries where these protections do not exist. As argued in this Study, the demise of the reciprocity principle, which the CJEU has justified for harmonisation purposes, is lowering the revenues of rights aimed at supporting vulnerable right-holders such as music performers and small or medium-size record labels that help preserve diversity of music productions.

The exceptionally fast development of Gen AI, in addition to the exponential rise of user-generated content across the social media landscape, can be excellent reasons to eventually harmonise creators' rights at the EU level with the aim to create clearer rules to ensure proper attribution and integrity of works, particularly in the digital sphere.

9.2.3 Fair balance of interests in copyright exceptions

Copyright exceptions are increasingly harmonised at the EU level, despite the "original sin" contained in the 2001 InfoSoc Directive and the non-mandatory character of the vast majority of specific copyright exceptions. From the adoption of the Orphan Works Directive in 2012, EU policy makers have shown awareness of the necessity to build robust exceptions to enable free uses that are ultimately justified by freedom of expression and other fundamental rights. Moreover, the case law of the CJEU in the past fifteen years effectively pursued the goal of a fair balance of interests when having to clarify the scope and purposes of copyright exceptions encroaching upon competing fundamental rights. Thus, the main priority for EU law on this front, even more so in a culturally and politically sensitive creative sector such as the music ecosystem, should be that of finding and maintaining a suitable balance between exceptions' legal certainty - which is characteristic of the European *droit d'auteur* tradition - and flexibilities in the design and enforcement of the exceptions that can accommodate users' fundamental rights without weakening creators' rights.

The exceptions for TDM activities under Articles 3 and 4 of the 2019 DSM Directive require special and greater attention than other exceptions. This is due to the necessity to ascertain whether and how TDM exceptions can strike a fair balance between allowing desirable computational analysis, both socially (i.e., scientific research) and economically (i.e., innovation), and protecting creators whose works and recordings are used for AI training. To this end, EU policy makers and EU bodies - including the newly established AI Office - should carefully monitor the implementation of

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obligations the EU AI Act creates at the interface of copyright and AI-related tort law. In particular, before considering the introduction of an AI-specific exception, and of a 'fair compensation' mechanism based on such exception, EU policy makers shall verify how AI companies are coping with the obligation to disclose datasets regarding the copyright works that are being used for training purposes.

9.2.4 Fairness as a main copyright contract law goal

With the adoption of Article 18 of the 2019 DSM Directive, EU law codified the principle of 'fair' ("adequate and proportionate") remuneration of authors and performers, seeking to address the structural weakness of individual creators vis-a-vis their traditional contractual counterparts and their sub-licensees, which include online music platforms. In doing so, EU law set out a fundamental principle of copyright contract law that - unsurprisingly - has been implemented differently across national laws. In particular, a few Member States have maintained or introduced a variety of statutory remuneration rights for online exploitations which benefit - depending on the jurisdiction and the type of digital service - composers and performers. A common feature of these rights is that they can be directly exercised by their individual right-holders, through their collective organisations, vis-a-vis the online music services. If - on the grounds of the examples provided by countries like Spain, Belgium and Germany- this model proved to be a viable solution to effectively address remuneration gaps, especially for performers, the model could be extended to the whole EU if adequately supported by data and metadata infrastructures aiming to properly identify repertoires and rightholders, in a granular way.

The 'fair remuneration' principle still faces an insurmountable barrier: the lack of transparency regarding the modes of exploitation of musical works and sound recordings, particularly in the social media industry, and the secrecy - coupled with a strongly proprietary character - of the data infrastructures and usage reports that can allow a nuanced identification of music repertoires and of the related rightholders. As argued in this Study, greater transparency would require EU-wide clarity in terms of types of information that rightholders and exploiters should make available to each other, and to composers and performers (even through the intermediation of their collective organisations) and sanctions for the failure to comply with this duty.

The Study has argued that the composers' and performers' rights to contractual adjustments - in case of 'disproportionately low' remuneration - and revocation rights linked to non-exploitation of works and recordings are also inevitably dependent on the degree of transparency on the earnings of individual creators' contractual counterparts. Clearly, these rights cannot be exercised if individual rightholders remain unaware of how their works are concretely exploited. The Study has also shown that an assessment of the impact of these rights - which are new and difficult to exercise in certain jurisdictions - is still premature if one considers the different degrees of collective representation of music rightholders - especially music performers - via labour unions and the very different experience that artists' communities have gained with alternative dispute resolution systems, which the DSM Directive made mandatory. Considering the cross-border dimension of the music ecosystem and the standard practices followed by composers' CMOs and performers' organisations in Europe, a good policy could be that of actively monitoring the exercise of the above-mentioned rights to progressively tailor them to the music ecosystem, following the DSM Directive's principle that copyright contract law should be adapted to the specificities of each creative sector.

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9.2.5 Enhancing social media's copyright accountability via greater transparency and data collaboration

The positive steps towards greater accountability of social media services aimed at an effective exercise of creators' rights pursued by Article 17 of the DSM Directive and its national implementations need to be carefully monitored from a publicly policy perspective. This Study emphasised that the preparatory work and the political agreement reached at the EU level for the introduction of this complex mechanism was a preliminary, necessary step towards the adoption of later regulatory measures aimed at placing stronger constraints on 'very large online platforms' (VLOPs, 2022 DSA) and 'gatekeepers' (2022 DMA). A big difference between Article 17's copyright-specific enforcement measures and the DSA and the DMA Regulations is that the former has given rise to different national liability regimes that 'Online Content-Sharing Service Providers' (OCSSPs) shall comply with as opposed to provisions that are (in principle) directly applicable EU-wide in the latter. As this Study argues, several Member States with large digital economies (e.g., Germany, Italy and Spain) implemented significantly different versions of Article 17's mechanisms that require policy makers' and attention for the sake of both creators' rights to be fairly remunerated - if they wish so - and of end-users' freedom of expression.

The European Commission has an important role to play, in cooperation with the Member States, under the DSM Directive (Article 17(10)), as an organiser of "stakeholder dialogues to discuss best practices for cooperation between online content-sharing service providers and rightholders." This provision requires consultations with OCSSPs, rightholders, users' organisations and other relevant stakeholders prior to the issuance of guidance on the application of this provision. This means that EU policy makers and national authorities already have a flexible instrument with which to pursue important goals such as: *(i)* ensuring a uniform implementation of Article 17 across Member States through EU-wide guidelines minimising the consequences of legal fragmentation; *(ii)* monitoring and enforcing creators' rights clearance and OCSSPs' compliance with content licensing requirements, fostering the involvement of national competition authorities in the scrutiny of dominant tech companies' conduct vis-a-vis all music right-holders' representatives (as suggested in Fair MusE's D2.3 Deliverable and exemplified by the dispute involving SIAE and Meta in Italy); and *(iii)* defining the exact scope of social media services' liability exemptions, clarifying how the 'best efforts' requirement in the DSM Directive interacts with the duties of good faith in negotiations and data transparency these companies bear, especially under the 2014 CRM Directive and the 2022 DSA.

As regards the (complex) music rights management sector, the Study has shown that Article 17's explicit reference to the implementation of high industry standards in the negotiation and conclusion of licences with music rightholders shall comply with based the principles of 'fair remuneration' under Article 18 and 'data transparency' under 19 of the DSM Directive. These goals clearly require greater efforts on both the music industry's and the tech sector's fronts in terms of data and metadata collaboration (see *infra*).

9.2.6 EU regulation of collective rights management: filling regulatory gaps and ensuring a greater European oversight

The empirical investigations carried out for the Fair MusE project evidenced broadly positive effects of the EU-wide regulation of CMOs embodied into the 2014 CRM Directive. The Study reported that the transparency- and efficiency-enhancing provisions contained in the corporate governance part

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of this directive have been very beneficial for the whole music ecosystem, including composers and performers, record labels (viewed as 'clients' or 'partners' of composers' and performers' CMOs) and music repertoires' licensees, including music streaming and social media service providers. In particular, the transposition of Article 5 of this directive has greatly empowered individual rightholders and granted them unprecedented freedom in choosing their rights managers and licensing partners.

Having said so, there are several regulatory gaps or inconsistencies between the national transpositions of the CRM Directive which triggered unexpected issues for the music sector that EU and national policy makers should be aware of:

(i) The above-mentioned freedom to withdraw authors' and publishers' rights from the traditional CMOs' mandates, and their transfer toIMEs, fostered a "chaotic" relationship and forms of unfair competition among CMOs and IMEs, especially if we consider the fact that some jurisdictions initially banned or hindered the establishment of IMEs in their territories. Given the present developments in the field of publishing rights' clearance and data management, IMEs shall be allowed to conduct their business operations across the EU, without facing any restrictions except for requirements set out in the CRM Directive for both IMEs' and CMOs' online multi-territorial rights management. Moreover, the level of public scrutiny of IMEs' operations should be as uniform as possible within the EU.

(ii) It is clear from the investigations conducted in the Fair Muse project that the collective rights management's supervisory authorities appointed at the national level are applying different standards in the scrutiny of transparency and accountability requirements, including the "Passport" the 2014 CRM Directive established for CMOs, especially for their multi-territorial licences for online uses. This situation is clearly evidenced by the very different quality and level of detail of the annual transparency reports that each CMO shall publish every year under Article 22 of the CRM Directive, and each national supervisor should carefully examine. The exceptional relevance of national CMOs' transparency obligations towards their members, other CMOs and licensees (especially in digital markets, which broadly depend on the availability of granular data: see *infra*) suggests that there should be a genuinely European oversight of this periodical compliance exercise. This seems to be crucial also for the legitimacy of business decisions and operations which placed national CMOs in the context of digital licensing hubs and special partnership with major music publishers and other specific music repertoires.

(iii) It is somewhat paradoxical that - as a direct consequence of the 2014 CRM Directive and of the previous measures adopted by the European Commission from 2005 onwards - the largest, best equipped and most powerful digital licensing hubs for the management of publishing rights in Europe ended up moving outside of the EU. The fact that important portions of their digital businesses are based in jurisdictions (i.e., UK, Switzerland, Liechtenstein) where their compliance with the strict governance and transparency requirements laid down under the CRM Directive is dubious (in the best-case scenario) raises serious accountability and transparency issues regarding their repertoires' tariffs, revenue distribution criteria, and dispute resolution mechanisms. Given the centrality, relevance, and the exceptional music data processing capacity of these hubs, coupled with their increasing success in terms of expansion of their services and inclusion of small and medium-sized European CMOs' repertoires, these hubs should be made subject to the same obligations as national CMOs in their respective countries of establishment.

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The above-mentioned issues and the concrete risks of repertoire fragmentation and further marginalisation of small and niche music repertoires in Europe would be a sufficiently strong reason to consider enhancing the supervision of *all* types of online music repertoire licensors. The assignment of this function to an existing EU regulatory body could start effectively monitoring compliance with transparency obligations and strengthen enforcement mechanisms at a local level. This cross-border, and stronger scrutiny would also improve music repertoire data standardisation, especially if EU law mandated interoperable metadata standards for music licensing (see *infra)*.

9.2.7 Music data infrastructures: transparency and stakeholder coordination in the recording and publishing industries

This Study emphasised that several pieces of EU law have embodied - since 2014, year of adoption of the CRM Directive - reporting and data disclosure obligations for both CMOs and online music exploiters whose concrete implementation has been problematic. Operational issues originate mostly from the conflict between unclear or generic transparency and data collaboration duties - deprived of any enforcement mechanisms and sanctions - the legal protection of databases and trade secrecy under EU law, and the legitimate expectation of each of these enterprises and organisations not to disclose sensitive datasets resulting from their operations and long-term investments.

As highlighted above, a stronger, more reliable, transparent and, therefore, *effective* alignment of usage reports, recording rights' and publishing rights' data infrastructures would foster 'fair' remuneration of *all* music creators, independently of the commercial profitability, geographical reach and size of their repertoires. To this end, the European Commission might consider using its soft law power as much as its monitoring and 'mediation' role, such as the one created under Article 17(10) of the DSM Directive, to foster the adoption of greater standards of data collaboration and data exchange.

The current data infrastructures would significantly improve if - through a business-to-business or through a legislative mandate embodied into an EU law provision - the reciprocal obligations of online music exploiters, on the one hand, and of the recording and publishing branches of the music sector, on the other, were shaped more specifically and in a detailed, enforceable way.

In digital markets where usage reports are based on the use of sound recordings and their own identifiers (ISRCs), and where the recording industry's data might not incorporate accurate data on the underlying musical compositions, IFPI and ISRC agencies should stop accepting ISRC submissions without ISWCs. This change of policy would radically simplify the activities of composers' and publishers' CMOs, which have no effective capacity of monitoring online uses, as things stand (if not by outsourcing these activities through partnerships with content identification companies such as BMAT and Pex).

On the online platforms front, these companies could be requested to:

(i) Identify the unmatched tracks and allocate the related unidentified revenues on fair and transparent grounds with the collaboration composers' CMOs;

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(ii) Avoid making available sound recordings without important metadata, including ISWCs, IPIs and other information helping to identify composers and performers;

(iii) Prevent critical metadata associated with musical compositions from being altered or removed.

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List of interviewees:

1) Interviewees who allowed Fair MusE to fully disclose their identities in its research reports, publications and any other deliverables

Ambur Urmas, Estonian Performers Union

Bargfrede Allen, Avance Advisors, formerly Verifi Media

Bensamoun Alexandra, Université Paris-Saclay

Chaidron Anastasia, PlayRight

Connold Nicholas, SGAE

Dahl Pedersen Martin, Kromann Reumert

D'Ammassa Giovanni, Attorney-at-law

De Angelis Deborah, Entertainment and Copyright Lawyer

De la Cueva Javier, Attorney-at-law and IP expert

Díez Alfonso Alvaro, Independent Expert

Du Moulin Marc, European Composers and Songwriters Alliance

El Sayegh David, SACEM

Enrich Enric, Attorney-at-law and Founder at Copyrait

Ercolani Stefania, ALAI Italia

Fischer Paul, AKM

Fredenslund Maria, RettighedsAlliancen

Frostick James, BumaStemra

García del Blanco Iban, Lasker, formerly MEP at the European Parliament

Gervais Daniel, Vanderbilt University, Milton R Underwood Chair in Law

Grossi Francesco, SIAE

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Gulinck Luc, Copyright Lawyer at 'Never Mind the Small Print'

Hergovich Franz, Austrian Music Export

Kaalep Mati, Estonian Authors' Society

Kallinikou Dionysia, University of Athens, formerly Hellenic Copyright Organisation

Kelli Alexei, University of Tartu

Landy Rachel, Cardozo Law School, Yeshiva University

Laurent Paul, Federal Public Service Economy

León Rodrigo Cecilia, Spanish Association of Independent Music Publishers

Leska Rudolf, Štaidl Leska Advokati

Lopes Palmero Jesus, Somos Musica, formerly SGAE

Lopes Rocha Manuel, Attorney-at-law

Machuel Benoît, International Federation of Musicians

Mallia Manlio, Independent Expert, formerly SIAE

Marzano Paolo, Legance Law Firm

Monteleone Andrea Giulia, Italian Antitrust Authority, formerly AGCOM

Myzalis George, Edemrights

Papadopoulou Maria-Daphne, Hellenic Copyright Organisation

Paramythiotis Yannos, Attorney-at-law

Patry Bill, Quinn Emanuel, formerly Google

Riccio Giovanni, Università di Salerno, E-Lex Studio Legale

Samer Siegfried, AKM

Schulze Nicole, Independent Music Publishers International Forum, formerly META

Sousa e Silva Nuno, Assistant Professor of Law at UCP, Attorney-at-law,

Strowel Alain, UC Louvain and Pierstone

Struve Kaare, KODA

Vagena Evangelia, Orfium

Vercken Gilles, Cabinet Vercken & Gaullier

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Yule Nick, AEPO-ARTIS

2) Companies and organisations whose representatives allowed Fair MusE to mention their involvement in the project's research and discussions:

Bundesverband Musikindustrie

CISAC Secretary

Spotify

Unison Rights

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Annex I - Music Data and Metadata

Music data and metadata infrastructures

While 'data' means a collection of information conveying values (for e.g., a music library collection), 'metadata' refers to the descriptions of other data (in other words, data about data), making it easier to manage and retrieve relevant information. There are various types of music metadata. Fair MusE is interested in descriptive metadata which, in the music industry, aims at "describing the content of a recording such as the song title, performing artist, and year of release".[1281] When it comes to music copyright management, one needs to securely identify, at the very least, the underlying protected subject matter (*i.e.*, the protected expressions) and the party (rightholder) it belongs to. The following are currently globally used identifiers for such expressions and parties which are - or might be - helpful if used within metadata.

1. Musical works

In the music industry, the subject matter involved includes, firstly, the musical work. Naturally characterised by the work title (possibly accompanied by the name of its author), such a description would obviously be insufficient if needed to be processed on a large-scale basis or if one needs to reliably distinguish one from another, in particular if unitary identification is needed across different stakeholders. Inspired by the success of the ISBN ('International Standard Book Number')[1282] in the book publishing industry and the ISMN ('International Standard Music Number')[1283] In the music print publishing industry, the International Organization for Standardization (ISO) commenced work on a new standard for musical works in 1997, in close cooperation with CISAC (Confédération Internationale des Sociétés d'Auteurs et Compositeurs). The latter had already started to work on this issue under the name 'Common Information System' (CIS) in 1994.[1284] This work developed into the ISWC ('International Standard Musical Work Code') standard, firstly published in 2001 (ISO 15707:2001) and updated in 2022 (ISO 15707:2022). The ISWC designates an abstract work "as such", not its recording nor the edition of a musical score, printed or electronic, to which an ISMN is

[1281] Tony Brooke, 'Descriptive Metadata in the Music Industry: Why It Is Broken And How to Fix It, Part 1' (2014) 3 (2) Journal of Digital Media Management 263 9, available at <https://www.researchgate.net/publication/263809777_Descriptive_Metadata_in_the_Music_Industry_Why_It_Is_Broken_And_How_to_Fix_It_Part_1>.

[1282] The International Standard Book Number ('ISBN') is a unique numeric identifier used globally to distinguish books and other publications. It identifies the registrant and the title, edition and format of the product, being used by booksellers, libraries, publishers, internet retailers, among others. ISBNs started at 10 digits in length, but have now been 13 digits since 2007. See 'What is an ISBN?' (International ISBN Agency) <https://www.isbn-international.org/content/what-isbn/10>.

[1283] The International Standard Music Number ('ISMN') is a unique numeric identifier used globally to distinguish notated music publications (for instance scores or choral octavos), whether available for sale, hire or for free. See 'What is ISMN?' (International ISMN Agency) <https://www.ismn-international.org/whatis>.

[1284] Charles Clark, 'The Copyright Environment for the Publisher in the Digital World', Joint ICSU Press/UNESCO Expert Conference on Electronic Publishing in Science, UNESCO Paris, 19-23 February 1996, <https://www.library.illinois.edu/icsu/clark.htm>; Gilles Valiquette, 'Works Numbering System on Horizon [International Standard Work Code]' (1997) 4(3) Words & Music 8.

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assigned. CISAC operates as a registration authority for the ISWC, appointing selected local music collective management organizations (CMOs) as registration agencies. Currently, CISAC is contemplating opening the possibility of direct assignment of ISWC numbers, like with the ISBN or ISRC numbers, for music publishers. However, thus far, only authorized CMOs may assign an ISWC.

2. Sound recordings

The sound recording or phonogram is paramount to digital exploitation of (recorded) music. The recording itself must be distinguished from the specific carrier, such as a compact disc or computer's Hard Disk Drive, because copyright law considers it *in abstracto* as an immaterial property (*i.e.*, phonogram) belonging to its producer. This way, 'recording' is similar to the concept of 'work'. As early as 1986, the ISO developed a standard for identifying sound (and music video) recordings (ISO 3901:1986), now existing in its third edition (ISO 3901:2019) known as ISRC ('International Standard Recording Code'). The International Federation of the Phonographic Industry (IFPI)[1285] was appointed as the ISRC Registration Authority in 1989 and continues to be so at the time of writing.[1286]

3. Music performances

Artistic performances constitute a further layer of protection in every music recording involving human performers. Since a recorded performance is inherently linked to the recording in which it is embodied, the performance itself does not require a separate identifier and can, in principle, be identified through the ISRC. However, as explained in the main text, most session musicians are not identifiable through ISRC metadata. For this reason, performers' organisations have progressively developed dedicated rights identifiers through their Societies' Council for the Collective Management of Performers' Rights ('SCAPR'), leading to the creation of two key data infrastructures: the International Performers Database ('IPD') and the Virtual Recording Database ('VRDB') (see Sect. 8.2.2.2).

