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INTERNATIONAL LEGAL STUDY ON IMPLEMENTING AN UNWAIVABLE RIGHT OF AUDIOVISUAL AUTHORS TO OBTAIN EQUITABLE REMUNERATION FOR THE EXPLOITATION OF THEIR WORKS

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Prof. Raquel Xalabarder

Intellectual Property Chair
Universitat Oberta de Catalunya (UOC),
Barcelona.



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EXECUTIVE SUMMARY

Authors of audiovisual works are granted exclusive rights to exploit their works. However, they rarely obtain equitable remuneration for the entire exploitation.

Despite international consensus that authors deserve to be fairly remunerated for the exploitation of their works, audiovisual authors seldom receive remuneration in the form of royalties or other proportional payments along the entire chain of exploitation. This is especially true in regards to new markets for online exploitation that, despite growing rapidly, do not generate additional remuneration for audiovisual authors.

Audiovisual authors' remuneration depends largely on the contracts signed with the producer and these contracts fail to secure them an equitable remuneration for the entire chain of exploitation of their works.

Signed before the audiovisual work is created, production contracts tend to convey a full transfer of exploitation rights in favour of producers, typically in exchange for a buy-out or lump-sum that also covers commissioning the authors' contribution. Follow up payments, along the exploitation of the work, are rarely agreed upon in production contracts. This ultimately deprives audiovisual authors of equitable remuneration in all markets of exploitation of their works.

Two basic reasons may account for this. On the one hand, the complex and unharmonised statutory allocation of authorship and ownership in audiovisual works. On the other, the need to facilitate exploitation of the audiovisual work across different markets, different territories throughout the world and over time.

All these reasons might explain that exploitation rights are concentrated in the hands of producers. Yet, this alone cannot justify depriving authors of receiving equitable remuneration.

Determining the authorship and initial ownership of audiovisual works is a complex issue with different solutions in different countries. Some countries allocate co-authorship in the main creative contributors, together with a statutory presumption of transfer of exploitation rights in favour of producers. Others prefer to allocate authorship and, at least, ownership *ab origine*, to the producer (e.g., under "work made for hire" or "*cessio legis*" provisions). In the end, the producer owns all the exploitation rights in the audiovisual work, controlling the long and intricate audiovisual exploitation chain, and receiving all revenues from it.

Most national laws impose specific restrictions on transferring the authors' exclusive rights to the producer as well as requirements for proportional or equitable remuneration along the exploitation of the work. Yet statutory contractual measures alone are proving to be insufficient in protecting the economic interests of audiovisual authors because they are easily trumped by specific terms agreed upon in production contracts.

Collective negotiation may help alleviate this less than optimal result. In some common law countries, professional guilds have contractually secured several remuneration payments (e.g., residuals) according to generated film revenues, made by the producer or distributor to authors. Yet these options are effectively available only in a handful of countries that are equipped with powerful labor unions representing authors, such as the guilds in the United States of America.

In other countries, some collective management organisations (CMOs) have managed to negotiate standard clauses to be included in production contracts to secure further remuneration through collective management for authors. As a general principle, CMOs may always be entrusted by audiovisual authors to manage licensing and remuneration for the exploitation of works on their behalf. Implementing collective management on a voluntary basis is not easy. Authors need to contractually reserve the right in production contracts before they can entrust its management to a CMO. This contractual reservation of rights, or “carve out”, requires a collective bargaining power that only exists in certain countries, such as France, or specific market conditions, which only benefit certain audiovisual authors such as music composers.

Even when successful, voluntary collective management has limited effects. It may secure authors’ remuneration for new or future audiovisual productions, but it fails to benefit already existing audiovisual productions, which remain subject to the signed production contracts.

Current examples of remuneration for audiovisual work exploitation that are managed by CMOs include: box office (movie theatre showings), television broadcasts, cable retransmission, rentals and internet usages (e.g., video on-demand, streaming, webcast, simulcast). Not all of these exploitations apply in all countries. They may differ in nature based on an exclusive or a remuneration right. They may be collectively managed on different grounds, such as on a voluntary or mandatory basis. In all of these cases, collective management’s success in generating revenues for audiovisual authors depends on the statutory design of these rights (e.g., exclusive or remuneration rights, unwaivable or not, inalienable or not, subject to mandatory or voluntary collective management) as well as on the specific economic and market conditions of the country.

Statutory “rights of equitable remuneration” are well-known in international instruments as well as in national laws, particularly in Europe. They have proven to be an effective option to secure “secondary” revenues for audiovisual authors by CMOs beyond initial payments received for contributing to the production of the work, regardless of any other contractual payments agreed upon with producers for both new and existing productions.

Statutory remuneration rights are proving to be effective in securing equitable remuneration for audiovisual authors, especially when set as unwaivable and inalienable rights and subject to mandatory collective management.

Granting audiovisual authors exclusive exploitation rights in their works but, in practice, denying them the possibility to obtain equitable remuneration for this exploitation, beyond what has been agreed upon in production contracts, is equal to granting authors no rights at all.

What is the benefit of exclusive rights secured by national laws and international treaties if audiovisual authors cannot obtain equitable remuneration for the exploitation of their works in practice?

For the above reasons, this study proposes introducing a statutory provision securing an unwaivable and inalienable right for audiovisual authors to obtain equitable remuneration for any acts of exploitation of their works, in exchange for transferring their exploitation rights to the producer. This remuneration will be subject to collective management, administered by CMOs, and paid directly by licensees.

For this purpose, the following text is proposed:

Without prejudice to any other agreements or regimes that guarantee remuneration to audiovisual authors, the authors of an audiovisual work shall retain, in exchange for the transfer of exclusive rights to the producer, an unwaivable and inalienable right to receive equitable remuneration for any acts of exploitation of their works, under collective management, and paid directly by the users.

As proposed, the right to receive equitable remuneration neither grants a new exclusive right nor turns any exclusive right into a remuneration right. The proposal relies on the exclusive rights as granted by copyright laws.* It seeks to enforce the fundamental principle that authors, including audiovisual authors, need to be fairly remunerated for the exploitation of their works. It secures, through collective management, remuneration for audiovisual authors once they have exercised their exploitation rights by transferring them to the audiovisual producer. Accordingly, the proposal is in full compliance with obligations acquired under international instruments for protecting authors' rights, notably the Berne Convention, the WIPO Copyright Treaty (hereinafter WCT) and the TRIPs Agreement, as well as with EU *acquis*.

This proposal benefits all parties involved in audiovisual production and exploitation: authors, producers and licensed operators as well as consumers and society at large.

It would ensure a constant flow of equitable remuneration to authors directly from users as licensed by the producer based on revenues generated by the exploitation of the audiovisual works. The equitable remuneration right would not affect any payments agreed upon in the production contract. It should be unwaivable and inalienable¹ and managed collectively. These measures are paramount in order to protect audiovisual authors from their unbalanced bargaining position with producers and to maximize effective negotiation and implementation of the proposed remuneration right with licensees.

The remuneration right would not affect, or in any manner upset, the production agreements, allowing producers to retain all ownership of exploitation rights and to be in full control of the licensing process. It would simplify licensing exploitation markets, helping producers comply with their obligations to provide equitable remuneration for audiovisual authors from all means of exploitation and over evolving markets, both existing and future, through collective management. It would ultimately benefit both licensed operators and consumers by fostering the development of lawful channels of exploitation of audiovisual works and allowing wider access to repertoires.

The proposed remuneration right should not upset any regimes currently in place to efficiently secure equitable remuneration for audiovisual authors, such as residuals agreements in the United States, extended collective licensing (ECL) mechanisms in Nordic countries, statutory remuneration rights existing in some national laws, or any collective management systems already available for music composers in some countries. The proposal would reinforce these national regimes and mechanisms. It would enlarge their scope by covering other means of exploitation, strengthening them by making remuneration rights unwaivable and inalienable as well as making them more efficient (subject to mandatory collective management, when necessary). The proposal would especially be fit to expand and secure remuneration for audiovisual authors in countries that currently offer no remuneration at all for audiovisual authors.

The audiovisual market is a global market. Any legal mechanism to secure equitable remuneration for audiovisual creators will be most effective when implemented globally. A full international implementation would ensure that all audiovisual creators benefit equally regardless of their country of origin or audiovisual production in all countries of exploitation of the audiovisual work.

To enhance its effectiveness, the remuneration right should be introduced preferably at international level, especially if set as mandatory. Its implementation at a national or supra-national basis, such as at the European Union level, would also have benefits, although at a smaller scale.

The specific acts of exploitation subject to remuneration and the need for other statutory measures to secure its effectiveness (such as mandatory collective management, extended collective licensing or presumed collective management) will be defined by specific circumstances and needs of different national markets and revenue streams, and adjusted to different national legal structures.

Over the past years, the need to grant authors an unwaivable and inalienable right to obtain equitable remuneration for all means of exploitation, including online, paid by licensees and managed by CMOs has been considered and endorsed by governments, stakeholders and international academic experts as the best solution to secure equitable remuneration for audiovisual authors.

* Unless expressly indicated, in this Study the term "copyright" is meant to refer to any rights granted by laws to authors, regardless of the specific terminology used in different legal systems: e.g., copyright, authors' rights, author's right, intellectual property, etc.

¹ Unwaivable prevents a waiver of this right. Inalienable prevents its transfer or assignment of any kind.



INDEX

INTERNATIONAL LEGAL STUDY ON IMPLEMENTING AN UNWAIVABLE RIGHT OF AUDIOVISUAL AUTHORS TO OBTAIN EQUITABLE REMUNERATION FOR THE EXPLOITATION OF THEIR WORKS.	3
EXECUTIVE SUMMARY	3
SCOPE AND PURPOSE	8
1. REMUNERATION OF AUDIOVISUAL AUTHORS FOR EXPLOITATION OF THEIR WORKS: CHALLENGE AND PROPOSAL	9
1. the challenge: securing equitable remuneration for audiovisual authors for the exploitation of their works.	9
2. why is that so?	11
3. what can be done?	22
2. PROPOSAL: AN UNWAIVABLE REMUNERATION RIGHT UNDER COLLECTIVE MANAGEMENT	38
1. An unwaivable remuneration right under collective management	38
2. Nature of the proposed remuneration right	42
3. Compliance with international norms and EU <i>acquis</i>	46
4. Implementation options	49
3. REMUNERATION RIGHTS OF AUDIOVISUAL AUTHORS IN INTERNATIONAL INSTRUMENTS, EU <i>ACQUIS</i> AND NATIONAL LAWS	52
1. International conventions	52
2. EU <i>acquis</i>	57
3. National laws	69
ANNEX: ANALYSIS OF THE PROPOSAL	91
BIBLIOGRAPHY	99



Scope and purpose

The scope and purpose of this study is to:

- Propose the implementation of an unwaivable right of audiovisual authors to obtain equitable remuneration, subject to collective management, for the international exploitation of their works, including through digital and online markets.
- Examine the issues relevant to its design, determine the audiovisual works and creators that are entitled to it, the covered acts of exploitation, its nature and triggering into existence, its unwaivable character and compulsory collective management, its duration, the calculation of the remuneration amount, who is obliged to pay it, etc.
- Map and scope remuneration rights currently granted by law, or secured by contract, to audiovisual works authors in the European Union and the United States of America as well as in other relevant markets regarding any means of exploitation, including digital and online.
- Assess the nature, justification and adequacy of this right to obtain equitable remuneration within the current international copyright framework as well as within EU *acquis*.
- Propose arguments for implementing such unwaivable right to obtain equitable remuneration at national and international levels.