It should be noted that recordings may also contain other forms of expression, such as literary works (for example, audiobooks) or the creative contributions of sound engineers and sound designers, which are protected by copyright in some jurisdictions.

4. Rightholder

Finally, the party (rightholder) who has an interest in the protected subject matter is identified by different identifiers developed for this purpose. The party description may include the authors and performers, or the "owners" (heirs, assignees, licensees) and distributors, including legal entities. Two major standards serve this purpose:

- The ISNI ('International Standard Name Identifier'), introduced in 2012 (ISO 27729:2012), now exists in its updated second edition (ISO 27729:2024). It is administered by the ISNI International Agency (ISNI-IA) Limited, a UK based company. Unlike the ISRC or ISWC,

[1285] See <https://www.ifpi.org/>.

[1286] International ISRC Registration Authority, *International Standard Recording Code (ISRC) Handbook* (4th edn, IFPI 2021) 5 <https://www.ifpi.org/wp-content/uploads/2021/02/ISRC_Handbook.pdf#Heading321>.

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which are supposed to be assigned only once to a specific recording or work, the ISNI might be assigned repeatedly if the contributor uses different names or pseudonyms. While this pays due respect to the anonymity of the pseudonymous author, it might miss the purpose of unique identifiers.

- Much more widely used is the IPI ('Interested Parties Information') System, designed, developed and operated by SUISA, a Swiss music CMO.[1287] The IPI system replaced the much older, simple Compositeur, Auteur, Editeur classification ('CAE'), used by music CMOs since the 1970s.[1288] Being developed for CMOs in 2001, it also became directly available for publishers in 2024. The IPI system is used throughout the network of CISAC members to identify any author or rightholder. Just like the ISNI, the IPI allows for the assignment of multiple numbers to one party if several names are used. It is technically fit for the identification of interested parties beyond music copyright (including film and visual art) and it is used by non-music CMOs as well. However, unlike the ISNI, the IPI system is not an ISO recognized standard.

[1287] The IPI (Interested Parties Information) system identifies rightholders worldwide, regardless of the type of creative work (music, literature, or art). It recognizes the roles individuals may have, such as musical creator, film director, or fine artist, and the different rights they hold - including performing, reproduction, and broadcasting rights. See 'Interested Parties Information System' (IPI System) <https://www.ipisystem.org/>.
[1288] The CAE (Compositeur, Auteur, Editeur) list was developed by SUISA in the 1970s to identify copyright holders in the music industry. In 2001, it was replaced by the IPI system. See ibid.

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Annex II - List of EU CMOs and IMEs

Collective Management Organisations (CMOs) in the EU Music Sector

Austria

- AKM (composers, music publishers)
- Austro-Mechana (composers, music publishers); sister company of AKM for mechanical rights
- Wahrnehmung von Leistungsschutzrechten Gesellschaft (LSG) (performers, phonogram producers)

Belgium

- Société d'Auteurs Belge/Belgische Auteurs Maatschappij (SABAM) (composers and publishers)
- PlayRight (performers)
- Société de l'Industrie Musicale/MuziekIndustrie Maatschappij (SIMIM) (phonogram producers)

Denmark

- Koda (composers, music publishers)
- Nordisk Copyright Bureau (NCB) (composers, writers, producers); owned by collecting societies in the Nordic countries (KODA (DK), STEF (IS), STIM (SE), Teosto (FI), TONO (NO))
- Gramex (performing artists, record companies)

Estonia

- Eesti Autorite Ühing (EAÜ) (composers, music publishers)
- Eesti Esitajate Liit (EEL) (performers)
- Eesti Fonogrammitootjate Ühing (EFÜ) (phonogram producers)

France

- Société des auteurs, compositeurs et éditeurs de musique (SACEM) (composers, music publishers)
- Organisme de gestion collective des droits des artistes-interprètes (ADAMI) (performers)
- Société de Perception et de Distribution des Droits des Artistes-Interprètes (SPEDIDAM) (performers)
- La Société des Artistes Interprètes (SAI) (performers); founded by both ADAMI and SPEDIDAM to allow closer cooperation
- Syndicat National de l'Édition Phonographique (SNEP) (phonogram producers)
- Société civile des producteurs phonographiques (SCPP) (phonogram producers)

Germany

- Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte (GEMA) (composers, music publishers)
- Gesellschaft zur Verwertung von Leistungsschutzrechten mbH (GVL) (performing artists, record companies)
- Verwertungsgesellschaft Musikedition (VG Musikedition) (composers, publishers)

Greece

- AUTODIA (AUTODIA) (composers)
- Rightholders' Cooperative Edem (edem) (composers)
- APOLLON (performers)
- ERATO (performers)
- GRAMMO (phonogram producers)
- GEA (performers, phonogram producers) - GRAMMO, ERATO and APOLLO established this single

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organization for collective management of neighboring rights

Italy

- Società Italiana degli Autori e Editori (SIAE) (composers and publishers)
- Liberi Editori Auditori (LEA) (composers and publishers)
- Nuovo Istituto Mutualistico Artisti Interpreti Esecutori (NUOVO IMAIE) (performers)
- ITSRIGHT (performers, producers)
- Societa' Consortile Fonografici (SCF) (phonogram producers)
- Associazione Fonografici Italiani (AFI) (phonogram and videogram producers)
- AudioCoop Italia (independent phonogram producers, publishers, producers, artists)

Portugal

- Sociedade Portuguesa de Autores (SPA) (composers)
- Gestão dos Direitos dos Artistas (GDA) (performers)
- AUDIOGEST (record producers)
- Associação para a Gestão da Cópia Privada (AGECOP) (established by all the collective management entities representing authors, performers, phonogram and videogram producers, book publishers and periodical publishers in Portugal)

Spain

- Sociedad General de Autores y Editores (SGAE) (composers, music publishers)
- Artistas Intérpretes o Ejecutantes, Sociedad de Gestión de España (AIE) (performers)
- Asociación de Gestión de Derechos Intelectuales (AGEDI) (phonogram producers)

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Independent Management Entities (IMEs) in the EU Music Sector

- ALMO
  - based in Belgium
  - represent international publishers for musicals, operas, operettas and ballets
  - license for public performances of music
- BRIDGER
  - based in Luxembourg
  - focus on independent songwriter's remuneration rights arising from streaming on streaming platforms
- CCLI (Christian Copyright Licensing Inc.)
  - global headquarters based in the US, registered as IME in Germany, Belgium, the Netherlands, and Denmark
  - specialise in licensing music works to churches
- IBVA
  - based in the Netherlands
  - license music for amateur theatre
- Jamendo[1289]
  - based in Luxembourg; subsidiary IME in Spain
  - license royalty-free music your venues (for e.g., shops)
- Red Europea de Derechos Musicales
  - based in Spain
  - license works of music for various types of uses (streaming, TV, radio etc.)
- Soundreef
  - currently based in Italy; represented in Italy by LEA; registered as IME in Greece, Portugal and Spain
  - license rights of songwriters and music publishers
  - since 2024, represent SESAC performing rights repertoire in Italy
- Unison
  - based in Spain
  - manage rights for music publishers and composers
  - license in Europe 'for digital and background' and only in Spain for TV/radio and live performances
- WatermelonCo.
  - based in Spain
  - administer rights for authors and music publishers

[1289] Jamendo and BRIDGER belong to the same parent company, see <https://www.llama-group.com/companies/bridger/>.

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Annex III - Desk Research National Law Summaries

Annex III includes summaries from the comprehensive research that the Fair MusE consortium conducted on the implementation of key EU copyright directives in the music industry across 10 selected EU Member States. These include the eight EU Member States of origin of the consortium partners: Austria, Belgium, Denmark, Estonia, France, Greece, Italy, and Portugal. In addition, the Study also covers Germany and Spain, chosen due to their significance, in terms of national legislation and size of their music industry markets, drawing on the expertise of Fair MusE's researchers in these two jurisdictions.

This approach enabled a thorough assessment of the fairness and effectiveness of current legal and industry practices in the European music ecosystem, all of which fed into *D2.2 'Music creators' rights under EU law'*. In accordance with the FAIR data principles,[1290] the Fair MusE consortium will make the extended version of the national reports available on its official website.[1291]

Research scope and timeline

This research was carried out from September 2023 to January 2025, reflecting the state of European and national laws and practice as of 1 January 2025. This time frame allowed for a thorough examination of recent developments in the European music ecosystem.

Focus areas

Each national report in the study consists of three main parts, which follow the main plan of D2.2:

1. Implementation of Chapter 3 of the DSM Directive 2019/790/EU (Articles 18-23)
2. Implementation of Article 17 of the DSM Directive 2019/790/EU
3. Implementation of selected provisions from the CRM Directive 2014/26/EU

These focus areas were chosen to provide a comprehensive overview of the legal framework affecting fairness in the music industry, particularly in relation to fair remuneration of music creators, the liability of social media platform providers and collective management of copyright and related rights.

Research methods

The study employed a mixed-method approach, combining:

[1290] FAIR Principles include a commitment to make data findable, accessible, interoperable, and re-usable.
The Fair MusE consortium is bound by FAIR Principles as per D1.2 'Data Management Plan'.
[1291] <https://fairmuse.eu/>

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1. Doctrinal legal research: this involved a systematic analysis of legal texts, including national implementations of EU directives, case law, and scholarly literature.

2. Qualitative empirical research: the team conducted over 100 semi-structured interviews with a diverse range of stakeholders. Interviewees included EU and national policy- and lawmakers; collective management organisations; rightholders; industry representatives; tech companies; legal practitioners; academics. Lasting between 60 and 90 minutes, the interviews were based on questionnaires previously facilitated to the interviewees. The questionnaires were adapted to the collective represented by the interviewee (e.g., rightholders and their representatives, policy makers, tech companies, practitioners). Once transcribed, the interviews fed into *D2.2 'Music creators' rights under EU law',* respecting the disclosures level chosen by the interviewees.

This approach allowed for a rich, multifaceted understanding of how the legal framework is interpreted and applied in practice across different sectors of the music industry.

Data Analysis

The research team analysed the collected data using interdisciplinary methods, drawing on expertise in law and other social sciences.

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1. Austria

1.1 Implementation Arts. 18-23 DSM Directive

1.1.1. Background

Austria implemented Directive (EU) 2019/790 ('DSM Directive') on 31 December 2021, through the 2021 Amendment to the Copyright Act (BGBl. I Nr. 244/2021). The Amendment entered into force on 1 January 2022, except for the transparency obligations enshrined in § 37d of the Austrian Copyright Act (Urheberrechtsgesetz, 'UrhG'), which entered into force on 7 June 7 2022.

1.1.2. Appropriate and Proportionate Remuneration

National Implementation

The principle of appropriate and proportionate remuneration has been transposed through § 37b UrhG. This provision ensures that authors who grant users the right to exploit their work are entitled to appropriate and proportionate remuneration (§ 37b(2) UrhG). Lump-sum payments can be considered appropriate if they reflect the economic value of the rights in question, the author's contribution to the work, and adhere to customary and fair business practices in the sector (§ 37b(2) UrhG).

Determination Mechanisms

The appropriateness of remuneration is defined in § 37b(3) UrhG, which states that remuneration is appropriate if it corresponds to what is customary and fair in business transactions at the time the contract is concluded. Additionally, § 37b(4) UrhG stipulates that remuneration will be deemed appropriate if it corresponds to an amount agreed under a collective agreement or a remuneration rule of an agreement between representative groups of authors and right users. If no agreement can be reached over collective rules on remuneration, the Conciliation Committee for collecting societies can make recommendations (§ 37b(6) UrhG).

1.1.3. Contractual Copyright Law

Transparency Obligations

The transparency obligations under Article 19 of the DSM Directive have been transposed through § 37d UrhG. This provision grants authors and performers the right to access information on the exploitation of their work once a year from their license partners (§ 37d(1)). Exceptions to this rule include minor contributions to a work and cases where providing information would cause a disproportionate burden to the license partner (§ 37d(2)). If the administrative effort of giving such information is not proportionate to the revenue made from exploiting a specific work, the scope of access to information might be limited (§ 37d(3)).

Contract Adjustment Mechanism

Article 20 of the DSM Directive is transposed through § 37c UrhG, which provides a contractual adjustment mechanism if the initially agreed remuneration turns out to be disproportionately low compared to the revenues generated from exploiting the right. This adjustment mechanism is not available if the remuneration has been agreed according to a

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collective agreement or a remuneration rule pursuant to §37b(4) that already provides for further appropriate remuneration in case of a clear imbalance (§37c(2)).

Alternative Dispute Resolution

Article 21 of the DSM Directive is transposed through § 37e UrhG, which allows claims regarding contractual adjustment under §37c UrhG and access to information under §37d UrhG to be brought before the Conciliation Committee for collecting societies. This provision ensures that disputes can be resolved through mediation.

Right of Revocation

Austria already had provisions in place for the right of revocation of an exclusive license in case of lack of exploitation (§§ 29 and 30 UrhG). These provisions allow authors to terminate the contractual relationship if the right to use a work is not used at all or is used inadequately, impairing the author's important interests. Performers also benefit from this right to revocation of an exclusive license agreement by referring to § 29 being applicable mutatis mutandis (§ 68(4) UrhG).

1.2 Implementation of Article 17 DSM Directive

1.2.1. Background

Austria transposed Article 17 of DSM Directive through the 2021 Amendment to the Copyright Act (BGBl. I Nr. 244/2021). This Amendment entered into force on January 1, 2022. The bill for the amendment was first presented on 3 September2021, and after a public consultation, it was finalized in November 2021 and voted upon in December 2021. The Explanations for the Draft Bill refer to the EU Commission Guidance and state that the legislative proposal fulfills most of the recommendations.

1.2.2. Definition of Online Content Sharing Service Providers (OCSSPs)

§ 18c UrhG incorporates all elements of Article 2(6) of the DSM Directive, essentially copying the definition contained in the DSM Directive. The Explanations to the Amendment Bill briefly refer to Recital 63 but do not incorporate it into the text of § 18c UrhG. However, the Explanations and the final text of § 18c UrhG incorporate the passage of Recital 62, targeting online services that play an important role in the online content market by competing with other online content services.

1.2.3. Authorisations under Article 17(1) and 17(2)

OCSSPs must obtain authorisation from right holders, as stated in § 18c UrhG, without any further specifications. The national transposition does not include principles applicable to negotiations of authorisations or additional provisions for cases where right holders and OCSSPs do not reach an agreement. § 24a UrhG specifies that the authorisation obtained by an OCSSP covers acts of users of the service when communicating or making available to the public the works concerned via the online platform, unless users are acting on a commercial basis or generating significant income.

1.2.4. Liability of OCSSPs Absent an authorisation

Given that the German translation of the term "best efforts" of Article 17(4)(a) of the DSM Directive is "*alle Anstrengungen*" ("all efforts"), the Austrian lawmaker adopted the same

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wording in its transposition (§ 89a(1) UrhG). This choice appears to raise the standard for OCSSPs, making the Austrian law stricter than the EU law model.

Despite the translation of 'best efforts', the provisions under Article 17(4)(b) and (c) of the Directive are transposed verbatim in § 89a(1) UrhG. The principle of proportionality is applied as specified in Article 17(5) of the DSM Directive, with the additional consideration of users' interests. The conditions for immunity of certain categories of OCSSPs under § 89a(2) UrhG are identical to the turnover and user thresholds stated in Article 17(6) of the DSM Directive.

1.2.5. Safeguards for Legitimate Uses

§ 89b(1) UrhG transposes Article 17(7)(1) of the DSM Directive, ensuring that measures pursuant to § 89a(1) shall not have the effect of making unavailable works or other subject-matter uploaded by users that do not infringe copyright or related rights. Caricature, parody, pastiche, or quotations for purposes such as criticism or review are specifically mentioned in § 89b(4) UrhG as permitted uses. These exceptions are also generally applicable under § 42f UrhG, which now includes specific provisions for large online platforms.

Moreover, and similarly to German law, §89b(3) UrhG specifically deals with de minimis uses, or "small excerpts of a work or other protected subject matter". These are defined in the same provision as a combination with user content when this combination amounts to less than "half of the works or protected subject matter of third parties with his own content and the use of these parts does not exceed (1) 15 seconds per film or motion picture, (2) 15 seconds of a soundtrack, (3) 160 characters per text or (4) a photograph or graphic with a data volume of 250 kilobytes each". Those small excerpts shall not be automatically blocked or removed by the OCSSP unless the right holder requests measures pursuant to § 89a (1) subparagraph 2 that are directed against the use of such an excerpt and gives the service provider the relevant and necessary information. As an exception, an OCSSP may block such small excerpts automatically, if the rightholder can demonstrate that for a certain period of time that without such temporary measures there would be a risk that the economic exploitation of the work would be significantly impaired by the use of small excerpts and that other precautions are taken to ensure that authorised uses are not prevented.

1.2.6. Transparency Obligations for OCSSPs

The national transposition of Article 17(8) does not identify specific categories of information that right holders must provide to OCSSPs or specify procedures for transparency obligations. The second sentence of Article 17(8) of the DSM Directive is transposed under the general rights to information in § 87b(5) UrhG. The transparency obligations under Article 18 of Directive 2014/26/EU are fully transposed in § 41 of the Act on Collecting Societies.

1.2.7. Complaint and Redress Mechanisms

OCSSPs are required to establish effective and expeditious complaint procedures for users under § 89b(5) UrhG. These procedures must allow users to submit complaints easily (§ 89b(5)(1)), process them immediately (§ 89b(5)(2)), obtain comments from respondents(§ 89b(5)(3)), and ensure human review of decisions(§ 89b(5)(4)). An appeal to an external complaints body (§89b (8) UrhG), located within the RTR GmbH (the administrative agency for the Austrian Communications Authority), is also possible. The complaints body must publish an annual report on the cases brought before it (§89b(9) UrhG).

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1.2.8. Additional Elements

The national transposition did not contemplate significant additional elements when implementing Article 17 of the Directive. KommAustria, the Austrian Communication Authority, published guidelines covering the complaints procedure before the complaints body on 1 March 2022. According to reports for 2022 and 2023 published by the RTR GmbH, no complaints against OCSSPs were submitted in those years.

1.3 Implementation of Directive 2014/26/EU

1.3.1. Background

Directive 2014/26/EU ('Directive') was transposed into Austrian law by the 2016 Act on Collecting Societies (Verwertungsgesellschaftengesetz, 'VerwGesG'). This Act has been amended twice since its initial implementation, in 2021 and 2023. The VerwGesG was an entirely new law, which states in § 1 that its purpose is the transposition of Directive 2014/26/EU. The Austrian transposition adheres to the principle of a national monopoly for Collective Management Organizations (CMOs), despite the Directive's encouragement of competition in the market for collective rights management.

1.3.2. Rights of Music Authors and Performers Post-Implementation

Music authors and performers in Austria are explicitly granted several rights vis-a-vis their respective CMOs under §§ 23-35 VerwGesG. These rights include the freedom to choose a collecting society, determine the geographical scope of their rights' management, and decide which types of rights to confer to a given CRMO. The right to grant non-commercial licenses is enshrined in § 26 VerwGesG, and the right to terminate the authorisation to manage rights is enshrined in § 27 VerwGesG.