1 Remuneration of audiovisual authors for exploitation of their works: Challenge and proposal

Making an audiovisual work requires numerous and diverse contributions. The rules to allocate authorship and initial ownership in an audiovisual works vary, sometimes widely, across national laws. The exploitation of an audiovisual work usually requires an intricate rights clearance and licensing processes that involves multiple agents and intermediaries across countries. Producers are the centrepiece in the production and exploitation of the work. Producers own or acquire all exploitation rights of the work. They control the exploitation process and main revenue streams.

Audiovisual contributors transfer their exploitation rights to the producer, usually in return for a single payment and, unless contractually negotiated or mandated by law, do not receive further revenue from the exploitation of their work. This is especially true regarding the new online exploitation markets that, despite rapid growth, fail to generate equitable remuneration for audiovisual authors. In order to secure equitable remuneration of audiovisual authors for the entire exploitation chain of their work, this study proposes introducing an unwaivable right to obtain equitable remuneration for the exploitation of their works, including making available online, subject to collective management in favour of audiovisual authors.

1. THE CHALLENGE: SECURING EQUITABLE REMUNERATION FOR AUDIOVISUAL AUTHORS FOR THE EXPLOITATION OF THEIR WORKS.

This study proposes introducing a statutory provision securing an unwaivable and inalienable right to obtain equitable remuneration for audiovisual authors in exchange for the transfer of their exploitation rights to producers, subject to collective management (administered by CMOs on a voluntary or mandatory basis or under ECL) and paid directly by the user or whoever carries out the exploitation activity for each act of exploitation.

A fundamental principle of copyright law requires **authors to be fairly remunerated for the exploitation of their works**.² This includes receiving remuneration for all forms of exploitation of their works.³ As far as audiovisual authors are concerned, this is rarely the case.

Markets for the exploitation of audiovisual works are booming, especially online, yet audiovisual authors area not seeing their remuneration increase accordingly. A 2015 SAA white paper pointed out this problem within the European Union:

Since the 1st edition of this white paper in 2011, box office receipts have grown despite a difficult economic climate. There are over 1,000 new television channels and the number of on-demand platforms has grown by over 400%. All this shows that our industry continues to evolve at quite a pace. It has never been easier to watch your favourite films and TV shows. Although more could still be done, it is clear that European works are more available than ever before. But this success is not necessarily being translated into increased remuneration for Europe's screenwriters and directors.⁴

² See, e.g., Recital 10 InfoSoc Directive 2001/29/EC: "If authors and performers are to continue their creative and artistic work, they have to receive an appropriate reward for the use of their work (...). See also EU Commission (2011) Green Paper on the online distribution... p.15: "The European Commission considers that an appropriate remuneration for rightholders should be ensured" and Recital 28 Collective Rights Management Directive 2014/26/EU: "... rightholders are entitled to be remunerated for the exploitation of their rights."

³ See, e.g., EU Parliament (2012) Report on the online distribution... #48.

⁴ See SAA (2015) White Paper ... p.10.

The same holds true, and even more so, worldwide.

Audiovisual creators fail to be equitably remunerated for the entire exploitation of their works. Most audiovisual creators do not receive any remuneration other than up-front payments received from producers and collect no revenues downstream. If they do, these revenues are marginal and often only accrue after reaching a specific threshold.

The most recent example of this “value gap” concerns **new forms of online audiovisual works exploitation**. Audiovisual authors have been granted by law an exclusive right to authorise or prohibit the making available online of their works (see Art.8 WCT, Art.3 InfoSoc Directive, and similar provisions in national laws). Digital and online means of exploitation are thriving, but authors fail to receive any remuneration. Audiovisual authors are being left behind. In 2012, the EU Parliament recalled “the necessity of ensuring the proper remuneration of rights-holders for online distribution of audiovisual content; ... although this right has been recognized at European level since 2001, there still is a lack of proper remuneration for works made available online.”⁵ The situation has not changed in the European Union.⁶ The same applies worldwide.

The market for audiovisual works exploitation has been transformed by digital technologies and online services. Despite traditional “windows” of exploitation⁷ and country-based opening calendars still in place, immediate availability of audiovisual content online on a worldwide basis is growing.

The audiovisual sector is doing its best to meet consumer demands. Video-on-demand (VOD) platforms, offering audiovisual content on demand, are proliferating (e.g., Netflix, iTunes, wuaki.tv or Chili.tv) and often offering services on a cross-country basis.⁸ All kind of audiovisual content (e.g., feature films, television films, television series, documentaries, video clips) can be accessed online for free, by paid subscription or on a pay-per-view basis. Online revenues from VOD platforms have been increasing constantly over the years,⁹ to the point that the question has been raised if on-demand audiovisual services could be soon dominate the audiovisual media market and prevail over traditional broadcasting business models.¹⁰

However, the problem of audiovisual authors’ remuneration is not restricted to just digital means of exploitation. In many countries, audiovisual authors fail to receive remuneration for offline exploitation of their works, such as theatrical exhibition (box office), broadcasting, cable retransmission or rental.

The audiovisual exploitation chain is long, complex and controlled by producers and distributors. Audiovisual authors are contractually “cut-off” from this chain.¹¹

⁵ See EU Parliament (2012) *Report on the online distribution...* #44

⁶ See SAA, *White Paper* ... p.21: “...in most European countries, audiovisual authors are not, as yet, receiving any payment for the online/on-demand consumption of their work. The online/on-demand distribution of works is becoming an increasingly important means of dissemination and consumption. It would be unacceptable for authors to be left behind by this digital revolution.”

⁷ Theatrical exhibition, pay TV, broadcast TV, distribution for rental and later home sale, etc.