1.3.3. Independent Management Entities (IMEs)

While the VerwGesG includes a definition of IMEs in § 2(2) and according to § 4 all provisions for CMROs under the VerwGesG are also applicable to IMEs (with very few exceptions), these provisions seem to exist primarily on paper to comply with the Directive. The operating principle in Austria is still based on territorial monopoly (§ 7 VerwGesG), where each traditional CMO in the field of musical works and sound recordings (AKM, austro mechana, and LSG) represents specific rightholder categories in respect of specific categories of economic rights. To date, there are no IMEs in Austria, nor does it appear that there is significant demand for IMEs.

1.3.4. Mandatory Collective Rights' Management

Austrian law reserves the management of certain music-related rights to collective rights management. These mandatory licensing schemes include:

- Lending of works for which the distribution right has been exhausted (§16a(2) UrhG);
- Right to make a work directly perceptible to the public as a signal distributor (§ 17(4) UrhG);
- Remuneration from private copying / fees from storage media and copying devices (§ 42b(5) UrhG);
- Digital uses of works in teaching and learning (§ 42g(4) UrhG);
- Non-commercial uses of musical art (§ 51(2) UrhG);
- Use of recordings by libraries (§ 56b(1) UrhG);
- Communication to the public in schools and universities (§ 56c(2) UrhG);

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- Communication to the public in accommodation establishments (§ 56d(2) UrhG);
- Reproducing, broadcasting, and communication to the public by cultural heritage institutions works no longer available (§ 56f(8) UrhG);
- Broadcasts of works intended for public reception, including those via satellite, for simultaneous, complete and unaltered retransmission (§ 59a(1) UrhG, §34(1) VerwGesG);
- Performers' and producers' rights to remuneration for secondary uses of sound recordings via TV and radio (§ 76(3) UrhG).

1.3.5. Extended Collective Rights' Management

The possibility of granting extended collective licenses was introduced into the VerwGesG in the 2021 amendment. Under § 25b VerwGesG, CMOs can grant extended collective licenses, but they must obtain authorisation from the supervisory authority. The area of use for which authorisations can be granted needs to be precisely defined and be of such nature that obtaining permission from the rights holders in each individual case is normally cumbersome and impractical. So far, the supervisory authority has granted two extended collective licenses: one to AKM for public performance and reproduction in business premises, and one to austro mechana for digital uses in teaching and learning.

1.3.6. Administration of Remuneration Rights

CMOs in Austria have specific tasks and functions in the administration of remuneration rights. For private copying levies, CMOs must keep 50% of the income to create and finance social and cultural institutions/funds (§ 33(2) VerwGesG). They are also obliged to carry out empirical investigations into the actual use of blank and storage media before announcing new fees/royalties applicable to new types of media/storage devices (§ 38 VerwGesG). Regarding secondary uses of phonograms by radio and TV broadcasters, the collecting society LSG administers the remuneration to producers and performers.

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2. Belgium

2.1 Implementation of Articles 18-23 DSM Directive

2.1.1. Background

Belgium transposed Directive (EU) 2019/790 ('DSM Directive') through the Law of 19 June 2022, which was published in the Belgian Official Journal and entered into force on 1 August 2022. The transparency obligations laid down in Articles XI.167/2 and XI.205/2 of the Belgian Code of Economic Law (CEL) entered into force retroactively on 7 June 2022. The transposition took place over a year past the deadline of 7 June 2021. The transposing law amended and introduced new articles into the CEL, specifically Articles XI.167/1 to XI.167/5 and XI.205/1 to XI.205/5, to transpose Articles 18-23 of the Directive.

2.1.2. Appropriate and Proportionate Remuneration

National Implementation

The general principle of Article 18(1) of the Directive is transposed into the Belgian legal order by Articles XI.167/1 (for authors) and XI.205/1 (for performers) of the CEL. These provisions ensure that authors and performers maintain the right to appropriate and proportionate remuneration when they have transferred or licensed their exclusive exploitation rights under an exploitation agreement.

Additionally, the Belgian legislator introduced novel remuneration rights for authors and performers, specifically targeting streaming services (Art. XI.228/10 CEL introduced by Article 61 of the transposing law and Article XI.228/11 CEL introduced by Article 62 of the transposing law) and OCSSPs (Art. XI.228/4 CEL introduced by Article 54 of the transposing law). These rights are non-transferrable, non-waivable, and subject to mandatory collective management, barring collective agreement provisions.

These legislative innovations, predicated on Article 18(2) of the Directive, have precipitated significant debate within the music industry, culminating in actions for annulment before the Belgian Constitutional Court by major tech companies. Consequently, on September 26, 2024, the Court referred 13 preliminary questions to the CJEU, seeking clarification on the compatibility of these remuneration rights with EU law.

Determination Mechanisms

The Explanatory Memorandum (EM) of the transposing law mentions that Article 18(2) of the Directive is not specifically transposed to allow for contractual freedom. The fair balance between rights and interests of the parties is considered in the context of collective agreements, as explored under Articles XI.167/5 and XI.205/5 CEL.

2.1.3. Contractual Copyright Law

Transparency Obligations

Articles XI.167/2 and XI.205/2 CEL transpose the transparency obligations regarding authors' and performers' rights. Authors and performers are entitled to receive updated, relevant, and complete information on the exploitation of their works and performances from assignees,

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licensees, and sub-licensees. This information must be provided at least once per year, taking into account the specificities of each sector.

Authors and performers can address their request for information directly to third parties, if they so wish, in which case the licensees have to enable this communication by providing information on the identity of the third party (Articles XI.167/2(5) and XI.205/2(5) CEL).

The terms of the transparency obligation may be determined by collective agreements (Articles XI.167/5(1) 4th and XI.205/5(1) 4th CEL).

Contract Adjustment Mechanism

The contractual adjustments' provision is transposed through Articles XI.167/3 and XI.205/3 CEL. Authors and performers may demand additional, appropriate, and fair remuneration when the initially agreed remuneration proves to be disproportionately low compared to the total revenues subsequently derived from the exploitation of the works or performances.

Alternative Dispute Resolution

Alternative dispute resolution (ADR) mechanisms can be determined by collective agreements as per Articles XI.167/5 and XI.205/5(1) 7th CEL. According to the EM, the Belgian Judicial Code already provides for ADR mechanisms, including arbitration (Articles 1676 to 1723 JC), judicial and out-of-court mediation (Articles 1724 to 1737 JC), and collaborative law (Articles 1738 to 1747 JC). For this reason, Article 21 of the Directive was not explicitly transposed.

Right of Revocation

The right of revocation for authors and performers is introduced under Articles XI.167/4 and XI.205/4 CEL. These articles stipulate that the licensee or assignee must exploit the exclusive rights within the agreed timeframe. If the exploitation does not occur within this timeframe, the author or performer can reclaim their rights or terminate the exclusivity of the license. The Belgian transposition excludes the applicability of the revocation mechanism under certain conditions, such as when the lack of exploitation is due to circumstances that the author or performer can reasonably remedy.

2.2 Implementation of Article 17 DSM Directive

2.2.1. Background

Article 17 of the DSM Directive was transposed into the Belgian legal order by the Law of 19 June 2022. This law amended and introduced new articles into the CEL, specifically Articles XI.228/3, XI.228/5, XI.228/6, XI.228/7, XI.228/8, and XI.228/9. The transposing law was adopted over a year past the transposition deadline and the European Commission's Guidance. Several elements of the Guidance were not taken into account in the transposition.

2.2.2. Definition of Online Content Sharing Service Providers (OCSSPs)

Article XI.228/2 CEL almost literally transposes Article 2(6) of the DSM Directive, with all elements present. The list of excluded service providers is non-exhaustive (cf. the use of "such as" in the second paragraph of Article XI.228/2 CEL). No additional elements from Recitals 61-63 were included, and no additional elements were added to the definition of OCSSPs.

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2.2.3. Authorisations under Article 17(1) and 17(2)

The provision transposing Article 17(1) of the DSM Directive, Article XI.228/3(1), does not specify how an OCSSP can obtain an authorisation from a rightholder. It does not mention differences in legal treatment depending on the type of work or sector, nor does it refer to non-voluntary collective agreements. The authorisation covers acts of communication to the public and acts of making available to the public carried out by users, provided they are not acting on a commercial basis or generating significant revenues (Article XI.228/3(2) CEL).

2.2.4. Liability of OCSSPs Absent an authorisation

The national law does not specify additional criteria to define "best effort to obtain authorisation." Article XI.228/5(1)(1°) transposes the exact wording of Article 17(4)(a) of the Directive. The provisions under Article 17(4)(b) and (c) were literally transposed by Article XI.228/5(1)(2°)(3°) CEL. The principle of proportionality and additional elements were transposed literally in Article XI.228/5(3). The conditions for immunity for new OCSSPs were explicitly transposed by Article XI.228/5(2).

2.2.5. Safeguards for Legitimate Uses

Article XI.228/6(1) CEL explicitly and literally transposes Article 17(7)(1) of the DSM Directive. The exceptions laid down by Article 17(7)(2) of the DSM Directive already existed in Belgian copyright law and apply generally, not confined to user-generated content shared via OCSSPs platforms. No additional criteria to identify legitimate uses in the specific domain of OCSSPs were provided.

2.2.6. Transparency Obligations for OCSSPs

The national transposition does not identify specific categories of information that rightholders must provide to OCSSPs. Article XI.228/7(3) provides for the possibility for the King to establish arrangements in connection with the information obligation, but this power has not been exercised. The law does not specify the categories of information to be provided by OCSSPs to rightholders regarding licensing agreements.

2.2.7. Complaint and Redress Mechanisms

Article XI.228/7(1) to (3) CEL literally transposes Article 17(9) subparagraph 1 and 2 of the Directive, requiring complaints to be processed without undue delay and decisions to be subject to human review. Article XI.228/8(4) provides for the possibility for the King to establish arrangements for complaint and redress mechanisms, but this power has not been exercised. The institutional set-up for out-of-court or judicial complaints is described by Article XI.228/9 CEL, which introduces an out-of-court mediation mechanism.

2.2.8. Additional Elements

Belgium introduced a non-transferrable and non-waivable right for remuneration of authors or performers by OCSSPs for acts of communication to the public, even when they have transferred or licensed their right to communication to the public to a third party (Article XI.228/4 CEL). This remuneration right is under mandatory collective rights management and can only be exercised by management companies and CMOs. This new right was based on Article 18(2) of the DSM Directive (see also point 2.1.2 above).

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2.3. Implementation of Directive 2014/26/EU

2.3.1. Background

Belgium transposed Directive 2014/26/EU through the Law of 8 June 2017, which introduced new, replaced, and amended provisions in the CEL. This transposing law entered into force on 1 January 2018. The Belgian transposition did not give rise to significant conflicts with the requirements of the Directive. However, some minor points of departure were noted, such as the introduction of two different terms for rights management entities: "management company" (I.16(1) 4th CEL) and "collective management organisation" (I.16(1) 5th CEL).

2.3.2. Rights of Music Authors and Performers Post-Implementation

Music authors and performers in Belgium are explicitly granted the rights provided by the Directive. Article XI.248/2 CEL ensures that rightholders have the freedom to choose which rights management entity will represent them, for which categories of rights, works, or performances, and in which territories. They also have the right to terminate the management mandate or withdraw rights from management companies. These freedoms cannot be set aside by management companies' articles of association, regulations, or contracts (Article XI.248/3(1)).

2.3.3. Independent Management Entities (IMEs)

The definition of IMEs in Belgium provided in Article I.16 (1) 6th CEL closely follows the Directive, with the addition that IMEs must be established in an EU Member State. IMEs operating in Belgium are required to negotiate in good faith with users during the licensing of rights, collection and tariffs and provide necessary information (Article XI.261(1) CEL), disclose certain categories of information to the public (Article XI.266 1st, 2nd, 3rd, 5th, 6th, 7th CEL), to provide information upon request to other rights management entities and right holders (Article XI.267 CEL) and to provide information to right holders on the management of their rights (Article XI.269 CEL). Adherence to these requirements is ensured by the Belgian Control Service (Articles XI.279(3) CEL and XI.273/18 CEL). There have not been significant issues in the establishment of IMEs in Belgium, with three IMEs reported active in the country.

2.3.4. Mandatory Collective Rights' Management

In Belgium, several rights are subject to mandatory collective management, including:

- performers' right to obtain annual supplementary remuneration, under the conditions and by the collecting society defined by the King (Article XI.210(4) CEL);
- performers' and phonogram producers' right to remuneration for public performance or broadcasting of phonograms within the meaning of Articles XI.212 and XI.213 CEL (Article XI.213 CEL and relevant Royal Decrees);
- exclusive cable transmission and/or retransmission right of authors and holders of neighbouring rights (Article XI.224(1) CEL);
- authors' and performers' right to remuneration for cable transmission and/or retransmission of audiovisual works (Article XI.225(3) CEL);
- exclusive right to communicate to the public by direct injection of authors and holders of neighbouring rights within the meaning of Article XI.226 (Article XI.227(1) CEL);
- authors' and performers' unwaivable and untransferable remuneration right for communication to the public by direct injection within the meaning of Article XI. 227/1(1) (Article XI.227/1(3) CEL);

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- authors' and performers' unwaivable and untransferable right to remuneration for communication to the public by an OCSSP within the meaning of Article XI. 228/4(1) (Article XI.228/4(3) CEL);
- authors' and performers' unwaivable and untransferable right to remuneration for acts of communication by streaming services within the meaning of Articles XI. 228/10 and XI. 228/11(1) (Article XI.228/11(3) CEL). This is subject to mandatory collective management in the absence of a collective agreement;
- authors', performers', and phonogram/audiovisual works producers' remuneration right from private copying under the conditions and by the collecting society defined by the King (Article XI.229 CEL and relevant implementing royal decrees);
- authors', performers' and phonogram producers' remuneration right for reproduction and communication to the public, for the purposes of illustrating teaching or scientific research (Article XI.242 CEL);
- authors', performers' and producers' remuneration right for public lending, under the conditions and by the collecting society that may be defined by the King (Article XI.244 CEL and relevant royal decree).

2.3.5. Extended Collective Rights' Management

Extended collective licenses are not contemplated by the law in Belgium.

2.3.6. Administration of Remuneration Rights

Several remuneration rights, including for private copying and secondary uses of phonograms, are subject to mandatory collective management in Belgium. For instance, Auvibel is responsible for collecting and distributing remuneration for private copying (Article 229 CEL and Article 1 of the Royal Decree of 3 November 2019), while Reprobel handles remuneration for uses intended for illustrating teaching or scientific research (Article XI.242 CEL and Article 1 of the Royal Decree of 14 December 2020). The law also requires companies managing remuneration rights for cable transmission and/or retransmission of audiovisual works to establish a single platform for their collection (Article XI.228/1 CEL).

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3. Denmark

3.1 Implementation of Articles 18-23 DSM Directive

3.1.1. Background

Denmark implemented Directive (EU) 2019/790 ('DSM Directive') through two amendments to the Danish Copyright Law (Ophavsretsloven). The first amendment, Law no. 1121 of 4 June 2021, entered into force on 7 June 2021 and prioritised the transposition of Articles 15 and 17 of the DSM Directive. The second amendment, Law no. 680 of 6 June 2023, which entered into force on 7 June 2023, transposed the remaining provisions of the DSM Directive, including Articles 18 to 23.

3.1.2. Appropriate and Proportionate Remuneration

National Implementation

Article 18 of the DSM Directive was transposed into Danish law as § 55 Ophavsretsloven. This provision states that when an author has assigned the copyright in whole or in part, the author is entitled to appropriate and proportionate remuneration for the utilisation of the work.

Determination Mechanisms

The Danish Government's Explanations to the 2023 Amendment Bill[1292] clarify that appropriate remuneration is a compensation aligned with relevant standards established by parties of equal power, if such standards exist. Market standards are not the sole determinant but presuppose equality in strength. Proportional remuneration relates to profits generated from work exploitation, usage, and the creator's contribution to the overall work. Collective agreements, when present, are considered in assessing remuneration appropriateness and proportionality. The legislation acknowledges freedom of contract and fair balance of rights between creators and licensees. It also recognizes the impact of evolving revenue models, such as online subscriptions, in determining adequate compensation. While individually negotiated contracts can potentially yield appropriate and proportionate remuneration, the ultimate determination of what constitutes such remuneration is left to the courts.

3.1.3. Contractual Copyright Law

Transparency Obligations

The transparency obligations under Article 19 of the DSM Directive have been transposed through § 55a Ophavsretsloven. This provision entitles authors or their representatives to obtain updated, relevant, and adequate information on the exploitation of their works from licensees and any subsequent sub-licensees. The information must be provided regularly and at least once a year. There are exceptions for minor contributions (§ 55 a para 2 Ophavsretsloven)) and provisions for obtaining information from sub-licensees if the original licensee does not possess all relevant information (§ 5a para 3 Ophavsretsloven). In the Government's Explanations, the Ministry of Culture makes clear that this provision means in the context of music licensing that if "e.g. a phonogram or film producer, does not have the

[1292] Danish Government's Comments on the Proposal for Amendment of the Copyright Law L 125 (L125 Forslag til lov om ændring af lov om ophavsret), available at<https://www.ft.dk/samling/20222/lovforslag/l125/20222_l125_som_fremsat.htm>.

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necessary information, a composer, lyricist or performer etc. will be able to go to the subsequent acquirer, e.g. a streaming service, in order to receive the information".

Contract Adjustment Mechanism

Article 20 of the DSM Directive is implemented through § 55b Ophavsretsloven. This provision allows authors to claim additional appropriate and reasonable remuneration if the originally agreed remuneration proves to be disproportionately low compared to subsequent relevant income from the exploitation of the work.

Alternative Dispute Resolution

The provision on alternative dispute resolution under Article 21 of the DSM Directive is transposed in § 55c Ophavsretsloven. Disputes concerning transparency obligations or contractual adjustments can be brought before the Copyright License Tribunal, which can lay down conditions, including the amount of remuneration. However, the Tribunal's decisions are not binding, and parties can still bring their disputes before ordinary courts.

Right of Revocation

Article 22 is transposed through an amendment to § 54 Ophavsretsloven. The right to revocation applies if the licensee has not initiated exploitation within a reasonable time. This right may only be derogated from by a collective agreement (§ 54(2)).

3.2 Implementation of Article 17 DSM Directive

3.2.1. Background

Denmark transposed Article 17 of the DSM Directive through Law no. 1121 of 4 June 2021, which amended the Ophavsretsloven. This amendment introduced a new Chapter 2b titled "Online Content Sharing Services" and specifically added § 52c to the Copyright Law. The law entered into force on 7 June 2021, coinciding with the deadline for transposition and shortly after the European Commission's Guidance was published. The amendment bill was proposed on 26 March 2021, and thus did not consider the Commission's Guidance.

3.2.2. Definition of Online Content Sharing Service Providers (OCSSPs)

The definition of OCSSPs in § 52c(1) transposes the first sentence of Article 2(6) of the Directive, defining an OCSSP as a provider of an information society service that has as its principal purpose or one of its principal purposes to store and make available to the public a large amount of works or subject matter protected under §§ 65-71, uploaded by its users, and organised and promoted with the aim of making a direct or indirect profit. However, it does not include the negative definition from the second sentence of Article 2(6) or any elements from the Recitals.

3.2.3. Authorisations under Article 17(1) and 17(2)

Obtaining Authorisation

According to § 52c para 2, an OCSSP must seek authorisation from rightholders for the use of rights protected under §§ 65-71. There are no further specifications on how authorisation should be sought, and the law does not provide guidance on the use of non-voluntary collective agreements or impose any sector-specific differences.

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Acts Covered by Authorisation

§ 52c paras 2 and 3 transpose Article 17(2) of the DSM Directive, specifying that the OCSSP's acts of communicating and making available to the public are covered by the authorisation. Additionally, acts carried out by users of the OCSSP are covered unless the users act for commercial purposes or generate significant revenue. The user's legal position cannot be better than the OCSSP's legal position in respect of the authorisation.

3.2.4. Liability of OCSSPs Absent an Authorisation

Best Efforts to Obtain Authorisation

§ 52c para 4 (1) requires OCSSPs to use their best efforts to obtain authorisation from rightholders. The provision mirrors the DSM Directive's language and does not specify additional criteria for defining "best efforts".

Ensuring Non-Accessibility of Unauthorised Content

§ 52c paras 4 (2) and (3) transpose the requirements of Article 17(4)(b) and (c) of the DSM Directive, obliging OCSSPs to use their best efforts to ensure that specific works and other subject matter for which rightholders have provided relevant and necessary information are not accessible and to act expeditiously upon receiving a sufficiently reasoned notice from rightholders.

Principle of Proportionality

Article 17(5) of the DSM Directive is transposed through § 52c para 5, which closely follows the DSM Directive's wording and does not incorporate additional elements for the proportionality analysis.

Immunity for Certain Categories of OCSSPs

The conditions for immunity of certain categories of OCSSPs under § 52c para 8 align with the turnover and user thresholds specified in Article 17(6) of the DSM Directive.

3.2.5. Safeguards for Legitimate Uses

§ 52c para 9 explicitly transposes the first sentence of Article 17(7) of the DSM Directive, ensuring that cooperation between OCSSPs and rightholders does not impede access to works or subject matter that do not infringe copyright or related rights. OCSSPs must inform users in their terms and conditions about the permissible use of works and creations under exceptions or limitations of copyright.

Caricature, parody, and pastiche are specifically mentioned in § 52c para 10 as types of uses that users may make available via the OCSSP. These exceptions were not initially included in the Danish Copyright Law but were recognised by the Danish Supreme Court based on the right to freedom of speech.

3.2.6. Transparency Obligations for OCSSPs

§ 52c para 7 transposes the transparency obligations of Article 17(8) of the Directive, requiring OCSSPs to provide rightholders with sufficiently precise information on how their practices operate concerning the cooperation referred to in para 4 and information on the use of works and subject matter covered by license agreements. These obligations are less stringent

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compared to those imposed on collective rights management organisations under Article 18 of Directive 2014/26/EU.

3.2.7. Complaint and Redress Mechanisms

Complaints Mechanism

§ 52c para 6 mandates that OCSSPs establish an effective complaints mechanism for users in the event of disagreements about preventing access to or removing uploaded works. Complaints must be processed without undue delay and subject to human review.

Institutional Set-Up

Disputes between rightholders, OCSSPs, and users can be brought before the Danish Copyright License Tribunal (Ophavsretslicensnævnet), as outlined in § 47 Ophavsretsloven. The Tribunal's Annual Reports for 2021 and 2022 indicate that it has not yet settled any licensing complaints related to OCSSPs.

3.2.8. Additional Elements

The national transposition of Article 17 did not include any additional elements such as new remuneration rights within an extended or mandatory collective management system. There have been no administrative or judicial procedures or mechanisms implemented in relation to the national transposition of Article 17 so far.

3.3 Implementation of Directive 2014/26/EU

3.3.1. Background

Denmark transposed Directive 2014/26/EU through the Act on Collective Management of Copyright and Related Rights (Act No. 321 of 5 April 2016). Denmark was one of the few EU Member States that transposed the Directive on time, ensuring compliance with the requirements set forth by the Directive. There are no significant divergences between the text of the Directive and the Danish Act on Collective Management of Copyright and Related Rights.

3.3.2. Rights of Music Authors and Performers Post-Implementation

Music authors and performers in Denmark are explicitly granted the rights provided by the Directive. These rights include:

- the right to choose a collective management organisation (CRMO), determine the geographical scope of their rights' management, and decide which types of rights shall be conferred to a given CRMO (§ 3 para 1);
- the right to grant non-commercial licenses (§ 3 para 3); and
- the right to terminate the authorisation to manage rights, categories of rights, or types of works and other subject matter (§ 3 para 4).

3.3.3. Independent Management Entities (IMEs)

Denmark has not imposed additional regulatory burdens on IMEs, which has facilitated their establishment. Both EU/EEA and non-EU IMEs are subject to the same rules. Notable IMEs operating in Denmark include the Motion Picture Licensing Corporation in the audiovisual sector and Christian Copyright Licensing International in the church music sector.

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3.3.4. Mandatory Collective Rights' Management

Denmark has several mandatory licensing schemes related to music rights, including:

- secondary use of sound recordings in TV and radio for performers and producers (§ 68 para 2 Ophavsretsloven), managed by GRAMEX;
- remuneration right for annual supplementary non-waivable remuneration of music performers (§ 66 b para 3 Ophavsretsloven), managed by GRAMEX; and
- private copying levies (§ 39 para 3 Ophavsretsloven), administered by Copydan.

Voluntary licensing schemes include the use of works in teaching and learning, use of works no longer available by cultural heritage institutions, secondary use of sound recordings in public broadcasting for authors, and simultaneous retransmission of broadcasts.

3.3.5. Extended Collective Rights' Management

The Ophavsretsloven establishes a system of extended collective licensing. § 50(1) allows users who have agreements with CMOs representing a significant portion of creators in Denmark to invoke contractual licenses for specific uses. § 50(2) introduces a general right to enter into contractual license agreements without area limitations. § 50(3) extends the application of these agreements to works by authors not represented by the CMO. § 50(4) requires authorization from the Danish Ministry of Culture for agreements under § 50(1) and 50(2).

The Ministry has authorized several extended collective licenses in the music sector.[1293] General authorizations have been granted to MPO, the CRMO for producers' rights, for audio and TV uses with public broadcasters DR and TV2. Specific authorizations include GRAMEX's license for rebroadcast and on-demand access of public broadcasting productions under § 30a, and KODA and NCB's license for broadcasts and on-demand services under § 30a and 35 of the Ophavsretsloven.

3.3.6. Administration of Remuneration Rights

CRMOs in Denmark are assigned specific tasks in the administration of remuneration rights. GRAMEX manages remuneration for secondary uses of sound recordings by radio and TV broadcasters, as described above. Copydan administers remuneration from private copying levies under § 39 para 3 Ophavsretsloven.

[1293] Available at: <https://kum.dk/kulturomraader/aftalelicensgodkendelser>

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4. Estonia

4.1 Implementation of Articles 18-23 DSM Directive

4.1.1. Background

Directive 2019/790/EU ('DSM Directive') was implemented in Estonia together with Directive 2019/789/EU ('CabSat II Directive') through the Copyright Amendment Act, which was adopted on 8 December 2021, and entered into force on 7 January 2022. The provisions transposing Articles 18-23 of the DSM Directive were mainly added to Chapter VII, Part 2 (Author's contract) of the Copyright Act (CA). The renewed regulation gives authors (§ 14(1)) and performers (§ 68(1)) the right to obtain appropriate and proportional remuneration, establishes a notification (transparency) obligation (§49[1]), and provides mechanisms for contract adjustment (§ 49[2]), cancellation, or withdrawal from author's contracts (§ 49[3]). Additionally, an alternative dispute resolution procedure is set up (§ 87(1) clause 4).

4.1.2. Appropriate and Proportionate Remuneration

National Implementation

The Estonian Copyright Act follows the requirements of the DSM Directive. The principle of appropriate and proportionate remuneration is implemented in § 14(1) and § 68(1) of the CA. This principle is considered a general guideline rather than a specific remuneration right, meaning authors and performers still need to conclude agreements and agree on remuneration. The Estonian approach is based on contractual freedom, and a fair balance of rights and interests is achieved through contract adjustment mechanism (§ 49[2]) and the right of revocation (§ 49[3]).

Determination Mechanisms

There are no specific principles to determine the fairness of remuneration. The Copyright Act declaratively states that authors (§ 14(1)) and performers (§ 68(1)) have the right to obtain appropriate and proportional remuneration, but freedom of contract applies. The fairness of remuneration can be achieved through the contract adjustment mechanism, which allows authors and performers to request additional remuneration if the initially agreed amount is disproportionately low compared to the total revenue derived from the use of their work or performance (§ 49[2]). The Explanatory memorandum suggests considering the author's or performer's contribution to the creation and commercial success of the work or performance when determining fairness.[1294]

4.1.3. Contractual Copyright Law

Transparency Obligations

Article 19 of the DSM Directive (Transparency obligation) is implemented in § 49[1](1) of the CA (Notification obligation). This provision obliges users of works or performances to provide timely, relevant, and sufficient information to authors and performers regarding the use, revenue, and remuneration due. Authors and performers can request additional information

[1294] Explanatory memorandum of the draft law on amending the Copyright Act (transposition of copyright directives) 368 SE. First reading of the bill] 12, available at <https://www.riigikogu.ee/tegevus/eelnoud/eelnou/d3d07943-9d1c-4ebe-94a4-8ae1ebdf7a68>.

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from their contractual partners if sublicensing agreements are involved. However, they cannot obtain information directly from sub-licensees (§ 49[1](2) and (3)).

Contract Adjustment Mechanism

The contract adjustment mechanism is implemented in § 49[2] of the Copyright Act. Authors and performers can request an amendment of the contract to receive additional, fair remuneration if the initial remuneration is unproportionally small compared to the total revenue derived from the use of the work or performance. This mechanism depends on fulfilling the transparency obligation.

Alternative Dispute Resolution

The Copyright committee is tasked with resolving disputes related to the transparency obligation and contractual adjustment requests (§ 87(1) clause 4). The committee acts as a conciliation body following the provisions of the Conciliation Act (§ 87(1[1])).

Right of Revocation

The Estonian Copyright Act allows authors and performers to partially or fully cancel or withdraw from exclusive licence agreements or contracts on the transfer of economic rights if the work or performance is not used within two years after the conclusion of the contract (§49[3](1)). The parties can agree on a longer term, but it cannot exceed five years (§49[3](2)). Before cancellation or withdrawal, the author or performer must grant a reasonable additional term for the commencement of the use of the work or performance (§49[3](3)).

4.2 Implementation of Article 17 DSM Directive

4.2.1. Background

Directive 2019/790/EU ('DSM Directive') was implemented in Estonia together with Directive 2019/789/EU ('CabSat II Directive') through the Copyright Amendment Act, which was adopted on December 8, 2021, and entered into force on 7 January 2022. The provisions transposing Article 17 of the DSM Directive were added to Chapter VII, Part 4 of the Estonian Copyright Act. These provisions define the online content-sharing service provider (OCSSP), regulate communication to the public and making available to the public of works and subject-matters by OCSSPs, include special rules for liability, establish a procedure for complaint submission and resolution, create a notification obligation, and regulate state supervision and compliance.

4.2.2. Definition of Online Content Sharing Service Providers (OCSSPs)

All elements of Article 2(6) of the DSM Directive have been transposed into Estonian law. The definition of OCSSP in the Copyright Act is almost identical to the wording of the Directive (§ 57[8](1)). The Estonian Copyright Act does not specify the concept of "a large amount of copyright-protected content" or "significant revenues," aligning with the European Commission's Guidance.

4.2.3. Authorisations under Article 17(1) and 17(2)

The Estonian Copyright Act does not specify how an OCSSP obtains an authorisation from the rightholder. Generally, authorisation is equated with a license, assignment of rights, or consent within the meaning of tort law (§ 46(1)). The Copyright Act does not differentiate between different types of works in the context of OCSSPs' activities, and freedom of contract

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is followed. If rightholders and OCSSPs do not reach an agreement, OCSSPs are not allowed to use protected content. The authorisation covers the communication to the public and making available to the public, provided the user does not operate on a commercial basis and their activities do not generate significant income (§ 57^{9}(2)).

4.2.4. Liability of OCSSPs Absent an Authorisation

The Estonian Copyright Act specifies that an OCSSP is not liable for copyright infringement if it proves that it made "best efforts to obtain an authorisation" (§ 57^{9}(3)). The Act copies the provisions of Article 17(4) of the DSM Directive, requiring OCSSPs to ensure the unavailability of protected content for which the rightholder has provided relevant information and to act expeditiously to remove and prevent future uploads of infringing content upon receiving a substantiated notice (§ 57^{9}(3)). The principle of proportionality is also transposed into national law (§ 57^{9}(4)).

4.2.5. Safeguards for Legitimate Uses

Article 17(7) of the DSM Directive is implemented in the Estonian Copyright Act, which refers to Chapter IV of the Act, providing several free use cases such as quotation, parody, and pastiche (§ 57^{9}(5)). These exceptions are generally applicable and not designed only to mitigate the impact of Article 17 on user-generated content shared via OCSSPs' platforms. The complaint procedure to protect legitimate interests is regulated in § 57^{11} of the Copyright Act.

4.2.6. Transparency Obligations for OCSSPs

The Estonian Copyright Act obliges OCSSPs to provide sufficient information to rightholders regarding the use of licensed works and objects of related rights (§ 79^{12}). The Act does not specify the categories of information to be provided by OCSSPs to rightholders. Transparency obligations under Article 18 of Directive 2014/26/EU are fulfilled through the Estonian Copyright Act, which requires collective management organisations to provide detailed information to rightholders.

4.2.7. Complaint and Redress Mechanisms

The Estonian Copyright Act requires OCSSPs to establish a complaint resolution procedure for users in the event of disputes over the access and removal of content uploaded by users (§ 57^{11} (1)). The procedure must be effective, free of charge for users, and allow parties to submit their positions, with decisions subject to human review (§ 57^{1}(2) and (3)). The Copyright committee resolves disputes arising between online content-sharing service users and OCSSPs or rightholders.

4.2.8. Additional Elements

The Estonian Copyright Act establishes state supervision over the performance of OCSSPs' obligations (§§ 57^{13}, 57^{14}, 57^{15}). The Consumer Protection and Technical Regulatory Authority exercises state supervision and may impose a non-compliance levy with an upper limit of EUR 50,000. No additional elements were contemplated in the national transposition of Article 17.

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4.3 Implementation of Directive 2014/26/EU

4.3.1. Background

Directive 2014/26/EU was transposed into Estonian law through the Copyright Amendment Act, which was adopted on 23 March 2016, and entered into force on 10 April 2016. The provisions of the Directive were implemented in the Estonian Copyright Act (Autoriõiguse seadus). There are no significant divergences between the text of Directive 2014/26 and the provisions implemented in the Estonian Copyright Act.

4.3.2. Rights of Music Authors and Performers Post-Implementation

Music authors and performers in Estonia are explicitly granted the rights provided by the Directive vis-a-vis their respective collective management organizations (CMOs). According to §79[1](1) of the Copyright Act, rightholders have the right to choose a CMO, determine the geographical scope of their rights management, and decide which types of rights to confer to a given CMO. These rights ensure that rightholders can manage their works and related rights effectively and flexibly.

4.3.3. Independent Management Entities (IMEs)

Provisions on IMEs were implemented into the Estonian Copyright Act through the Copyright Amendment Act. The definition of IMEs, included in § 76(4) of the Copyright Act, aligns with the CRM Directive. § 78(2) of the Copyright Act extends the scope of provisions stipulated in Article 7(4) of the CRM Directive to IMEs. However, no IMEs are currently operating in Estonia.

4.3.4. Mandatory Collective Rights' Management

The Estonian Copyright Act reserves the management of certain music-related rights to CMOs in specific contexts. According to § 79(3) of the Estonian Copyright Act, the exercise of rights through a collective management organisation is mandatory in the cases specified in §§ 10[3] and 10[4], subsection 7 of § 13[3], subsections 6 and 7 of § 14, §§ 15, 27 and 67[1] and subsection 4 of § 68 of this Act. Based on the referred provision, the management by CMOs is mandatory for:

- the right of retransmission within the meaning of §10[3] of the Copyright Act (§ 79[17] (1)), and direct injection within the meaning of § 10[4](2)(§ 79[17](4[1]));
- the compensation for lending works and sound recordings from libraries within the meaning of § 13[3](7);
- and the right to obtain equitable remuneration in the following cases:
    - Where an author has transferred (assigned) the author's economic rights to a producer of audiovisual works or granted an authorisation (licence) to use (including to rent) the original or a copy of an audiovisual work, or where such transfer or authorisation is presumed (§ 1(6));
    - Where an author has transferred (assigned) the right or granted an authorisation (licence) to a producer of phonograms to rent a copy of a phonogram, or where such transfer or authorisation is presumed (§ 14(7));
    - Remuneration for resale of original works of art (§ 15(1));
    - Remuneration for private use of audiovisual works and sound recordings of works (§ 27);
    - Rights of performers to additional remuneration (§ 67[1] (1));
    - The performer's right to obtain equitable remuneration for the rental (§ 68(4)).

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4.3.5. Extended Collective Rights' Management

The Copyright Amendment Act implementing the DSM Directive also transposed Article 12 of the DSM Directive, introducing the concept of collective licensing with an extended effect (§ 57[1]). This allows collective licence agreements to cover rightholders who have not authorized the CMO to represent them, provided certain conditions are met. The extended collective licensing is not confined to specific uses and aims to enhance the accessibility of content.

4.3.6. Administration of Remuneration Rights

CA assigns specific tasks related to remuneration rights to CMOs. For instance, § 27(12) stipulates that the minister in charge of the policy sector may appoint a CMO to collect remuneration for private use of audiovisual works and sound recordings. The Estonian Authors' Society was approved as the collector of fees for the personal use of audiovisual works and sound recordings for 2021-2023.

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5. France

5.1 Implementation Arts. 18-23 DSM Directive

5.1.1. Background

France implemented Articles 2(6) and 18-23 of Directive 2019/790 ('DSM Directive') through Ordinance no. 2021-580 of 12 May 2021 ('Ordinance'). Chapter II of the Ordinance specifically transposes these articles by introducing new provisions and amending existing ones in the French Code of Intellectual Property (CPI). The provisions transposing Articles 18-23 entered into force on 12 May 2021, with the transparency obligations for authors and performers coming into effect on 7 June 2022.

5.1.2. Appropriate and Proportionate Remuneration

National Implementation

France's implementation of Article 18 of the DSM Directive focuses on ensuring fair, appropriate, and proportionate remuneration for authors and performers. The Ordinance amended Article L131-4 of the CPI to include "appropriate and proportionate remuneration" for authors, replacing the previous term "proportionate participation". This amendment came into force on February 17, 2024, following a decision by the French administrative Supreme Court from 15 November 2022 (No 454477) that the previous 1994 version did not guarantee appropriate remuneration.[1295]

For performers, the amended Article L212-3(II) CPI mandates that the assignment of rights must include remuneration appropriate and proportionate to the economic value of the rights transferred, considering the performer's contribution and market practices.

Determination Mechanisms

The CPI allows for lump-sum remuneration in specific cases where proportional remuneration is impractical. Collective agreements may also determine the conditions for implementing remuneration provisions, taking into account sector-specific characteristics.

For instance, Article L212-14 CPI establishes a guaranteed minimum remuneration for performers in relation to streaming broadcasts. The article stipulates that the modalities of this guarantee are to be determined through a collective agreement between professional organizations representing performers and their collective management organizations on one side, and professional organizations representing phonogram producers and their collective management organizations on the other. The Minister responsible for culture may extend these agreements to all performers and phonogram producers concerned, implementing a system of extended collective management. In the event of failed negotiations, an administrative commission is empowered to issue a decision.

[1295] The inclusion of the expression "adequate remuneration" in the current version of the first paragraph of Article L131-4 CPI was introduced through the amendment of this provision by Article 62 of Law No. 2024-449 of 21 May 2024 aimed at securing and regulating the digital space. In addition, pursuant to Article 64(V) of Law No 2024-449 of 21 May 2024, Article 62 of the same law, amending Article L131-4 CPI, entered into force on 17 February 2024.

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The guaranteed minimum remuneration is to be proportional to the economic value of the rights, as provided for in Article L212-3 (II) CPI. However, the article allows for a flat-rate remuneration in certain cases specified therein (Article L. 212-14 (IV) CPI).

On May 12, 2022, a significant agreement was concluded between music artists and producers, which was subsequently extended by a decree of the French Ministry of Culture (Rima Abdul Mala) on 29 June 2022.[1296] This agreement establishes minimum remuneration standards for streaming broadcasts, including a minimum advance that is both recoverable and compensable. The advance is set as a variable flat rate ranging from EUR 500 to 1,000 per unreleased album, contingent upon the size of the producing company. Additionally, the agreement stipulates a minimum royalty rate ranging from 11% to 28% of the sums received by the producer for streaming. The agreement also regulates reductions, removing them from the sphere of contractual freedom. For collective and under flat fee artists, a 2% guarantee is provided. In cases involving multiple performers, the distribution of royalties is to be determined through consultation among the artists.