⁸ For instance, a total of 2,563 on-demand audiovisual services were established in the European Union by the end of 2015. VOD services and catch-up television services together represented 73% of the total number. On average, 22% of VOD services available in a given country were established in another EU country. The share of services established in another EU country ranged from 5% in the United Kingdom to 58% in Hungary. A series of hubs where VOD services serve several countries are emerging in Europe. As with linear television, the United Kingdom is the major VOD service hub. Smaller countries also account for a significant share of VOD services targeting other EU countries, such as the Czech Republic (HBO), Luxembourg (iTunes), Sweden (Viaplay, SF Anytime, CMore targeting DK and FI) and the Netherlands (Netflix).

Approximately 50 pay-VOD services originating from the USA were available in Europe in October 2015. These include multiple versions of Google Play and Microsoft Store, two services whose country of establishment is unclear. See Schneeberger and Fontaine (2016) *Linear and on-demand audiovisual media services in Europe 2015*, European Audiovisual Observatory: http://www.obs.coe.int/documents/205595/264629/MAVISE+EXTRA_TV+and+ODAS+in+Europe+2015.pdf/

⁹ Revenues from films on video-on-demand platforms increased 60% to an estimated €310 million (\$410 million) across Europe this year with the U.K., France and Germany attaining two-thirds of revenues. Revenues for films on pay TV provider on-demand services reached \$861 million, a 20% year-on-year increase, according to IHS Screen Digest (<http://variety.com/t/ihs-screen-digest/>). Europe is still way behind the U.S., where the pay TV on-demand sector for films is worth about \$1.2 billion and the online film market is worth about \$728.5 million. E. Keslassy: Variety, Dec.2012 <http://variety.com/2012/digital/news/online-vod-revenues-grow-60-in-europe-1118063888/>

¹⁰ At the EAO Conference “Traditional broadcasting: is it still relevant?” (Prague, 9 June 2016), it was stated that although linear TV still represents the vast majority of time spent and revenues, on-demand is quickly growing and the number of pay-TV subscribers is decreasing. Media groups are starting to launch their own TV and video on-demand services (TVOD and SVOD). See: <http://www.obs.coe.int/en/home>

¹¹ See The Audiovisual Campaign: <http://www.theaudiovisualcampaign.org/>

In many countries, the producer owns the authors' exploitation rights in the audiovisual work as well as the neighboring rights in the audiovisual recording. Be it through a rebuttable "presumption of assignment" from audiovisual co-authors (e.g., Italy or Spain) or *ab initio* under statutory authorship or "work for hire" doctrines and alike (e.g., United Kingdom and the United States, respectively), **the producer tends to hold all economic rights of an audiovisual work**, becoming a "one-stop shop" for exploitation rights clearance and licensing.¹²

Licensing the exploitation of an audiovisual work takes place through a myriad of regional intermediaries, distributors and sales agents.

As owners of all exclusive rights, producers control the exploitation of audiovisual works and recordings on a worldwide basis and channel **all revenues derived from them**.

As a general rule, authors participate in **exploitation revenues through producers** and in accordance to what has been agreed upon in production contracts.¹³ Audiovisual authors' remuneration largely depends on what has been agreed upon in production contracts. The contractually agreed remuneration that authors receive from producers is regarded as the "primary" revenue source. In principle, it ought to include at least two instances of remuneration: for the contribution to the audiovisual work and for the exploitation of the audiovisual work resulting from the transfer of exclusive rights to the producer.

Several measures try to secure fair remuneration (a share) for audiovisual authors (a share) from exploitation revenues. National statutes¹⁴ and international instruments require the remuneration of authors for the exploitation of their works to be "proportional" to revenues generated by this exploitation. Other laws prefer to refer to "equitable remuneration". Some specifically require that "separate remuneration" be agreed for each means of exploitation.

*However, in practice audiovisual authors usually receive a single up-front payment in the form of a lump-sum or salary covering their contribution to the audiovisual work as well as the transfer of exclusive rights to the producer. As a general rule, no further remuneration is paid by the producer to authors for the exploitation of the work.*¹⁵

2. WHY IS THAT SO?

A combination of practical and legal reasons may explain this situation.

The production and exploitation of an audiovisual work requires the involvement of multiple creators, technicians, agents, intermediaries and licensees across different countries as well as drafting multiple production and licensing contracts.¹⁶

National laws offer different rules to address authorship and ownership issues in audiovisual works as well as their scope of rights. **The complex mechanisms to allocate rights in audiovisual works** under national laws, **the lack of international harmonisation** regarding the scope of rights granted to authors and producers and the principle of territoriality (*lex loci protectionis*) become major obstacles that need to be overcome by production and licensing contracts in order to secure international exploitation and maximize revenues.

¹² See IVIR (2015) *Remuneration of Authors...*, p.90.

¹³ Currently no standard practice exists at the international level, nor across Europe, regarding contractual remuneration of audiovisual works. See IVIR (2015) *Remuneration of Authors...*, p.102. See also KEA (2010) *Multi-territory licensing...* p.171

¹⁴ See German Act art.32, French Act art.L.131-14 or Spanish Act art.46.1. In general, see the national reports prepared on the basis of a common questionnaire for the 2015 ALAI Bonn Congress: <http://www.alai.org/en/congresses-and-study-days.html>

¹⁵ See EU Commission, *Green Paper on the online distribution ...* p.16: "For the most part, authors transfer their exclusive economic rights to the producer in return for a lump sum or "buy out" payment for their contribution to an audiovisual work (writing and/or directing etc). It is not the norm for authors to receive a per use remuneration for primary uses of their work such as cinema exhibition or the sale of DVDs. Equally, the majority of Member States do not provide a framework for audiovisual authors to receive a "per-use" payment for the online exploitation of their works."