5.1.3. Contractual Copyright Law

Transparency Obligations

Article L131-5-1 CPI, introduced by the Ordinance, transposes Article 19 of the Directive, requiring assignees to provide authors with explicit and transparent information on revenues generated by the exploitation of their works at least once a year.

The conditions under which accounts are to be submitted, in particular their frequency and the deadline for sending them electronically, may be specified by a professional agreement. This agreement may also lay down specific conditions for the rendering of accounts for authors whose contribution is not significant, as well as the conditions for the transmission of the information. Professional agreements are concluded between, on the one hand, the professional authors' organizations or the collective management organizations and, on the other hand, the organizations representing the assignees in the sector concerned. They may be extended to all interested parties by order of the minister responsible for culture.

In relation to performers, Art. 19 has been transposed by Article L212-3-1 CPI. Specifically for the music sector, Article L212-15 CPI (which existed already in the CPI before the transposition) foresees that the producer of phonograms reports half-yearly to the performing artist of the calculation of his remuneration, in an explicit and transparent manner. At the request of the performing artist, the producer of phonograms provides a chartered accountant mandated by the performing artist with all necessary justifications to establish the accuracy of his accounts.

Contract Adjustment Mechanism

Article L131-5 CPI allows authors to request a revision of contractual pricing if they suffer a significant loss due to insufficient anticipation of proceeds. Paragraph I of the provision foresees that in case of transfer of exploitation rights, the author may request for a revision of

[1296] French agreement of 12 May 2022 on the guarantee of minimum remuneration for performers in relation to streaming, available in French at <https://mediateurdelamusique.fr/wp-content/uploads/sites/6/2022/05/Accord-GRM_signé_12052022-min-avec-compression.pdf>. This agreement was subsequently extended by the French Ministry of Culture (Rima Abdul Mala) decree of 29 June 2022, entered into force on 1 July 2022. See Arrêté du 29 juin 2022 pris en application de l'article L. 212-14 du code de la propriété intellectuelle et rendant obligatoire l'accord du 12 mai 2022 relatif à la garantie de rémunération minimale, available in French at <https://www.legifrance.gouv.fr/loda/id/JORFTEXT000045997320/>.

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the contractual pricing conditions, if he/she has suffered a loss of more than seven twelfths due to infringement or insufficient anticipation of the proceeds from the work. However, such a request can only be made if the work has been assigned for a fixed (lump-sum) remuneration. The assessment of the loss is made in consideration of the whole of exploitation by the assignee of the works of the author who claims to be injured.

According to paragraph II, the author is entitled to additional remuneration when the proportionate remuneration initially foreseen proves to be excessively low in relation to the total income subsequently derived from the exploitation by the assignee. In this case it is the contribution of the author that is taken into account. Prior to the transposition of the Directive adjustment was not foreseen when proportionate remuneration (as opposed to lump-sum remuneration) had been agreed.

In relation to performers, Article L212-3-2 CPI, as introduced by Article 12 of the Ordinance, transposes Article 20 of the Directive. Absent a specific provision in the exploitation contract or in the collective or professional agreement applying to the sector foreseeing a comparable mechanism, the performer is entitled to additional remuneration when the remuneration initially provided for in the exploitation contract proves to be excessively low in relation to the total income subsequently derived from the exploitation by the assignee. As in case of authors, the contribution is taken into consideration.

Alternative Dispute Resolution

Title VI of Book I of French Code of Civil Procedure provides for conciliation and mediation accessible to authors, performers, and their representatives. No specific provisions were adopted by the Ordinance to transpose Article 21 of the DSM Directive, as existing mechanisms were deemed sufficient.

Right of Revocation

Article L131-5-2 CPI grants authors the right to terminate the transfer of their rights if their work is not exploited. The procedures for exercising this right are defined by professional agreements, which may be extended to all interested parties by the Minister of Culture. Similar provisions apply to performers under Article L212-3-3 CPI.

5.2 Implementation of Article 17 DSM Directive

5.2.1. Background

France transposed Article 17 of the DSM Directive through Ordinance n°2021-580 of 12 May 2021. This Ordinance transposes Articles 2(6) and 17-23 of DSM Directive, which addresses copyright and related rights in the digital single market. The transposition occurred before the deadline and partially considers the European Commission's Guidance. Notably, the Ordinance defines what constitutes a "large amount" of works and imposes obligations on Online Content Sharing Service Providers (OCSSPs) to obtain authorisation for reproductions, which deviates from the Commission's Guidance.

5.2.2. Definition of Online Content Sharing Service Providers (OCSSPs)

The Ordinance defines OCSSPs as entities providing online communication services to the public, aiming to store and give access to works and other protected objects uploaded by users, organized and promoted for profit (Article L137-1 CPI introduced by Article 1 of the Ordinance). This definition includes all elements of Article 2(6) and Recitals 61-63 of DSM Directive. Additionally, the Ordinance quantifies "large amounts" of works, considering the

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number of uploaded files, types of works, and audience size. Specific thresholds are set by the decree n° 2021-1369 of 20 October 2021, such as 400,000 unique visitors per month and varying thresholds for different types of works (Article 1 of the decree n° 2021-1369).

5.2.3. Authorisations under Article 17(1) and 17(2)

OCSSPs must obtain authorisations from rights holders for the exploitation of works (Article L137-2(I)). The national transposition does not differentiate between types of works or sectors and does not provide specific guidance on non-voluntary collective agreements, leaving parties with full contractual freedom. Extended collective management is foreseen for authorizing works of graphic and plastic arts (Article L137-2-1). Mediation mechanisms are available for disputes involving Collective Management Organisations or Independent Management Entities under Articles L321-4, L321-6 L325-2, L327-1. The authorisation obtained by OCSSPs also applies to acts of making works available to the public by users, provided the users are not acting for commercial purposes or generating significant income (Article L. 137-2(IV)).

5.2.4. Liability of OCSSPs Absent an authorisation

The national law requires OCSSPs to make their best efforts to obtain authorisation from rights holders. The provisions under Article 17(4)(b) and (c) are transposed using the same wording as the DSM Directive (Article L137-2(III)1°). No additional criteria are specified for the "relevant and necessary information" that rights holders must provide. The principle of proportionality is included without additional criteria. The law does not contain sector-specific requirements or special procedures for trustworthy right holders. Conditions for immunity of certain categories of OCSSPs are transposed as per the DSM Directive, requiring supporting information certifying audience and turnover thresholds (Article L137-2(III)3°).

5.2.5. Safeguards for Legitimate Uses

Article 17(7)(1) is explicitly transposed into national law, ensuring that OCSSPs' provisions do not deprive users of the effective benefit of copyright exceptions (Article L137-4). General exceptions for caricature, parody, and pastiche are provided under Article L122-5. However, the quotation exception is more limited, requiring justification by the critical, polemical, educational, scientific, or informational nature of the work. No additional criteria are provided to identify legitimate uses in the specific domain of OCSSPs.

5.2.6. Transparency Obligations for OCSSPs

The national transposition does not specify categories of information that rights holders must provide to OCSSPs. It requires OCSSPs to provide relevant and precise information on the measures taken for liability mechanisms upon request from copyright holders (Article L137-2 (III)). The obligation to provide information is subject to business secrecy (Article L137-3(I)). Transparency obligations under Directive 2014/26/EU have been transposed into national legislation, with the format for communication of information defined by organizations and users or by an order of the Minister of Culture in the absence of agreement (Article L324-8).

5.2.7. Complaint and Redress Mechanisms

OCSSPs must provide effective and expeditious complaint and redress mechanisms for users in disputes over content removal (Article L137-4 II). Complaints must be processed quickly and efficiently, with decisions subject to human review (Article L137-4 III). Users and rights holders can refer disputes to Audiovisual and Digital Communication Regulatory Authority

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(ARCOM) or a judge(Article L137-4 IV). ARCOM handles conciliation and renders decisions within specified timeframes, with the possibility of appeal.

5.2.8. Additional Elements

The national transposition does not contemplate additional elements such as new remuneration rights within an extended or mandatory collective management system. Some aspects of the Act may be considered inconsistent with the Directive, such as the notion of "large amount" and the requirement for reproduction rights. No administrative or judicial procedures have been identified for the implementation of Article 17.

5.3 Implementation of Directive 2014/26/EU

5.3.1. Background

France transposed Directive 2014/26/EU through Order No. 2016-1823 of 22 December2016. This Order introduced amendments to the CPI, specifically in Title II "Management of copyright and related rights by an organization" of Book III "General provisions relating to copyright, related rights and rights of database producers" (Articles L321-1 to L328-2). No significant divergences between the Directive and the national transposition have been identified. However, France included additional provisions, such as the obligation for independent management entities to grant test licenses to users providing new types of online services for less than three years.

5.3.2. Rights of Music Authors and Performers Post-Implementation

Following the transposition of Directive 2014/26/EU, music authors and performers in France are explicitly granted several rights vis-a-vis their collective management organizations (CMOs). These rights include the freedom to choose a collecting society, determine the geographical scope of their rights' management, and decide which types of rights to confer to a given CMO. These provisions are reflected in Article L322-3 CPI. Additionally, right holders have the right to withdraw all or part of their rights at any moment, as stipulated in Article L322-5 CPI.

5.3.3. Independent Management Entities (IMEs)

The concept of IMEs was introduced into French legislation with the transposition of Directive 2014/26/EU. IMEs are regulated under Article L321-6 CPI and related provisions. They are subject to various requirements, including providing information on management costs, conditions for tariff setting, and distribution of collected remuneration. IMEs are also subject to control by the commission for the control of copyright and related rights management bodies. Notably, the French Cassation Court has ruled that certain activities, such as the collective management of the right to remuneration for communication to the public of phonograms published under Creative Commons non-commercial licenses, are reserved for CMOs and not IMEs.

5.3.4. Mandatory Collective Rights' Management

In France, several rights are subject to mandatory collective management. These include:

- Private copying levy (Article L311-6(I) CPI);
- Reprographic rights (Article L122-10 CPI);
- Remuneration for public lending right (Article L133-2 CPI);
- Digital exploitation of out-of-commerce works (Articles L134-3(I) and L138-2 CPI);

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- Artist's resale rights in the absence of heirs (Article L123-7(II) CPI);
- Remuneration right to obtain an annual supplementary non-waivable remuneration right for performers (Article L212-3-7(IV) CPI);
- Cable retransmission (Articles L132-20-1 and R323-1 to R323-5 CPI);
- Secondary uses of phonograms by radio and TV broadcasters within the meaning of Article 214-1CPI (Article 214-5 CPI).

5.3.5. Extended Collective Rights' Management

The French system of extended collective licensing (ECL) was reformed with the transposition of Directive 2019/790/EU. Ordinance No. 2021-1518 of 24 November 2021, introduced amendments to the CPI. Under Articles L324-8 to L324-8-6, ECL is applicable to the following rights:

- exploitation of works in digital form by educational establishments for the purposes of illustration as part of teaching activities (Article L122-5-4(II) CPI);
- exploitation of works of visual arts by content sharing platforms (Article L137-2-1 CPI);
- exploitation works of visual arts in scientific publications (Article L139-1 CPI).

To act as a CMO with extended licensing competences, French CMOs must receive approval from the Ministry of Culture (Article L324-8-1 CPI) based on criteria such as the importance of the CMO's repertoire and the diversity of its associates (Article L324-8-3).

5.3.6. Administration of Remuneration Rights

The administration of remuneration rights, such as the private copying levy (Article L311-6(I) CPI) and secondary uses of phonograms by radio and TV broadcasters (Article L214-5), is subject to mandatory collective management by CRMOs accredited by the Ministry of Culture. The accreditation is based on criteria including the professional qualification of the directors, the means proposed for rights collection, and the diversity of the CRMO's associates. Additionally, 25% of the collected private copying levies must be dedicated to supporting artistic and cultural education.

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6. Greece

6.1. Implementation Arts. 18-23 DSM Directive

6.1.1. Background

Greece implemented Directive (EU) 2019/790 ('DSM Directive') on 24 November 2022, through Law 4996/2022. This law amended existing Greek Law 2121/1993 on Copyright, Related Rights, and Cultural Matters (hereafter 'Law 2121'), as well as Law 4481/2017 on Collective Rights Management. Parts B and D of the Act specifically address the transposition of the Directive.

6.1.2. Appropriate and Proportionate Remuneration

National Implementation

Article 18 of the Directive was transposed by Article 21 of Law 4996/2022, which modified Article 32 of Law 2121 to explicitly reflect the Directive's wording. Authors are entitled to "appropriate and proportionate remuneration" for licensing or transferring their exclusive rights. The basis for calculating this remuneration includes all gross income or expenses derived from the exploitation of the work. In specific cases, such as theatrical performances and musical accompaniment of films, the law provides for a minimum percentage of remuneration.

Determination Mechanisms

The remuneration can be calculated as a lump-sum if it is practically impossible to determine the percentage basis, if the costs of calculation are disproportionate, or if the nature of the exploitation makes percentage calculation impossible. While parties have the freedom to decide on the level of remuneration, it must be appropriate and proportionate, which limits contractual freedom compared to the pre-transposition period. Article 32 of Law 2121 is a mandatory provision, meaning that authors cannot waive their rights to appropriate and proportionate remuneration.

6.1.3. Contractual Copyright Law

Transparency Obligations

Article 15A, added to Law 2121 by Article 22 of the transposing Act, implements the transparency obligations almost verbatim from Article 19 of the DSM Directive. Assignees or transferees must provide authors with up-to-date, relevant, and sufficient information at least once a year regarding the exploitation and promotion of their works. This includes information on modes of exploitation, revenues generated, and remuneration due. If the first contractual counterpart does not hold or provide all necessary information, authors can request additional information from sub-licensees or other successors.

Contract Adjustment Mechanism

Article 32A of Law 2121, introduced by Article 23 of the transposing Act, allows authors to claim additional remuneration if the originally agreed remuneration is disproportionately low

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compared to subsequent revenues. This provision applies unless there is a collective bargaining agreement providing a mechanism for additional remuneration. The criteria for determining additional remuneration include the special circumstances of each case, the author's contribution, and remuneration practices in different fields. Waiver or contractual limitation of the right to claim additional remuneration, is void. Invalidity may only be invoked by the author (Article 32A(3) of Law 2121).

Alternative Dispute Resolution

Article 39A of Law 2121, introduced by Article 24 of the transposing Act, provides for mediation as an alternative dispute resolution mechanism for disputes concerning transparency obligations and claims for additional remuneration. Parties can request the assistance of mediators chosen from a list drawn up by the Hellenic Copyright Organisation (HCO) every two years. The mediators assist in negotiations and may make proposals to the parties, which are considered accepted unless objected to within three months.

Right of Revocation

Article 15B of Law 2121, introduced by Article 25 of the transposing Act, grants authors the right to revoke or terminate the exclusive character of a license or transfer of rights if the work is not being exploited. This right can be exercised after a reasonable time has passed since the conclusion of the contract, and the author must notify the counterparty and set an appropriate deadline for exploitation. The right of revocation does not apply to film and audiovisual works or when the lack of exploitation is due to circumstances the author can reasonably remedy.

6.2. Implementation of Article 17 DSM Directive

6.2.1. Background

Greece transposed Article 17 of the DSM Directive through Law 4996/2022, which was passed by the Greek Parliament on 22 November 2022, and published in the Official Gazette on 24 November 2022. As mentioned above, this law amended Law 2121/1993 on Copyright, Related Rights and Cultural Matters. The transposition occurred after the deadline and the European Commission's Guidance. The Greek legislation closely follows the text of the Directive, with only minor differences, and does not significantly incorporate elements from the Commission's Guidance.

6.2.2. Definition of Online Content Sharing Service Providers (OCSSPs)

All elements of Article 2(6) of DSM Directive have been transposed into Greek law through Article 66F(1) of Law 2121/1993. This provision defines OCSSPs as providers of information society services whose main purpose is to store and give public access to a significant amount of copyright-protected works or other protected subject matter uploaded by users, which the service optimizes and promotes for profit-making purposes. The Greek legislation adds that online application stores are not considered OCSSPs.

6.2.3. Authorisations under Article 17(1) and 17(2)

OCSSPs must obtain authorisations from rights holders to communicate or make available copyright-protected works to the public (Article 66F(2) and (3) of Law 2121/1993). The national transposition does not specify the ways to seek such agreements, leaving parties with full contractual freedom. It does not include additional principles for negotiations or mediation mechanisms for cases where agreements are not reached. The authorisation obtained by

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OCSSPs also covers acts of communication and making available to the public by users, provided they are not acting on a commercial basis or generating significant revenues.

6.2.4. Liability of OCSSPs Absent an authorisation

The national law requires OCSSPs to make "every possible effort" to obtain authorisation from rights holders, reflecting the "best efforts" clause of the Directive (Article 66F(5) of Law 2121/1993). The provisions under Article 17(4)(b) and (c) are transposed verbatim, with the principle of proportionality explicitly mentioned. The law also states that the liability exemption does not apply to service providers whose main purpose is to engage in or facilitate piracy. No additional criteria are specified for the "relevant and necessary information" that rights holders must provide.

6.2.5. Safeguards for Legitimate Uses

Article 17(7)(1) is explicitly transposed into Greek law (Article 66F(8) of Law 2121/1993), ensuring that cooperation between OCSSPs and rights holders does not hinder the availability of works uploaded by users that do not infringe copyright. Users may upload and make available content for quotation, criticism, review, and use for caricature, parody, or pastiche. These exceptions and limitations apply specifically to user-generated content shared via OCSSPs' platforms and do not include other uses for the same purpose. Article 19 of Law 2121/1993 does provide a general exception for the purpose of quotation.

6.2.6. Transparency Obligations for OCSSPs

The national transposition of Article 17(8) replicates the EU law model without additional elements (Article 66F). It does not identify categories of information that rights holders must provide to OCSSPs or specify procedures for transparency obligations. Article 66F does not provide specific obligations for OCSSPs regarding transparency or the categories of information to be provided to rights holders.

6.2.7. Complaint and Redress Mechanisms

OCSSPs are required to implement effective and expeditious complaint and redress mechanisms for users in disputes over content removal (Article 66F(10) of Law 2121/1993). Complaints must be processed without undue delay, and decisions to disable access or remove content must be subject to human review. In the event of a dispute between rights holders and users, mediation may be sought, applying the provisions of Article 35(9) of Law 2121/1993.

6.2.8. Additional Elements

The national transposition did not contemplate significant additional elements when implementing Article 17 of the DSM Directive. No administrative acts or circulars have been issued to regulate specific matters or provide technical details. To date, the implementation of Article 17 has not been subject to judicial review.

6.3. Implementation of Directive 2014/26/EU

6.3.1. Background

Directive 2014/26/EU was transposed into Greek legislation by Law 4481/2017 (hereafter 'Law 4481'). Prior to this, the functioning and control of Collective Management Organisations (CMOs) were regulated by Law 2121/1993. The transposition of the Directive marked a significant shift, introducing substantial changes to the landscape of collective management

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in Greece, particularly in terms of transparency, monitoring, and accountability. However, the legislative decision to introduce a separate law for the transposition did not receive unanimous support, with some arguing that the transposition could have been accomplished through amendments to Law 2121/1993. The Act has faced criticism for neglecting the cultural significance of authors' rights and collective management, prioritising the managerial efficiency of CMOs in their relations with users and rightsholders over the promotion of their cultural role.[1297] In addition, the legislative approach has come under scrutiny for potentially resulting in unequal treatment of domestic CMOs compared to their foreign counterparts. The stringent measures, coupled with the delicate position of the relatively small Greek music market, have raised questions about the appropriateness of the Act. In very general lines, the transposition by Law 4481/2017 aligns with Directive 2014/26; however, some provisions go beyond the Directive raising questions of compatibility.

6.3.2. Rights of Music Authors and Performers Post-Implementation

Following the transposition of Directive 2014/26/EU, Greek Law 4481/2017 explicitly grants music authors and performers several rights vis-a-vis their collective management organisations (CMOs). These rights include the freedom to choose a collecting society, determine the geographical scope of their rights management, and decide which types of rights to confer to a given CMO. Authorisation is made in writing and for a maximum period of three years. Right holders also have the right to terminate the authorisation agreement with a three-month written notice.

6.3.3. Independent Management Entities (IMEs)

Greek Law 4481/2017 establishes two categories of Independent Management Entities (IMEs): 'simple' IMEs (Article 32) and IMEs with a dominant position in the Greek market (Article 50). The latter category is accorded similar treatment to CMOs, including equivalent privileges and presumptions under Article 7, while remaining subject to scrutiny, transparency obligations, and licensing requirements.

IMEs without a dominant position face significant restriction. They are prohibited from managing rights subject to collective rights management and are not afforded the presumptions under Article 7. These 'simple' IMEs may operate after obtaining a decision from the Ministry of Culture and Sports, based on a recommendation from the Hellenic Copyright Organisation (HCO).

Both categories of IMEs must register their shares if operating as limited public companies, including foreign IMEs with branches in Greece. They are required to provide specific operational information to the HCO within three months of commencing operations.

The law explicitly prohibits IMEs from becoming members of CMOs or entering into contractual relationships regarding mandatory collective management of rights. For an IME to enter a CMO, strict conditions must be met, including absence of conflicts of interest, non-engagement in anti-competitive practices, and approval by a 75% majority of CMO members.

CMOs and IMEs established in other EU Member States may operate in Greece after notifying the HCO and obtaining a decision from the Minister of Culture and Sports. However, if managing rights under mandatory collective management, they must obtain an operating license.

[1297] Sylvia Stavridou, 'Collective Management of Copyright in Greece After the Implementation of Directive 2014/26/EU' (2020) 69(2) GRUR International 128, 134.

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As of the current date, the list of IMEs operating in Greece is notably empty, with only one foreign IME, Faded Media from Poland, having notified its intended activity in the country.

6.3.4. Mandatory Collective Rights' Management

Greek law reserves the management of certain music-related rights to collective rights management. These include:

- Private copying levies: Authors and certain holders of related rights are entitled to equitable remuneration for reproduction for private use, which is exercised by a CMO (Article 18(3) of Greek Law 2121/1993);
- Secondary uses of phonograms by radio and TV broadcasters: Performers and producers of recordings have a right to equitable remuneration, which is managed by CMOs (Article 49(1) of Greek Law 2121/1993).

6.3.5. Extended Collective Rights' Management

Article 12 of the DSM Directive was transposed by Article 7A of Greek Law 4481/2017. This allows CMOs to represent right holders who have not expressly authorised them, provided certain conditions are met. These conditions include sufficient representativeness of right holders, equal treatment of all right holders, and the impracticality of obtaining individual licenses. The law also transposes Article 8 of the DSM Directive, allowing CMOs to grant non-exclusive and non-commercial extended collective licenses to cultural heritage organisations (Article 27B of the Greek Law 2121/1993).

6.3.6. Administration of Remuneration Rights

The administration of remuneration rights, such as private copying levies and secondary uses of phonograms by radio and TV broadcasters, is subject to mandatory collective management by CMOs. CMOs are responsible for negotiating and agreeing on remuneration levels, raising claims for payment, and collecting remuneration from users. The collected remuneration is distributed equally between performers and producers of recordings.

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7. Italy

7.1 Implementation of Articles 18-23 DSM Directive

7.1.1. Background

Italy implemented Directive (EU) 2019/790 ('DSM Directive') through Law Decree No. 177 from November 8, 2021, which introduced amendments to the Italian Copyright Act (Legge 22 aprile 1941, n. 633). These amendments came into force on 12 December 2021 and aimed to align Italian copyright law with the provisions of the DSM Directive, particularly Articles 18-23.

7.1.2. Appropriate and Proportionate Remuneration

National Implementation

Article 18 of the Directive was transposed into Italian law by adding a second paragraph to Article 107(2) of the Italian Copyright Act (ICA). This provision grants authors, dialogue adaptors, dubbing directors, and performing artists, including voice actors, the right to appropriate and proportionate remuneration when they license or transfer their exclusive rights for the exploitation of their works or other protected subject matter. Agreements contrary to this provision are void. Lump-sum remuneration is permitted only in limited cases where the contribution is incidental, and the calculation costs are disproportionate.

Determination Mechanisms

Article 107(2) ICA specifies that remuneration must be adequate and proportionate to the value of the rights licensed or transferred and commensurate with the revenues derived from their exploitation. It also considers the particularity of the reference sector and the existence of collective bargaining agreements. Article 107(2) further specifies that it shall be applied without prejudice to Articles 46-bis and 84 of the ICA. In this regard, Articles 46-bis(4) and 84(4) provide that, if an agreement on remuneration is not reached, the Italian Communications Authority (AGCOM) will decide on the amount. This provision aims to correct market distortions, particularly in payments by large on-demand platforms.

Furthermore, in August 2023 the Italian Parliament issued a non-binding decision no 138 "Remuneration paid by streaming platforms by artists and performers".[1298] In this decision, the Parliament invited itself to specify the criteria for the quantification of adequate and proportionate remuneration, as indicated by Article 84 ICA, and for the determination, in the absence of agreement between the parties, of the remuneration through negotiation under Art. 84(4) ICA.

7.1.3. Contractual Copyright Law

Transparency Obligations

Article 110-quater ICA transposes Article 19 of the DSM Directive, requiring licensees and their assignees to provide authors and performers with updated, relevant, and complete information on the exploitation of their works and performances at least every six months (as

[1298] Affare assegnato su "I compensi corrisposti agli artisti delle piattaforme in streaming" (n. 138), available in Italian at <https://www.senato.it/leg/19/BGT/Schede/ProcANL/ProcANLscheda49308.htm>.

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opposed to every 12 months, as required by the DSM Directive). This information includes the identity of all subjects affected by the transfers or licenses, methods of exploitation, revenues generated, and remuneration due. Authors and performers can obtain information directly from sub-licensees if their first contractual counterparty does not have all the necessary information.

Article 110-quater(4) ICA establishes remedies against breaches of transparency obligations, not foreseen under the DSM Directive. First, AGCOM has the power to apply a pecuniary administrative sanction for the failure to comply with transparency obligations, reaching up to 1 percent of the turnover achieved in the last financial year closed before notification of the dispute. Second, failure to comply with transparency obligations constitutes a legal presumption of inadequacy of the compensation in favor of the rights holders (Article 110-quater(4)). Consequently, authors and performers may activate the contract adjustment mechanism under Article 110-quinquies without proving that the contractually agreed remuneration is disproportionately low.

Contract Adjustment Mechanism

Article 110-quinquies ICA transposes Article 20 of the DSM Directive, allowing authors and performers to claim additional, appropriate,[1299] and fair remuneration if the agreed remuneration proves to be disproportionately low compared to the proceeds generated from the exploitation of their rights. This provision is supplemented by a legal presumption of inadequacy of compensation in favor of rights holders in case of non-compliance with transparency obligations, as discussed below.

Alternative Dispute Resolution

Article 110-sexies ICA transposes Article 21 of the DSM Directive, establishing AGCOM as the alternative dispute resolution body for disputes concerning transparency obligations and the contractual adjustment mechanism.

Right of Revocation

Article 110-septies transposes Article 22 of the DSM Directive, granting authors and performers the right to terminate or revoke the exclusivity of a license agreement in cases of non-exploitation. This right must be requested by all authors and performers with the greatest contribution to the work or performance. Any contractual provision derogating from this right is void unless provided for by a collective agreement (Article 110-septies(5)). Collective works are included within the scope of the right of revocation; it must be requested by all the authors and performers with the greatest contribution to the work or performance (Article 110-septies(3)).

7.2 Implementation of Article 17 DSM Directive

7.2.1. Background

Italy transposed Article 17 of the DSM Directive through Law-Decree No. 177 from November 8, 2021, which amended the ICA. The amendments, which introduced Articles 102-sexies to 102-decies, came into force on 12 December 2021. The transposition occurred after the deadline and the publication of the European Commission's Guidance, and certain elements of the Italian transposition contradict the Guidance.

[1299] Notably, both the Italian version of Directive (EU) 2019/790 and the Italian Copyright Act refer to "remunerazione adeguata" (i.e., 'adequate remuneration').

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7.2.2. Definition of Online Content Sharing Service Providers (OCSSPs)

Article 102-sexies of the Italian Copyright Act incorporates all elements of Article 2(6) of the DSM Directive. It defines an OCSSP as an information society service provider that:

- Has as its main purpose, or among its main purposes, to store and give public access to large quantities of works or other materials protected by copyright.
- The works or other protected materials are uploaded by its users.
- The works or other protected materials are organized and promoted with the aim of directly or indirectly profiting from them.

The definition also includes "profit-making purposes" as both direct and indirect profit, as regulated in Recital 62 of the DSM Directive. Elements from Recital 63 are not included in the Italian transposition.

7.2.3. Authorisations under Article 17(1) and 17(2)

Obtaining Authorisation

Under Article 102-sexies(3), OCSSPs must obtain authorisation from right holders, including through licensing agreements obtained directly or through collective management organizations and independent management entities. This applies to all types of works and sectors.

Acts Covered by Authorisation

The authorisation covers acts carried out by users who upload works protected by copyright to the OCSSP's platform, provided they are not acting for commercial purposes or their activity does not generate significant revenues (Article 102-sexies(4) ICA).

7.2.4. Liability of OCSSPs Absent an authorisation

Best Efforts to Obtain Authorisation

The term "best efforts" is translated as "maximum efforts" ('massimi sforzi') in both the Italian version of the Directive and the Italian transposition. Article 102-septies(1)(b)(c) ICA transposes Article 17(4)(b) and (c) of the DSM Directive literally, requiring OCSSPs to make maximum efforts to obtain authorisation and ensure that specific works are not made available without authorisation.

Principle of Proportionality

Article 102-septies(2) ICA faithfully includes all elements from Article 17(5) of the DSM Directive and adds that OCSSPs practicing or facilitating copyright piracy are not excluded from liability.

Immunity for Certain Categories of OCSSPs

Article 102-octies ICA provides that new OCSSPs operating within the EU market for less than three years and having a yearly turnover of less than 10 million euros are liable unless they prove to have made the greatest effort to obtain authorisation and promptly disabled access to or removed reported works. If they had more than 5 million visitors per month in the previous year, they must also prove efforts to prevent future uploads of reported works.

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7.2.5. Safeguards for Legitimate Uses

Article 102-nonies ICA explicitly transposes Article 17(7)(1) of the DSM Directive, ensuring that cooperation between OCSSPs and right holders does not affect the availability of works uploaded by users in compliance with copyright and related rights. Citation, criticism, and review are available as both generally applicable exceptions (Article 70 ICA) and for user-generated content (Article 102-nonies(2)), while use for the purpose of caricature, parody, or pastiche is only available for user-generated content (Article 102-nonies(2)).

7.2.6. Transparency Obligations for OCSSPs

Art 17(8)(2) of the DSM Directive was transposed by Article 102-septies(3) of the ICA. General transparency requirements, including those under Article 17 of Directive 2014/26/EU, are applicable. Directive 2014/26/EU was transposed into Italian law by Article 24 of Law-Decree No. 35 from March 15, 2017.

7.2.7. Complaint and Redress Mechanisms

Under Article 102-decies, decisions on disablement and removal of content are subject to human review. Users may contest these decisions with the OCSSPs and appeal to the AGCOM. The AGCOM has adopted specific guidelines for this process.[1300] However, the contested content remains disabled throughout the complaint and redress procedure, which may lead to overblocking.

7.2.8. Additional Elements

The national transposition did not include any additional elements such as new remuneration rights within an extended or mandatory collective management system. There is no information available on the implementation of the national transposition of Article 17 via administrative or judicial procedures.

7.3 Implementation of Directive 2014/26/EU

7.3.1. Background

Italy transposed Directive 2014/26/EU through Legislative Decree No. 35/2017, which amended the ICA. The amendments entered into force on 11 April 2017, one year later than the original deadline set by the Directive. Initially, the reform sought to maintain the monopoly of Società Italiana degli Autori ed Editori ('SIAE') as the only Italian collective management organisation (CMO) for copyright management. However, subsequent amendments to Article 180 ICA through Legislative Decree No. 148/2017 allowed other CMOs to undertake collective management of the rights listed in Article 180 ICA. The Italian market for related rights' intermediation was also liberalized.

The AGCOM received regulatory and supervisory powers, part of which had been traditionally held by SIAE. AGCOM supervises compliance with applicable norms on collective management, imposes administrative sanctions, and sets criteria for defining the most representative CMOs for extensive collective licensing. CMOs and IMEs shall notify the start of its activities to AGCOM AGCOM may also decide on tariffs, if negotiations between a CMO or an IME and a user fail. Upon the ruling in C-10/22, Italian authorities once again amended

[1300] AGCOM, decision No. 276/22/CONS, available in Italian at <https://www.agcom.it/documents/10179/27359996/Allegato+28-7-2022/590bfc34-ec0e-45c3-8149-e0fe14989d50?version=1.0>.

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Article 180 of the Copyright Law, finally opening the copyright intermediation market to IMEs from 17 September 2024.[1301]

7.3.2. Rights of Music Authors and Performers Post-Implementation

Music authors and performers in Italy are explicitly granted the rights provided by Directive 2014/26/EU. These rights include:

- The freedom to choose a CMO or independent management entity (IME) for the management of their rights, categories of rights, or types of works and other subject matter (§ 4(2) Legislative Decree No. 35/2017).
- The right to grant non-commercial licenses (§ 4(5) Legislative Decree No. 35/2017).
- The right to revoke the assignment of intermediation activity with notice (§ 4(6) Legislative Decree No. 35/2017).

7.3.3. Independent Management Entities (IMEs)

Prior to 2024, Article 180 ICA restricted copyright management to CMOs and excluded IMEs. This limitation led to two requests for preliminary rulings to the Court of Justice of the European Union (CJEU).

The first case, involving SIAE and Soundreef, was withdrawn after an out-of-court settlement. Soundreef then established Liberi Editori Autori (LEA), a CMO compliant with Italian law.

The second case, *LEA v Jamendo* (C-10/22), questioned the compatibility of Article 180 ICA with EU law. On March 21, 2024, the CJEU ruled that completely prohibiting IMEs from offering services is incompatible with EU law. The Court found that: (i) IMEs are not information society service providers and do not fall under Directive 2000/31; (ii) Directive 2006/123 does not apply to copyright and related rights; (iii) the Italian law impaired the freedom to provide services (Article 56 TFEU).

Following this ruling, Italian authorities amended Article 180 of the Copyright Law, opening the copyright intermediation market to IMEs from 17 September 2024.

7.3.4. Mandatory Collective Rights' Management

In Italy, the cable retransmission rights are subject to mandatory collective rights management, as per. Article 16-ter(3) of the ICA as revised pursuant to implementation of Directive (EU) 789/2019.[1302] Under Article 16-ter(5) of the ICA, where right holders have not transferred the management of cable retransmission rights to a CMRO, the right to grant or refuse authorization for a retransmission on their behalf shall belong to the CRMO which manages the rights of the same category of holders and, in the case of a plurality of organisations, it is up to the three most representative bodies for each category of holders, on the basis of the representativeness criteria identified by the AGCOM.

[1301] Decree Law of 16 September 2024, No 131, OJ 16/09/2024 No 217.

[1302] Decreto Legislativo, 8 novembre 2021, n. 181, attuazione della direttiva (UE) 2019/789 del Parlamento europeo e del Consiglio, del 17 aprile 2019, che stabilisce norme relative all'esercizio del diritto d'autore e dei diritti connessi applicabili a talune trasmissioni online degli organismi di diffusione radiotelevisiva e ritrasmissioni di programmi televisivi e radiofonici e che modifica la direttiva 93/83/CEE del Consiglio, GU Serie Generale n.284 del 29-11-2021. Available in Italian at <https://www.gazzettaufficiale.it/eli/id/2021/11/29/21G00191/sg>.

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7.3.5. Extended Collective Rights' Management

Italy introduced the mechanism of extended collective licensing (ECL) with the transposition of the DSM Directive. Article 180-ter ICA stipulates that ECL is applicable to various rights, including:

- rental rights (Article 18-bis ICA);
- remuneration rights of audiovisual authors (Article 46-bis);
- secondary uses of sound recordings (Articles 73 and 73-bis);
- exclusive rights of performers (Article 80);
- and remuneration rights of performers (Article 84).

The collective management is done by the three CMOs most representative for each category of right holders. AGCOM adopted a regulation in April 2024 (DELIBERA N. 95/24/CONS)[1303], setting criteria for determining the greater representativeness of CMOs and procedures for opting out of ECL.

7.3.6. Administration of Remuneration Rights

CMOs in Italy are assigned specific tasks in the administration of remuneration rights, including:

- Remuneration for private copyright levies, managed by SIAE (Article 71-octies ICA);
- Remuneration for secondary uses of phonograms by radio and TV broadcasters, managed by the corresponding CRMO to which the performer or producer has assigned their rights (Article 73 ICA).

7.3.7. Transparency of Online Music Licensing Solutions for Music rightholders Post-Implementation

The implementation of Directive 2014/26/EU seems to have increased the degree of transparency in the management of copyright and related rights in Italy. AGCOM's recent practice, such as in the administrative proceedings against Netflix (case 220/23/CONS)[1304], demonstrates the application of provisions transposing Articles 16 and 17 of the Directive. These provisions ensure negotiations based on principles of good faith and proportionality, with AGCOM setting procedures for information exchange during license negotiations.

[1303] AGCOM, Regulation No 95/24/CONS, Regolamento Recante Attuazione Degli Articoli 18-bis, 46-bis, 80, 84, 110-ter, 110-quater, 110-quinquies, 110-sexies, 180-ter della legge 22 Aprile 1941, N. 633 come novellata dal decreto legislativo 8 novembre 2021, N. 177, available in Italian at <https://www.agcom.it/sites/default/files/migration/delibera/Delibera%2095-24-CONS.pdf>.

[1304] AGCOM, Resolution No. 220/23/CONS, "Conclusione del procedimento avviato nei confronti della società Netflix International B.V. per la violazione dell'articolo 23, commi 1 e 2, del decreto legislativo 15 marzo 2017, n. 35 (Contestazione 11/22/DSDI - N°PROC. 13-GG)" (2 August 2023), available in Italian at <https://www.agcom.it/sites/default/files/migration/delibera/Delibera%20220-23-CONS.pdf>.

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8. Portugal

8.1 Implementation of Articles 18-23 DSM Directive

8.1.1 Background

Portugal implemented Directive (EU) 2019/790 ('DSM Directive') on 19 June 2023, through Law Decree No. 47/2023, which entered into force on July 4, 2023. This decree introduced amendments to the Portuguese Copyright and Related Rights Code (CRRC), including new Articles 44-A to 44-F that transpose Articles 18-23 of the DSM Directive.

8.1.2 Appropriate and Proportionate Remuneration

National Implementation

Law Decree No. 47/2023 adds a new Article 44-A to the CRRC, modeled upon Article 18 DSM Directive. This article introduces the principle of appropriate and proportionate remuneration for authors and performers who transfer or license their exploitation rights. The principle of contractual freedom and the goal of a fair balance of rights and interests are fully considered.

Determination Mechanisms

Article 44-A(2) CRRC outlines specific rules to determine the appropriateness and proportionality of remuneration. Relevant criteria include: (1) the principle of contractual freedom, (2) market practices, (3) the specific cultural sector, (4) the individual contribution of the original owner, and (5) the need to achieve a fair balance of rights and interests. Points (1) and (5) are taken from Article 18(2) Directive, while points (2) to (4) are inspired by Recital 73 Directive. Despite these provisions, the small market size, reputation of musicians, and lack of means to resort to courts often prevent musicians from exercising their rights.