See IVIR (2015) *Remuneration of Authors...*, p.94: "Only a few authors and performers with substantial bargaining power will be able to secure proportional remuneration for the transfer of their rights, with the majority transferring their rights in return for a lump-sum payment."

¹⁶ A high degree of integration exists among major audiovisual industry players worldwide. For instance, major television and film production groups are linked to audiovisual distribution groups and multi-country broadcast groups.

Other practical reasons also **play an important role in failing to secure equitable remuneration for audiovisual authors**. Signed at the time of audiovisual production, production agreements cannot foresee all possible means and markets of exploitation that may evolve over time and audiovisual creators lack the necessary bargaining power to obtain equitable remuneration for them. As a result, authors are contractually “cut off” from exploitation revenues. As long as their remuneration is based only on what has been agreed upon in the production contract, audiovisual creators will receive hardly any remuneration beyond the agreed initial amount.

a. Statutory copyright in audiovisual works: authorship, ownership and scope of rights

Audiovisual works are complex products. Making an audiovisual work requires **several creative, technical, commercial and entrepreneurial contributions**. This results in **several protected subject-matter** (e.g., audiovisual work, performances, audiovisual recording) and **rights holders** (e.g., authors, performers, producers).

National laws deal with the complexity of audiovisual production in different manners. National solutions may be grouped under two main systems. One system concentrates all rights in the hands of the producer (a person or legal entity) as author or as initial owner, at least. This is the solution adopted predominately in **common law countries**. The second system prefers the co-authorship status of individual contributors combined with presumptions of transfer of exclusive rights to the producer. This is the system adopted predominately in **civil law countries**. Such basic distinction fails to convey the full picture of all different national solutions, but it is useful in explaining the problem. (i)

Another layer of uncertainty is the scope of rights owned by authors and producers and how they may be affected by contracts. The scope of rights owned by a producer may differ depending on each applicable national law and on what has been agreed upon in production contracts. Audiovisual authors may retain some exclusive rights because not all rights are covered by the statutory presumption of transfer, or because they have been contractually secured or “carved out” of the transfer to the producer. In addition, authors may also be granted unwaivable remuneration rights by certain national statutes that often are safeguarded from any contractual agreement, set as unwaivable and inalienable, and mandatorily subject to collective management. (ii)

The complexity of national statutory solutions and subsequent contractual modulation is aggravated by the principle of territoriality of copyright laws and conflict of law rules based on *lex loci protectionis*. (iii)

(i) Authorship and initial ownership

In **common law countries**, the producer is considered to be the author and initial copyright owner of an audiovisual work, usually under “work for hire” doctrines. The United States provides the most relevant example. Similar provisions granting authorship status to the employer or commissioning party exist in Australia, New Zealand, India and China.

In the **United States**, motion pictures may qualify as “works made for hire” when done under employment or under commission by means of a written agreement signed by both parties (Sec.101 USCA). ¹⁷

¹⁷ Sec.101 USCA: A “work made for hire” is— (1) a work prepared by an employee within the scope of his or her employment; or (2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire. For the purpose of the foregoing sentence, a “supplementary work” is a work prepared for publication as a secondary adjunct to a work by another author for the purpose of introducing, concluding, illustrating, explaining, revising, commenting upon, or assisting in the use of the other work, such as forewords, afterwords, pictorial illustrations, maps, charts, tables, editorial notes, musical arrangements, answer material for tests, bibliographies, appendixes, and indexes, and an “instructional text” is a literary, pictorial, or graphic work prepared for publication and with the purpose of use in systematic instructional activities.

The employer or commissioning party of a “work made for hire” is considered to be the author and, unless expressly agreed otherwise (also in a written instrument signed by both parties), owns all rights comprised in the copyright (Sec. 201(b) USCA),¹⁸ including for any new means of exploitation that did not exist at the time of creating the work.¹⁹

In **New Zealand**, the producer is author and copyright owner in the audiovisual work. Similarly in **Australia**, authorship and ownership typically belongs to the producer by means of a combination of specific rules on commissioned works and works made under employment.²⁰

The **United Kingdom** and **Ireland** combine “work made for hire” doctrines²¹ with the European Union mandate (see below) to treat the director as at least a co-author of the audiovisual work. In both countries, the producer and director are co-authors of the audiovisual work.

In **India** and **South Africa**, authorship and initial copyright ownership also belongs to the producer.

Canadian law offers no specific rules on audiovisual authorship or initial ownership. Accordingly, it depends on the facts of each case and on agreements reached in production contracts. In 1995, a ruling by the Quebec Superior Court concluded that films are joint works as opposed to collective works. The writer and director were co-authors in this specific case. Nothing precludes other co-authors to be declared. As far as ownership, no legal presumption of transfer to the producer exists in Canadian law, leaving it to be agreed upon by parties and contracts.²²

Cyprus has no relevant provision regarding audiovisual works.

This context is the opposite in **civil law countries**. Most qualify audiovisual works as **joint works** or works of collaboration, and individuals who make a creative contribution to the audiovisual work are deemed to be its co-authors.

This is the case in most **European Union countries**. The Term Directive 93/98/EEC (derogated and codified as Directive 2006/116/EC)²³ expressly required that the principal director “shall be considered as its author or one of its authors” (Art.2.1) leaving the rest of the co-authors to be designated by national law.²⁴ Beyond this, **national solutions vary**. Some European national laws provide a presumptive list of co-authors²⁵ while others prefer to leave co-authorship open to any natural person who makes a creative contribution to the film.²⁶ Usually the director, the screenplay author (e.g., adaptation, script and dialogue) and the author of the musical composition specially created for the film are regarded as co-authors. Less frequently, authors of preexisting works (such as a novel or piece of music) adapted for the film,²⁷ directors of photography, editors, set designers, costume designers, production designers, story boarders, animators or others are also considered. Most European Union countries provide for a statutory presumption of transfer of exploitation rights to the producer.