8.1.3. Contractual Copyright Law

Transparency Obligations

Article 44-B CRRC implements Article 19 DSM Directive, regulating the duty of assignees and exclusive licensees to provide information to authors and performers on the commercial exploitation of their works. Information must be relevant, exhaustive, updated, and provided at least once a year. However, the right to information applies only to exclusive licensees, not non-exclusive licensees (Article 44-B(1)). This may, for instance, exclude licenses concluded with OCSSPs under Art. 17 DSM Directive. Authors and performers can request information from sub-licensees through primary assignees or directly if the primary assignees do not request it.

Contract Adjustment Mechanism

Article 44-C CRRC transposes the contract adjustment mechanism from Article 20 DSM Directive. Authors and performers can claim additional remuneration if the initially agreed remuneration is disproportionately low compared to subsequent revenues (Article 44-C(1)). The criteria for additional remuneration include all relevant revenues, the specific contribution of the author or performer, and sector-specific remuneration practices (Article 44-C(3)). While Article 20 of the DSM Directive does not set any deadlines to exercise the contract adjustment

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mechanism, Article 44-C(4) CRRC limits its validity to two years of becoming aware of the relevant circumstances.

Alternative Dispute Resolution

Article 44-D CRRC introduces an alternative dispute resolution procedure for disputes concerning transparency obligations and contract adjustments. Disputes can be submitted to an institutionalized arbitration center or arbitration under the Voluntary Arbitration Law. Collective management organisations representing authors and performers can initiate and intervene in these procedures if expressly mandated by the right holders. Article 44-D CRRC creates a new dispute resolution mechanism called "specialized institutionalized arbitration and mediation in matters of copyright and related rights".

Right of Revocation

Article 44-E CRRC transposes Article 22 DSM Directive, allowing authors and performers to revoke licenses or transfers of rights due to lack of exploitation. The right of revocation can be exercised five years after the contract's conclusion or one-third of its initial duration (Article 44-E(2)). This right does not apply to audiovisual works (Article 44-E(4)).

8.2 Implementation of Article 17 DSM Directive

8.2.1. Background

Portugal transposed Article 17 of the DSM Directive through Decree-Law no. 47/2023, which came into force on 4 July 2023. This decree added several new articles (Articles 175-A to 175-I) to the CRRC. The transposition occurred after the deadline and the publication of the European Commission's Guidance, but it does not incorporate all elements of the Commission's Guidance.

9.2.2. Definition of Online Content Sharing Service Providers (OCSSPs)

Article 175-A of the CRRC defines OCSSPs in Portuguese law, including all elements of Article 2(6) of the DSM Directive. It also incorporates elements from Recital 62, such as the clarification that "profit-making purposes" cover both direct and indirect economic or commercial advantage. However, it does not follow Recital 62 and the Commission's Guidance regarding the non-exhaustive list of services that are not OCSSPs (Article 175-A(2)). Additionally, the Portuguese transposition does not consider Recital 63, which requires a case-by-case analysis of whether an OCSSP stores and gives access to a large amount of copyright-protected content.

8.2.3. Authorisations under Article 17(1) and 17(2)

OCSSPs must obtain authorisation from the respective right holders as stipulated in Articles 175-B(2) and (3) of the CRRC. No further guidance on such authorisation s is provided. For works incorporated in commercially edited phonograms or videograms, authorisation for acts of communication to the public may be subject to extended collective management (Article 149(4)). The Portuguese Civil Code regulates overall principles applicable to negotiations, including contractual freedom (Article 405). There are no additional provisions for cases where right holders and OCSSPs do not reach an agreement, except for audiovisual works on demand video platforms, where parties may resort to an institutionalised arbitration center (Article 74-E).

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8.2.4. Liability of OCSSPs Absent an Authorisation

Article 175-C of the CRRC transposes the provisions of Article 17(4) of the DSM Directive. It requires OCSSPs to make best efforts to obtain authorisation, ensure the unavailability of certain works, and act diligently upon receiving a sufficiently substantiated notice from rights holders (Article 175-C(1) point c)). The principle of proportionality is observed, and the elements to be considered include the type, target audience, and size of the service, among others (Article 175-C(2)). There are no additional criteria for the "relevant and necessary information" that right holders must provide to OCSSPs.

8.2.5. Safeguards for Legitimate Uses

Article 175-I of the CRRC explicitly transposes Article 17(7)(1) of the DSM Directive, ensuring that the provisions do not result in the unavailability of works or other protected material uploaded by users that do not infringe copyright and related rights. The exceptions and limitations identified under Article 17(7)(2) are generally applicable and were added as part of the implementation of the DSM Directive (Article 75(2) points h)[1305] and x)[1306]).

8.2.6. Transparency Obligations for OCSSPs

Article 175-E of the CRRC transposes the transparency obligations from Article 17(8)(2) of the DSM Directive. It requires OCSSPs to provide rights holders with adequate information on the functioning of their practices and the use of content covered by authorisations or licensing agreements. Transparency obligations under Article 18 of Directive 2014/26/EU are fulfilled separately in Article 28 of Law No 26/2015.

8.2.7. Complaint and Redress Mechanisms

Article 175-F of the CRRC regulates a notice/counter-notice system, allowing users to complain against the undue removal or blocking of their works. The procedure is not detailed in the law, leaving most of the system's design to OCSSPs. Decisions to remove uploaded content or block access to it must be subject to human control (Article 175-F(5)). Article 8 of Decree-Law No 47/2023 foresees the creation of a specialised institutionalised arbitration and mediation center for copyright and related rights disputes.

8.2.8. Additional Elements

The Portuguese transposition does not contemplate any additional elements beyond the literal text of Article 17. There has been no administrative or judicial application of Article 17 in Portugal so far.

8.3 Implementation of Directive 2014/26/EU

8.3.1. Background

Portugal transposed Directive 2014/26/EU through Decree-Law No. 100/2017, which amended Law No. 26/2015 on the collective management of copyright and related rights. The

[1305] "The insertion of quotations or summaries of other people's works, whatever their genre and nature, in support of one's own doctrines or for purposes of criticism, discussion or teaching, and to the extent justified by the objective to be achieved'.
[1306] "The reproduction, communication to the public and making available to the public of works in order to make them accessible to anyone from the place and at the time chosen by them, for the purpose of caricature, parody or pastiche'.

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transposition did not introduce significant divergences from the Directive. However, Portuguese legislation includes two notable features: the possibility for collective management organisations (CMOs) to form associations and the requirement for CMOs and commercial users' associations to offer a joint one-stop licensing entity for public performance licenses.

8.3.2. Rights of Music Authors and Performers Post-Implementation

Under Portuguese law, music authors and performers are granted several rights vis-a-vis their CMO, all in compliance with Directive 2014/26/EU. These include the freedom to choose a collecting society (Article 31(1) of Law No 26/2015), determine the geographical scope of their rights' management (Article 31(1)(b) of Law 26/2015), and decide which types of rights to confer to a given CMO (Article 31(1) of Law No 26/2015). Article 31(1)(a) of Law No. 26/2015 ensures that right holders can mandate their rights to a collective management entity of their choice and revoke such mandates partially or entirely.

8.3.3. Independent Management Entities (IMEs)

The Portuguese transposition of Directive 2014/26/EU regarding IMEs only partially aligns with the Directive's requirements. IMEs must negotiate with users in good faith, provide necessary information for revenue collection (Article 36(1) of Law No 26/2015), and disclose specific information to the public (Article 28(2)(a,b, e-h, n) and right holders (Article 28(4-5)). However, Portuguese law differs in that IMEs must not be controlled by right holders and can still be owned by them (Article 2(e) of Law No 26/2015). IMEs are to be supervised by the Portuguese General Inspection of Cultural Activities (IGAC).

8.3.4. Mandatory Collective Rights' Management

In Portugal, certain music-related rights are subject to mandatory collective management. These include:

- Remuneration from private copying levy (Law No. 62/98);
- Performers' right to obtain an annual supplementary non-waivable remuneration (Article 183-A(7) of the CRRC);
- Performers' right to remuneration for secondary uses of sound recordings via radio and TV (Article 178(2) of the CRRC);
- Right holders' cable retransmission rights (Article 7 of Decree-Law No. 333/97).

8.3.5. Extended Collective Rights' Management

Portuguese law allows for extended collective licenses (ECLs) in specific situations, such as:

- Authorisations to use out-of-commerce works by cultural heritage institutions (Article 74-C of the CRRC);
- Authors' right to authorise acts of communication to the public of works incorporated in commercially released phonograms or videograms (Article 149(4) of the CRRC);
- Performers' right to remuneration for secondary uses of sound recordings via radio and TV (Article 178(2) of the CRRC);
- Producers' right to authorise acts of communication to the public of works incorporated in commercially released phonograms or videograms (Article 184(4) of the CRRC).

8.3.6. Administration of Remuneration Rights

CMOs in Portugal are tasked with administering remuneration rights such as private copying levies (Article 6 of Law No 62/98) and secondary uses of phonograms by radio and TV broadcasters (Article 178(2) CRRC). AGECOP is responsible for collecting, managing, and

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distributing equitable compensation from private copying levies. Performers' remuneration for secondary uses of sound recordings is managed through collective agreements between users and the CMO.

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9. Germany

9.1 Implementation Arts. 18-23 DSM Directive

9.1.1. Background

Germany transposed Directive (EU) 2019/790 ('DSM Directive') through the Act on the Adaptation of Copyright Law to the Requirements of the Digital Single Market, which amended the existing Act on Copyright and Related Rights (Urheberrechtsgesetz, 'UrhG') and introduced the Act on the Copyright Liability of Online Content Sharing Service Providers (Urheberdiensteanbietergesetz, 'UrhDaG'). The amendments to the Copyright Act came into force on June 7, 2021, and the German OCSSP Act came into force on 1 August 2021. The German legislator mainly made adjustments to existing provisions of the German Copyright Act, as the German Copyright Contract Law served as a model for the DSM Directive.

9.1.2. Appropriate and Proportionate Remuneration

National Implementation

Since 2002, Section 32 UrhG has granted authors an inalienable right to equitable remuneration.[1307] This principle has been reinforced by judgments from both the Federal Court of Justice (Bundesgerichtshof) and the German Constitutional Court (Bundesverfassungsgericht), emphasizing the necessity of authors' participation in the revenue generated from their work's exploitation.[1308] The Federal Court of Justice has indicated a preference for linking authors' remuneration to the sale and distribution of copies, particularly when the work is exploited through physical distribution. This approach aims to ensure that authors benefit from each individual sale, reflecting the economic exploitation of their performance. Section 32(1)(3) UrhG allows authors to demand contractual adjustment if the initially agreed remuneration was not appropriate. The assessment of appropriateness is based on the contract's conclusion date, with Section 32a applying to subsequent periods. The law does not provide specific guidelines on balancing the principle of freedom of contract (derived from Article 2(1) of the German Constitution) with the need for fair remuneration. This leaves room for interpretation and negotiation.

In response to the DSM Directive, Germany introduced new remuneration rights for rightholders through the UrhDaG. Section 4(3) read in conjunction with Section 21(2) of this Act establishes a direct remuneration right for authors and performers against Online Content-Sharing Service Providers (OCSSPs), even when the author has authorized a third party to make their work publicly available. Additionally, Section 5(2) read in conjunction with Section 21(1) UrhDaG requires OCSSPs to provide fair remuneration to authors and holders of neighboring rights when users upload content under certain exceptions, namely pastiche, parody, or caricature. Section 12 further extends remuneration rights to cases where OCSSPs must leave user-generated content uploaded when it is presumed lawful (see *infra*, 9.2.5.).

[1307] Notably, the provisions of German copyright contract law mentioned in this report also apply to performers (Section 79 (2a) UrhG).

[1308] See, for instance, German Constitutional Court, judgment from 23.10.2013, 1 BvR 1842/11, 1 BvR 1843/11 ('Überetzerhonorare'), available in German at <https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2013/10/rs20131023_1bvr184211.html>.

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Notably, these new remuneration rights can only be enforced by collecting societies, ostensibly for practical reasons. This approach aims to streamline the process of rights management and remuneration collection in the digital environment.

Determination Mechanisms

German copyright law has long established provisions for ensuring appropriate remuneration for authors, predating the transposition of the DSM Directive. Section 32(2)UrhG stipulates that remuneration is considered appropriate if it aligns with:

- a tariff or joint remuneration agreement under Section 36 UrhG, or
- what is customary and fair in business, considering factors such as the nature, extent, duration, frequency, and timing of the granted usage rights.

Notably, the law emphasizes that customary remuneration may still be deemed inappropriate if it is unreasonably low, even if common in certain industries. Collecting societies' tariffs, such as those of GEMA, can serve as benchmarks for determining appropriateness.

Prior to the DSM Directive's implementation, lump-sum payments were generally permissible, though not explicitly regulated. The Federal Court of Justice had ruled that such payments could be appropriate if they objectively guaranteed an adequate share of the expected total income from utilization at the time of contract conclusion.

The newly introduced Section 32(2)(3) UrhG now explicitly addresses lump-sum remuneration, permitting it only if it ensures the author's adequate participation in expected revenue and is justified by sector-specific characteristics. However, legal scholars argue that assessing the latter criterion can be challenging, as it's difficult to predict the extent of a work's use over its copyright duration.

Joint remuneration agreements, as outlined in Section 36 UrhG, are negotiated between associations representing authors/performers and exploiters. These agreements consider sector-specific factors, including the structure and size of users. While such agreements exist in literature, translations, scriptwriting, and film production (including with Netflix), the music industry has yet to establish one. However, negotiations between VUT (representing independent music businesses) and PRO MUSIK (representing performers) for a joint remuneration agreement on streaming revenues began in spring 2023, with results pending publication.

9.1.3. Contractual Copyright Law

Transparency Obligations

German copyright law has established comprehensive transparency obligations for licensees and sub-licensees, both before and after the transposition of the DSM Directive.

Prior to the Directive's implementation, Section 32d UrhG granted authors an annual right to request information on the extent of work usage and generated income. The transposition transformed this into a proactive obligation for licensees to provide such information annually without author request. The amended Section 32d(1a) now requires disclosure of sublicensees' names and addresses only upon author request.

Exceptions to these obligations exist when the author's work is a minor contribution to another work, unless the information is needed for contract amendment (Section 32d(2)). Additionally, the obligation is waived if the cost of providing information is disproportionate to exploitation income or if the work is no longer in use.

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Regarding sub-licensees, Section 32e previously granted authors information rights in cases of significant economic impact or disproportionately low remuneration. Post-transposition, this right applies only when the licensee fails to provide information within three months or provides insufficient information. The German legislator has limited the scope of sub-licensee obligations, potentially weakening authors' rights compared to the pre-transposition version.

Section 36d allows authors, who are members of qualifying authors' societies, to seek injunctions against further use of their work if a (sub-)licensee systematically refuses to provide required information. This provision is expected to promote greater transparency, particularly in the context of streaming platforms.

Contract Adjustment Mechanism

Section 32a UrhG, known as the 'Bestseller-Paragraph', has provided for contractual adjustments since 2002. This provision grants authors the right to modify existing licensing contracts if the agreed remuneration is 'disproportionately low' compared to the benefits derived from the work's exploitation by the licensee. Prior to 7 June 2021, the threshold was 'strikingly disproportionate'.[1309]

The German Federal Court of Justice has previously ruled that a 'strikingly disproportionate' remuneration occurs when there is a 100% difference between the agreed remuneration and the revenue derived from the work's exploitation. Legal literature suggests that the threshold might be reached at 20-30% below appropriate remuneration. The recent amendment lowering the threshold to 'disproportionately low' is expected to be more favorable for authors, potentially allowing for easier contractual adjustments.

Alternative Dispute Resolution

Section 32f UrhG provides authors and (sub-)licensees with the option of a mediation procedure or an out-of-court dispute resolution for any disputes arising from claims related to Sections 32 to 32e UrhG, i.e., remuneration and provision of information.

This provision ensures that the possibility of such procedures cannot be excluded via contract (Section 32f (2) UrhG).

Right of Revocation

Since 2016, Section 41 UrhG has dealt with the author's right to revoke an exclusive license. Following the amendment of the law, the author can now revoke either the exclusivity of the license or the entire license in the event of no/inadequate exploitation of the work. Unlike the previous version of this provision, there is no longer a requirement of detriment to the author's interests. The licensee generally has a two-year grace period to exercise the granted rights.

9.1.4. Transparency in the National Music Sector Post-Implementation

The lack of transparency of streaming services is an ongoing discussion in Germany. A study on music streaming in Germany, conducted by GEMA and published in 2022, highlighted the issue of transparency.[1310] Following this study, the Federal Government Commissioner for

[1309] See Federal Court of Justice, judgment of 20.02.2020 – I ZR 176/18 ('Das Boot II'), available in German at <https://openjur.de/u/2198095.html>.

[1310] GEMA, 'Musikstreaming in Deutschland - Erlössitutation im eutschen Musikstreaming-Markt' (2022) full study available in German at <https://www.gema.de/documents/d/guest/user_upload-dokumente-aktuelles-pressemitteilungen-2022-gema_goldmedia_studie_musikstreaming_in_deutschland-pdf>; a summary in English is available at

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Culture and the Media announced that it would conduct its own study on streaming platforms. The VUT, representing self-marketing artists, labels, publishers, distributors, and producers, also published a position paper criticizing the lack of transparency in remuneration flows.[1311]

9.2. Implementation of Article 17 DSM Directive

9.2.1. Background

Germany transposed Article 17 of the DSM Directive through the Act on the Adaptation of Copyright Law to the Requirements of the Digital Single Market, which introduced the UrhDaG. This Act was adopted on 31 May2021, and came into force on 1 August 2021.

9.2.2. Definition of Online Content Sharing Service Providers (OCSSPs)

The definition of OCSSPs in Section 2(1) UrhDaG applies to services with the purpose of "making available to the public" works protected by copyright, directly referring to Article 3(1) of the InfoSoc Directive. Section 3 of the UrhDaG provides a non-exhaustive list of services excluded from the scope of the law, following Article 2(6) and Recital 62 of the DSM Directive. The additional requirement for OCSSPs to "compete with online content services for the same target group" also stems from Recital 62. Elements of Recital 63 have not been considered.

9.2.3. Authorisations under Article 17(1) and 17(2)

The German transposition does not explicitly provide for the obligation to obtain a licence as laid down in the second subparagraph of Article 17(1) of the DSM Directive. Therefore, German law does not provide further guidance on how to obtain such authorisation, nor does the German legislation distinguish between different types of works in this respect. Furthermore, the national transposition does not include specific principles for negotiations of authorisations, and regular contract law as laid down in the German Civil Code applies.

Section 6(1) UrhDaG transposes Article 17(2) into German law and grants users the right to communicate a work to the public if OCSSPs have that right, provided the user is not involved in commercial activities or generating substantial income. Section 6(2) UrhDaG mirrors this principle in reverse, applying it when the user has obtained authorisation (cf. Recital 69(2) of the DSM Directive).

9.2.4. Liability of OCSSPs Absent an Authorisation

German law specifies when an OCSSP makes "best efforts" to obtain an authorisation from the rightholder (Article 17(4)(a) DSM Directive). Section 4(1) UrhDaG outlines three methods for OCSSPs to obtain authorisation: (i) passively accepting offered licenses; (ii) actively seeking licenses from known representative rightholders; (iii) seeking licenses from German-based CMOs or dependent management entities.

According to 4(2) UrhDaG, OCSSPs must only accept a licensing offer if it a) covers genres of work made available by the OCSSP in more than minor quantities; b) includes a substantial

<https://www.gema.de/documents/d/guest/user_upload-dokumente-aktuelles-pressemitteilungen-2022-gema_goldmedia_study_music_streaming_in_germany_key_findings-pdf>.

[1311] VUT, 'Fair. Transparent.Streaming' (12 September 2022), available in German at <https://www.vut.de/musikwirtschaft/aktuelles-musikwirtschaft/artikel/details/fair-transparent-streaming-vut-forderungen-zum-streaming-der-zukunft/>.

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repertoire of works and rightholders; c) covers the German territory; d) permits the use of the licensed works or subject matters under reasonable conditions.