¹⁸ Sec.201(b) USCA: Works Made for Hire. In the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author for purposes of this title and owns all of the rights comprised in the copyright unless the parties have expressly agreed otherwise in a written instrument signed by them.

¹⁹ According to *New York Times v. Tasini*, 533 U.S. 483 (2001), new means of exploitation not expressly covered by a transfer need be renegotiated with authors. In the case of “Works made for hire” under Sec.201(b) USCA initial ownership of all copyright vests in the employer/producer.

²⁰ When the audiovisual work has been commissioned, the commissioning party is initial owner of copyright, unless otherwise agreed (Sec.98.3); while for non-commissioned audiovisual works, the maker (producer) is the original copyright owner (Sec.22.4) and since 2006, the “maker” also includes the director (Sec.98.4). However, when the audiovisual work is made under employment, all these rights will be owned by the employer unless contrary agreement (Sec.35.6).

²¹ When the work has been created under employment, the employer is deemed to be the initial owner of all exploitation rights.

²² The Directors Guild of Canada is trying to fight the ascendancy of the United States work-made-for-hire doctrine by lobbying for a Canadian Copyright Act amendment so the director is expressly regarded as an author or co-author of the audiovisual work. See the Directors Guild of Canada: <http://www.dgc.ca/>

²³ Council Directive 93/98/EC on the term of protection of copyright and certain related rights, 29 Oct. 1993, derogated and codified by Directive 2006/116/EC, 12 Dec.2006: <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32006L0116&from=EN>

²⁴ Art.2.2 Rental and Lending Directive 92/100/EEC (derogated and codified as 2006/115/EC) had previously done the same for purposes of these two rights.

²⁵ Denmark, France, Hungary, Italy, Poland. In Spain, the statutory list of co-authors is closed and exhaustive.

²⁶ Croatia, Germany, Netherlands, Austria, Denmark, Finland, Iceland, Norway and Sweden do not have lists of presumptive authors.

²⁷ France and Belgium.

The following table shows the variety of solutions for audiovisual authorship across **Europe**:

	Producer	Director	Script writer	Music Composer	Other creators	Comments	Article
Austria (EU)						Anyone who participated in creation	39(1)
Belgium (EU)			*		**	* Also author of adaptation; ** Also visual artist (animated films)	14
Bulgaria (EU)					**	** Also operator; in cartoons: also production designer	62(1)
Croatia (EU)					**	** Also cameraman, animator ... anyone who makes an essential contribution	116(1)
Cyprus (EU)						No special provision	
Czech Rep. (EU)						Director as only author	63(1)
Denmark (EU)						No special provision	
Estonia (EU)					**	** Also cameraman and designer	33(2)
Finland (EU)						No special provision	
France (EU)			*			*Including authors of adapted works and dialogue	L113.7
Germany (EU)						Anyone who participated in creation	89.1
Greece (EU)						Director as presumed author (rebuttable). Authors of contributions: screenwriter, composer, cinematographer, set designer, costume designer, sound engineer, editor ...	9&31.3
Hungary (EU)						Anyone who has creatively contributed to the work	64.2
Iceland (EEA)						No special provision	
Ireland (EU)						Co-authorship: director and producer (mandatory)	21.b&25
Italy (EU)					**	Other creative contributors (i.e., cartoons)	44
Latvia (EU)			*		**	*Also dialogue author. ** Other persons who creatively contributed to the work	11(1)
Liechtenstein (EEA)						Producer and any persons participating in creation or production who are contractually referred to as co-authors	20&33.3
Lithuania (EU)			*		**	*Also dialogue author. **Also art director and camera operator	11
Luxembourg (EU)							21(1)
Netherlands (EU)						Natural persons who creatively contribute to the audiovisual work	45a
Norway (EEA)						No special provision	
Poland (EU)						Any persons who made a creative contribution to its completion	69
Portugal (EU)			*			* Also author of adaptation and dialogue	22(1)
Romania (EU)					**	**Also graphic author; parties may agree to include other creators in production contracts	66
Slovakia (EU)			*			* Also dialogue author	17
Slovenia (EU)			*		**	* Also author of adaptation and dialogue; ** Also director of photography; If animation is essential element of the audiovisual work, principal animator is also co-author	105.1
Spain (EU)			*			* Also authors of plot, adaptation, dialogue. Closed list of authors (exhaustive).	87
Sweden (EU)							6
Switzerland (EFTA)						No special provision	
Ukraine (ENP)					**	** Also designer, cameraman	17
UK (EU)						Co-authorship: director and producer (mandatory)	F23(ab)

EU: European Union - **EEA:** European Economic Area - **EFTA:** European Free Trade Association - **ENP:** European Neighborhood Policy

not mentioned but inferred
 specifically mentioned as author
 no specific provision
 * Other contributors mentioned as authors

Similar, varied combinations are found elsewhere.²⁸

Several countries retain joint-work and co-authorship status for audiovisual works and presumptive co-author lists that at least include directors, writers and music composers. This is the rule in **Georgia, Russia, Turkey** (co-authorship includes animator), **Armenia** (co-authorship includes cameraman), **Egypt** (co-authorship includes author of the pre-existing work) as well as in **Syria**. Except for Syria and Armenia, all of these countries provide for a presumption of transfer to the producer. No specific rule for authorship in audiovisual works exists in **Lebanon**. Although if the work is made under employment, exploitation rights belong to the employer unless otherwise agreed.

South American countries abide to the joint-work or co-authorship regime for audiovisual works. Typically, directors, screenwriters and music composers are deemed to be co-authors either through an open list (**Brazil, Panama, Peru, El Salvador, Chile, Venezuela**) or a closed list (**Mexico, Bolivia, Colombia, Ecuador, Dominican Republic**). A few expressly include as co-authors the authors of preexisting works (Panama, Peru, El Salvador, Chile and Venezuela), cinematographer (Mexico), story boarders and animators (Brazil, Panama, Peru, El Salvador, Mexico, Colombia, Dominican Republic) and even the producer (Argentina, Costa Rica, Brazil, Paraguay). However, in **Cuba** the producer owns "the author's right in the audiovisual work, while the director and any other persons who made relevant contributions to its making may exercise the author's rights in their contributions "according to the contracts entered with the producer".

Japan and **Israel** offer both possibilities (work made for hire and joint-work) depending on specific production circumstances. In **Japan**, co-authorship in an audiovisual work is restricted to those authors (e.g., director, cinematographer, producer) whose contribution is "inseparable" from the audiovisual work itself, thus excluding authors of underlying novels, scripts and music. In **Israel**, no specific audiovisual authorship rule exists. While courts have accepted the director as author, nothing seems to preclude the acceptance of other contributors as co-authors. Furthermore, when the audiovisual work (as any other work) has been created under employment, copyright belongs to the employer unless otherwise agreed.

China prefers an open-list of co-authors including scriptwriter, director, cameraman, lyricist, composer and "other authors" together with a *cessio legis* of rights in favour of the producer. Yet when the audiovisual work is done under employment or commission, authorship belongs to the employer or commissioner. In **Hong Kong**, the director and producer are co-authors of the audiovisual work; this is a mandatory rule rather than a presumption. In **South Korea**, the producer is the author and owner of all copyright in the audiovisual work.

Most **African** laws have specific authorship rules for audiovisual works representing the two legal traditions. For example, **Burkina Faso** and **Senegal** abide to civil law, and list co-authors of an audiovisual work²⁹ together with a rebuttable presumption of transfer of all exploitation to the producer. **South Africa, Kenya** and **Nigeria** abide to common law, and deem the producer as author and initial copyright owner of the audiovisual work.

²⁸ See national chapters in *Copyright Throughout the World* (von Lewinski ed.), Thomson West.

²⁹ In Burkina Faso and Senegal, co-authors are deemed to be directors, authors of the script, adaptation and dialogues, and authors of musical compositions specially created for the film.

(ii) Scope of rights owned by producers and authors

In addition to diverging authorship and first ownership rules, the scope of rights owned by producers and authors may vary according to applicable national laws.

In countries with co-authorship status, audiovisual work co-authors are typically presumed to have assigned their rights of exploitation to the producer unless otherwise agreed upon. This tends to be done by means of a **rebuttable (*iuris tantum*) presumption of transfer**,³⁰ which operates failing any agreement to the contrary and concentrates all or, at least the primary, exploitation rights in the hands of the producer or employer. Fewer countries prefer a *iuris et de iure* presumption of transfer to the producer, as initial owner of the exploitation rights in the audiovisual work, not admitting proof to the contrary.³¹

The scope of such presumption of transfer may vary under different national laws, or apply differently to different co-authors,³² thus resulting in legal uncertainty.³³ On top of that, the grounds on which the presumption of transfer may apply also vary among countries. Most production contracts expressly provide for an **assignment of all exploitation rights to the producer**, which should suffice in principle to trump the statutory presumption of transfer in most civil law countries. However, this is a controversial issue and solutions may be different under various national laws.³⁴

In some countries, audiovisual authors have succeeded in retaining certain exclusive rights so that they can be entrusted to collective management. The best example of it is the position of music composers.³⁵ Due in part to historical reasons when silent films were accompanied by music performed by live orchestras, and to successful collective bargaining with producers, music composers tend to retain some exploitation rights (e.g., communication to the public) to collectively license them together with the audiovisual work.³⁶

The scope of rights granted to the producer will not only be a matter of applicable national law, but mostly of contract interpretation. In other words, the scope of an express contractual assignment of rights in favour of the producer will be a strictly contractual and private matter subject only to the will and bargaining position of the parties. This makes its scope even more difficult to assess.

Uncertainties that derive from diverse national scenarios reinforce the importance of individual contracts in securing the exploitation rights chain of title.

Uncertainties regarding rights clearance may result from the difficulty to ascertain **the scope of rights owned by the producer**, be it under a statutory presumption of transfer or under a contractual assignment of rights.

The scope of rights granted to authors is not fully harmonised under national laws. Exploitation rights have been somewhat harmonised at an international level, if only indirectly by means of the Berne Convention, WIPO Copyright Treaty, TRIPs and others. Yet remuneration rights and their scope are far less

³⁰ See France, Italy, Lithuania, Netherlands, Poland and Spain. The CJEU has confirmed the validity of statutory presumptions of transfer in favour of an audiovisual producer, as long as they are rebuttable and parties (at least, the director) can agree otherwise; See CJEU, 9 Feb.2012, *Luksan v. Van der Let* (C-277/10).

³¹ See Austria and Italy. However, in *Luksan*, the CJEU rejected the allocation of exploitation rights “by operation of law exclusively to the producer” of an audiovisual work; at least, as far as its director, who must be granted first ownership of exploitation rights according to the EU *acquis*. See CJEU, 9 Feb.2012, *Luksan v. Van der Let* (C-277/10). Beyond the context of works made for hire or under employment relations (e.g., New Zealand), very few countries convey a *cessio legis* (a *iuris et de iure* non rebuttable presumption of transfer) in favour of audiovisual producers (e.g. Japan).

³² Some countries apply the same presumption of transfer to all co-authors (e.g., Italy and Spain), while the scope of the presumption of transfer varies in other countries depending on the kind of author and contribution (e.g., The Netherlands and France).

³³ See IVIR (2015) *Remuneration of Authors...*, p.4: “there is legal uncertainty arising from the lack of specification of rights covered by the presumption of transfer from the creator to the producer.”