The almost verbatim transposition of Article 17(4)(b) and (c) is found in Sections 7 ("qualified blocking") and 8 ("simple blocking") UrhDaG, respectively. Both sections refer to Section 1(2) UrhDaG, which requires fulfilling these blocking obligations according to "high standards which are customary in the industry".

The principle of proportionality from Article 17(5) is incorporated in Section 1(2) UrhDaG, which includes a non-exhaustive list of factors similar to those in the DSM Directive. However, it does not explicitly mention the OCSSP's size as a consideration.

The UrhDaG includes a sector-specific exception in Section 7(2)(3) and a special procedure for trustworthy rightholders (the "Red Button" mechanism) in Section 14(4).

Regarding immunity for certain OCSSPs, the UrhDaG does not only provide a privilege for "start-up service providers" (cf. Article 17(6) of the DSM Directive) but also for so-called "small service providers" with specific provisions for each category in Sections 7(4) and 7(5), respectively.[1312]

9.2.5. Safeguards for Legitimate Uses

Sections 7(2)(1) and 8(2) UrhDaG ensure that qualified/simple blocking does not result in the blocking/removal of content that does not infringe copyright.

The exceptions and limitations listed in Article 17(7)(2) of the DSM Directive are generally applicable under German law, as reflected in Section 51 UrhG (quotation) and the newly introduced Section 51a UrhG (caricature, parody, and pastiche).[1313] Section 5(1) Nos. 1 and 2 UrhDaG refers to these sections and explicitly makes these exceptions applicable to user-generated content uploaded to OCSSP's online platforms. Moreover, Section 5(3) UrhDaG requires OCSSPs to inform users of these exceptions and limitations in their terms and conditions.

The German lawmaker further introduced Sections 9-11 UrhDaG, which address "uses presumably authorised by law" ensuring that user-generated content (UGC) containing the user's own content combined with less than 50% of another rightholder's work or works remains uploaded until the end of the complaint procedure. The first category of presumably lawful UGC covers minor uses of an rightholder's work or subject matter, namely (i) 15 seconds per film or motion picture, (ii) 15 seconds of a soundtrack, (iii) 160 characters per text, or (iv) a photograph or graphic with a data volume of 250 kilobytes each (§10 UrhDaG). The second category concerns UGC that would be subject to automated blocking. In such cases, the OCSSP must inform the user before the upload about the blocking request and

[1312] Small Service providers are service providers with an EU-wide annual turnover of no more than 1 million euros (Section 2(3) UrhDaG). How long the platform provider has been operating the service is irrelevant for qualifying as a small service provider. Section 7(5) of the UrhDaG states that small service providers are presumably not obliged to implement automated blocking procedures (Section 7 UrhDaG). However, this presumption can be rebutted if the service does not justify this privilege on the basis of its design, the target audience, the scope of its services or the nature of the uploaded content. If this is the case, small services are also subject to the obligations set out in Art. 7(1) UrhDaG.

[1313] The German Copyright law does not explicitly consider review and criticism but according to the Explanatory Memorandum, those uses are covered under the citation exception of Section 51 of the Copyright Act.

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provide the option to manually flag their content as lawful if a copyright exception applies (Section 11 UrhDaG).

The provisions on presumably lawful uses do not apply to the use of cinematographic works or moving images until the end of their premiere, which must be blocked immediately upon the rightholder's request (§ 7(2) UrhDaG). They also do not apply to blocking requests from so-called "trusted flaggers", who can rebut the presumption of lawfulness and prove that the ongoing exploitation would cause them significant economic harm (Section 14(4 UrhDaG). The determination of who qualifies as a trusted flagger is left to the discretion of the OCSSP.

Notably, the provisions on presumably lawful uses, along with the three newly introduced remuneration rights vis-à-vis OCSSPs, are currently being challenged before the German Constitutional Court by members of the Bundesverband Musikindustrie, the German branch of IFPI.

9.2.6. Transparency Obligations for OCSSPs

The national transposition of Article 17(8)(2) DSM Directive does not identify specific categories of information that right holders must provide to OCSSPs or specify procedures for transparency obligations. Section 19(1) UrhDaG allows right holders to request information regarding the use of their repertoire authorised by contract. The transparency obligations under Article 18 of Directive 2014/26/EU, transposed into Section 54 of the Act on the Management of Copyright and Related Rights by Collecting Societies (VGG), are also applicable.

9.2.7. Complaint and Redress Mechanisms

OCSSPs can either process complaints internally (Section 14 UrhDaG) or delegate the complaints procedure to a recognized external complaints body (Section 15 UrhDaG). Section 14(3) UrhDaG requires OCSSPs to notify the parties concerned of the complaint without undue delay, give the parties the opportunity to comment, and decide on the complaint within one week of receipt. All decisions on complaints must be made by an impartial human (Section 14(5) UrhDaG).

Section 16 UrhDaG allows OCSSPs and users to appeal to private out-of-court arbitration bodies. Section 17 UrhDaG obliges the Federal Office of Justice, in cooperation with the German Patent and Trademark Office, to set up an official arbitration board, which has jurisdiction only if no private arbitration board exists.

9.2.8. Additional Elements

The most noteworthy additional elements of the UrhDaG are the three new remuneration rights vis-a-vis OCSSPs (see *supra*, 9.1.2.).

Notably, Section 18 UrhDaG allows OCSSPs to exclude alleged rightholders and users from blocking procedures for an "appropriate period of time" in the case of repeated false copyright claims/false flagging.

Several German courts have implemented the UrhDaG into their decisions, including a landmark decision over TikTok's activities.[1314] The Federal Constitutional Court has yet to

[1314] The Munich Regional Court of Munich found in its judgement of 09.02.2024 - 42 O 10792/22, that TikTok did not undertake 'best efforts' under Section 4(1) UrhDaG to obtain a licence after being informed of various unauthorised uploads. Although the plaintiff offered TikTok a licence for the works, TikTok only pretended to negotiate and stalled the plaintiff.

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reach a decision on a constitutional complaint lodged by members of the "Bundesverband Musikindustrie" regarding the "uses presumably authorised by law" and the regulations on the three newly introduced direct remuneration claims vis-a-vis OCSSPs.

9.3 Implementation of Directive 2014/26/EU

9.3.1. Background

Germany transposed Directive 2014/26/EU ('Directive') through the VG-Richtlinie-Umsetzungsgesetz (BGBl I Nr. 24/2016), from 31 May 2016, which introduced the new Act on the Management of Copyright and Related Rights by Collecting Societies (Verwertungsgesellschaftengesetz, VGG). This Act replaced the previous Act on the Administration of Copyrights and Related Rights (Urheberrechtswahrnehmungsgesetz) from 1965 and entered into force on 1 June 2016. The transposition was relatively smooth as the previous law already provided a comprehensive legal framework for Collective Management Organizations (CMOs), which was updated with the adoption of the VGG.

9.3.2. Rights of Music Authors and Performers Post-Implementation

Music authors and performers in Germany are explicitly granted several rights vis-a-vis their respective CMOs. Section 9(1) VGG transposes Article 5(2)(1), (2) of Directive 2014/26, allowing right holders to determine the specific rights, types of works, and territorial scope to be administered by the collecting society. Section 10 VGG transposes Article 5(7)(1), (2) of the Directive, requiring the right holder's consent for each individual right to be administered. Section 11 VGG transposes Article 5(3), (8) of the Directive, and Section 12 VGG implements Article 5(4), (5) of the Directive, ensuring that right holders can terminate the management relationship or withdraw rights with reasonable notice.

9.3.3. Independent Management Entities (IMEs)

IMEs are defined in Section 4(1) VGG, in line with Article 3(b) of Directive 2014/26. IMEs must comply with certain provisions, including negotiating in good faith and fulfilling information obligations towards right holders (Section 4(2)). They must notify their activities to the German Patent and Trade Mark Office (DPMA) but do not require authorisation. Currently, there are only two IMEs operating in Germany: Christian Copyright Licensing International (CCLI) and the Motion Picture Licensing Company (MPLC).[1315]

9.3.4. Mandatory Collective Rights' Management

Germany reserves the management of certain music-related rights to collective rights management, all of which are mandatory licensing schemes. These include:

- Rights of retransmission of programs (Section 20b UrhG);
- Remuneration from the grant of rental rights of an audio recording or film (Section 27(3) UrhG);
- Remuneration rights from the reproduction and distribution of works for disabled people (Section 45a UrhG);
- Rights resulting from private copying (Section 54h(1) UrhG);
- Remuneration rights from uses authorized by law (Sections 60a-60g UrhG);
- Performers' remuneration rights (Section 79a(3) UrhG);

[1315] See the German Patent and Trademark Office's website at <https://www.dpma.de/dpma/wir_ueber_uns/weitere_aufgaben/verwertungsges_urheberrecht/aufsicht_verwertungsges/listederverwertungseinrichtungen/index.html>.

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- Remuneration rights from new kinds of use (Section 137l(5) UrhG);
- Remuneration from OCSSPs communicating a work to the public (Sections 4(3)(4), 5(2), 12 UrhDaG).

9.3.5. Extended Collective Rights' Management

Sections 51-51b VGG transpose Article 12 of the DSM Directive, allowing CMOs to grant licenses for works of external right holders. The requirements for granting extended collective licenses (ECLs) include representativeness and the unreasonableness of obtaining individual authorisations. Section 51b VGG defines representativeness, and Section 52e VGG clarifies that ECL provisions also apply to related rights. The Federal Ministry of Justice is authorized to further define representativeness through statutory orders.

9.3.6. Administration of Remuneration Rights

Collecting societies in Germany have specific tasks in the administration of remuneration rights. For private copying levies, they must designate a joint receiving office (Zentralstelle für private Überspielungsrechte, ZPÜ) to collect and distribute copyright levies (Section 54h(3) UrhG). For retransmission rights, collecting societies negotiate contracts on behalf of broadcasting organizations and retransmission services. Performers' remuneration rights from secondary uses of phonograms are administered by the Gesellschaft zur Verwertung von Leistungsschutzrechten (GVL), with GEMA acting as the collecting agency.

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10. Spain

10.1 Implementation of Articles 18-23 DSM Directive

10.1.1. Background

Spain jointly implemented Directives (EU) 2019/790 ('DSM Directive') and Directive (EU) 2019/789 ('Sat Cab II Directive') on November 2, 2021, via Royal Decree-Law 24/2021. This entered into force on 4 November 2021, after the deadline had expired on June 7, 2021. The Royal Decree-Law incorporates the principle of proportionate remuneration in its Article 74 and the obligation of transparency in its Article 75, while other parts of the Directive have been implemented within an amendment to the Consolidated Text of the Intellectual Property Law (TRLPI).

Moreover, in 2006 Spain introduced an additional remuneration right for performers for online exploitations of sound recordings and audiovisual works in 2006 (Article 20(2)(i) and Article 108(3) TRLPI). As is clear from the dates, this right is not based on the DSM Directive. Instead, Spain introduced this right with the transposition of Directive 2001/29.

10.1.2. Appropriate and Proportionate Remuneration

National Implementation

Royal Decree-Law 24/2021 focuses on remuneration in Article 74, without introducing amendments to the TRLPI. Article 46 of the TRLPI allows for both proportionate and lump-sum remuneration. This suggests an implicit understanding of the compatibility of lump-sum payments with the principle of proportionate remuneration, although Recital 73 of the DSM Directive states that lump-sum payments should not be the rule. There are terminological differences between the provisions. Article 46 TRLPI uses the formula 'fair share', ("participación proporcional") whereas Article 74 Royal Decree-Law 24/2021 grants a right to an 'adequate and proportionate remuneration' ("remuneración adecuada y proporcionada").

Determination Mechanisms

For the authorisation or transfer of rights, Article 74 of Royal Decree-Law 24/2021 establishes that negotiations will take place according to the principles of good faith, due diligence, transparency, and respect for free competition. However, the provision does not further develop specific rules for these parameters beyond the transparency obligation explicitly regulated in Article 75.

10.1.3. Contractual Copyright Law

Transparency Obligations

Article 19 DSM Directive is implemented by Article 75 of Royal Decree-Law 24/2021. This provision imposes a transparency obligation on the assignee of exploitation rights or the holder of an authorisation for the use of a work or performance, requiring them to provide updated information on the exploitation of works or performances, including the extent of exploitation, total income generated, and corresponding remuneration. Authors and performers can request additional information from successive assignees if the authorisation is transferred. The obligation does not apply if it becomes disproportionate in relation to the income generated or if the contribution of the author or performer is not significant.

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Contract Adjustment Mechanism

The right to claim additional, appropriate, and fair remuneration is articulated in Article 47 TRLPI, which allows for an action to adjust non-equitable remuneration. This provision was modified to include the possibility of claiming adjustment for both lump-sum and proportional remuneration. The provision does not elaborate on the circumstances that may result in disproportionately low remuneration other than an evident disproportion between the agreed remuneration and the revenues derived from the exploitation of the works.

Alternative Dispute Resolution

Article 130 of Royal Decree-Law 24/2021 allocates new mediation and arbitration functions to the First Section of the Intellectual Property Commission. Article 194(5) of the TRLPI delineates the specific functions regarding mediation or arbitration in conflicts related to the obligation of transparency, review action for non-equitable remuneration, and disputes related to access and withdrawal of works within the framework of online content sharing services.

Right of Revocation

The right of revocation has been incorporated through Article 48bis of the TRLPI. This right allows authors who have exclusively assigned or licensed their rights over a work to terminate the assignment or license if the work is not being exploited. The national transposition excludes collective works from the right of revocation and specifies the conditions under which this right can be exercised.

10.2. Implementation of Article 17 DSM Directive

10.2.1. Background

Spain jointly implemented the DSM Directive and the Sat Cab II Directive through Royal Decree-Law 24/2021. The transposition of Article 17 DSM Directive is included in Article 73 and, as regards the definition of online content sharing service providers, in Article 66(6) of the Royal Decree-Law. These provisions were not incorporated into the TRLPI. The transposition of Article 17 in Spain is a considered deficient implementation due to the lack of consideration for the nuances emphasised by the Commission in its Guidance, particularly in failing to strike the balance between the rights of rightholders and users' fundamental rights, to the benefit of the former.

10.2.2. Definition of Online Content Sharing Service Providers (OCSSPs)

The definition of OCSSP is provided in Article 66(6) of Royal Decree-Law 24/2021. Unlike the Directive's definition, platforms qualify as OCSSPs in Spanish national law if they store and give access to protected content either in large numbers or have a large audience in Spain. This broadens the scope of Article 17 DSM Directive and its liability regime. The Spanish legislator also included carve-outs for non-profit online encyclopedias and other similar services.

10.2.3. Authorisations under Article 17(1) and 17(2)

OCSSPs must obtain prior authorisation from rightholders to share online content, as established in Article 73(1) of Royal Decree-Law 24/2021. The provision does not specify how to obtain authorisations or establish differences in treatment depending on the type of works. The negotiation of authorisations must abide by principles of good faith, due diligence,


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transparency, and respect for free competition. There are no additional provisions for cases where rightholders and OCSSPs do not reach an agreement. The authorisation covers acts of public communication as defined in Article 20 TRLPI, including acts by users who do not act on a commercial basis or generate significant income.

10.2.4. Liability of OCSSPs Absent an authorisation

The national law does not specify additional criteria to define "best effort to obtain authorisation." The provisions under Article 17(4)(b) and (c) of the DSM Directive were transposed into Spanish national law by copying the exact wording of the Directive. However, the Spanish legislator significantly undermines the provision's safe harbours by allowing rightholders to initiate legal proceedings to restore economic harm, including actions for unjust enrichment. Moreover, the national transposition includes additional requirements for live content-sharing, requiring OCSSPs to disable access or remove content during live broadcasts (Article 73(4)(c) Royal Decree Law 24/2021).

The principle of proportionality is transposed without further specification.

10.2.5. Safeguards for Legitimate Uses

Article 73(8) of Royal Decree-Law 24/2021 transposes Article 17(7) of the DSM Directive, including exceptions for quotation, analysis, commentary, critical review, criticism, illustration, parody, or pastiche. Spain introduced a general pastiche exception and already had a general exception for parody. However, there is no explicit statutory exception for caricature.

10.2.6. Transparency Obligations for OCSSPs

The national transposition of Article 17(8)(2) DSM Directive does not identify specific categories of information that rightholders must provide to OCSSPs. Article 73(9) requires OCSSPs to provide rightholders with adequate information on a semi-annual basis. The law also requires assignees to provide authors or performers with updated information on the exploitation of their works or services at least once a year.

10.2.7. Complaint and Redress Mechanisms

OCSSPs must establish effective and expeditious complaint and redress mechanisms, processing complaints within 10 business days and ensuring decisions are subject to human review. The works and services subject to the claim and appeal procedure will not remain accessible while the procedure is resolved. The First Section of the Intellectual Property Commission will mediate or arbitrate disputes related to access and removal of works.

10.2.8. Additional Elements

The national transposition did not contemplate any additional elements when implementing Article 17. There is no information on specific cases or procedures implementing Article 17 in Spain.

10.3. Implementation of Directive 2014/26/EU

10.3.1. Background

Directive 2014/26/EU was transposed in Spain in two stages. Initially, Law 21/2014, of 4 November, partially transposed the Directive by modifying the TRLPI. This was followed by Royal Decree-Law 2/2018, of 13 April, which completed the transposition and incorporated Directive 2014/26/EU and Directive (EU) 2017/1564 into the Spanish legal system. This Royal

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Decree-Law was later transformed into Law 2/2019, of 1 March, which modified the consolidated text of the Intellectual Property Law and repealed the Decree-Law.

10.3.2. Rights of Music Authors and Performers Post-Implementation

Prior to the 2018 amendment, the TRLPI indirectly recognized the rights of music authors and performers. Law 21/2014 introduced requirements for collective management organizations (CMOs), including obligations to negotiate and contract under equitable and non-discriminatory conditions. The 2018 amendment modified these provisions, explicitly recognizing the rights of music authors and performers. CMOs are now obliged to accept the management of rights, ensure non-discrimination in the collection and distribution of rights, and provide information rights to rightholders. The amendment also introduced the possibility of total or partial withdrawal from the management agreement.

10.3.3. Independent Management Entities (IMEs)

There have been issues related to the establishment of IMEs competing with traditional CMOs, particularly concerning the Sociedad General de Autores y Editores (SGAE). In 2024, the Spanish National Markets and Competition Commission (CNMC) sanctioned SGAE for abuse of dominant position and imposed fines for restrictive practices.

10.3.4. Mandatory Collective Rights' Management

Article 156(3) TRLPI states that the management of rights will be assigned to a management entity through a management contract. The management of certain music-related rights is reserved for collective rights management. These rights include:

- the right to authorize cable retransmission (Article 20(4) b) TRLPI). Similar provisions apply to the retransmission of programs (Article 77(1) of Royal Decree-Law 24/2021) and the transmission of programs through direct injections (Article 79(1) of Royal Decree-Law 24/2021);
- and the right to obtain equitable remuneration in the following cases (Article 108(6) TRLPI):
    - performers' right to obtain equitable remuneration from the person making his/her phonogram or audiovisual recording available to the public (Article 108(3) TRLPI);
    - performers' and phonogram producers' right to get payed a single equitable remuneration from users of a phonogram published for commercial purposes/of a reproduction of such a phonogram that is used for any form of communication to the public (Article 108(4) TRLPI);
    - performers' and audiovisual recording producers' right to appropriate remuneration from the users of audiovisual recordings used for the acts of communication to the public (Article 108(5) TRLPI).

10.3.5. Extended Collective Rights' Management

The Spanish legislator did not implement extended collective licenses in the music sector. The mandatory provisions of Article 8-10 of the DSM Directive for out-of-commerce works were transposed, but Article 12 of the DSM Directive was not implemented.

10.3.6. Administration of Remuneration Rights

The TRLPI assigns specific tasks related to remuneration rights to CMOs. Article 25(9) TRLPI establishes that equitable remuneration for private copying levies will be managed through

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intellectual property rights management entities. These entities must ensure unified communication of billing to debtors and jointly responsible parties.

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