³⁴ Different national laws may have different sayings as to whether the presumption can only be trumped by an express agreement, or in writing, or can also be rebutted by an implied consent from the author.

³⁵ The author of a musical work synchronised to the film is free to establish conditions for such exploitation including which means of exploitation are licensed or not. The same should not apply regarding the music specifically composed for the film for which the composer will obtain co-authorship status.

³⁶ Despite retaining the exclusive right, music composers of the soundtrack especially created for the film obliges themselves to collectively license the soundtrack with the film. Lacking the power to prohibit or choose who to license, the collective license *de facto* amounts to securing composers' remuneration for the exploitation of the film.

harmonised and may vary widely among countries. Assessing specific rights that a producer or author may have under each national law may be a cumbersome task. On top of that, the producer is not only the assignee of the authors' exploitation rights in the audiovisual work but also, in many countries, the original owner of related rights in the audiovisual recording. Accordingly, the assignment of authors' rights in the audiovisual *work* to the producer must include, at least, the same related rights in the *recording* granted *ab origine* to the producer.

Yet, some issues cannot be affected by contracts. Neither the statutory presumption of transfer nor any formal assignment of rights to the producer will affect the **authors' moral rights**.³⁷ Furthermore, any rights to obtain **equitable remuneration that are set as inalienable and unwaivable** by statute, or subject to mandatory collective management, will be "safe" from any contractual agreement.

The **scope of a contractual transfer of rights** will certainly affect the chances of collective management of any rights (exclusive and remuneration) that have been granted to producers either by express contract or by statutory presumption of transfer. In principle, in order for an audiovisual author to mandate management of their rights to a CMO on a voluntarily basis, they must have reserved them in the production contract; at least, they must have reserved the remuneration accruing from the transferred rights. This reservation may be achieved with the help of collective bargaining in countries where CMOs have negotiating power (e.g., France). Even then, collective management on a voluntary basis of these rights is costly, time-consuming and often has limited effects. Substantial benefits of voluntary collective licensing is a reality only in a few, mostly European, countries -particularly in France. Instead, when remuneration rights are **managed exclusively by CMOs** (as unwaivable remuneration rights, under mandatory collective management or under ECL), revenues for authors are more easily secured since enforcement costs are lower and authors do not need to negotiate them out of the production contract.

In some national laws, audiovisual authors are granted **statutory remuneration rights for secondary uses** (see below) that are subject to collective management. Their existence and scope as well as whether these remuneration rights may or may not be waived or transferred to the producer is decided by each national law.

The **lack of international harmonisation of these remuneration rights** and the failure to safeguard them from contracts may ultimately frustrate international enforcement and the chances of foreign authors to obtain remuneration from countries where they are statutorily granted remuneration rights. For example, imagine that in country A, remuneration due to an author is based on a statutory unwaivable remuneration right. The same remuneration in country B can only derive from the exercise of an exclusive right that may be administered by the CMO only on a voluntary basis. Imagine also that in country A1, remuneration right is granted upon the transfer of exclusive rights to the producer and is managed only by CMOs. In country A2, the CMO can only manage it upon voluntary mandate of the exclusive right by the author who has reserved this right from being transferred to the producer.

Furthermore, the nature of **the different exploitation rights** may vary under different national laws. For instance, some countries have chosen to implement broadcasting right as a mere remuneration right for authors subject to mandatory collective management (ex Art.11 of the Berne Convention). Others confer it as an exclusive right that is collectively managed on a voluntary basis. The same may be true regarding rental rights where applicable.

³⁷ The exercise of moral rights in audiovisual works is subject to different rules. In some countries, moral rights can only be exercised on the final version of the work (e.g., France, Spain). The final cut may be left in the hands of producers and directors or may also include other joint-authors. In other countries, moral rights may be exercised at any time during production or exploitation of the audiovisual work (e.g., Germany).

(iii) Principle of territoriality

To navigate this complex and unharmonised worldwide legal scenario, **the basic principles of territoriality, national treatment as well as *lex loci protectionis*** are applied. These principles, which are deeply rooted in the international instruments protecting copyright,³⁸ further aggravate **uncertainties** caused by the different national law solutions and scope of rights.

Article 5 of the Berne Convention for the Protection of Literary and Artistic Works (1886) enshrines both principles of national treatment and of *lex loci protectionis*:

“(1) Authors shall enjoy, in respect of works for which they are protected under this Convention, in countries of the Union other than the country of origin, the rights which their respective laws do now or may hereafter grant to their nationals, as well as the rights specially granted by this Convention. (2) The enjoyment and the exercise of these rights shall not be subject to any formality; such enjoyment and such exercise shall be independent of the existence of protection in the country of origin of the work. Consequently, apart from the provisions of this Convention, the extent of protection, as well as the means of redress afforded to the author to protect his rights, shall be governed exclusively by the laws of the country where protection is claimed.”

These principles may be fit to secure a basic scope of protection beyond their countries of origin for the majority of works, but fail to overcome the complexity of securing protection for audiovisual works under multiple and unharmonised national laws. In 1967, the Berne Convention (Stockholm Act)³⁹ tried to specifically address **the complexity of authorship and ownership in audiovisual works** by adding a new **Art.14bis**. However, the resulting text is an ineffective provision that basically:

- Implies that all the different regimes for the attribution of **authorship** in audiovisual works are welcomed under the Berne Convention;⁴⁰
- Makes clear that **ownership depends on “the law of the country of importation”**⁴¹ by stating that “Ownership of copyright in a cinematographic work shall be a matter for legislation in the country where protection is claimed” (Art.14bis(2)(a) Berne Convention);
- Strengthens the **presumptions of assignment** from creators to producers in those countries where they are weak (Art.14bis (2)(b) and (c) Berne Convention).⁴²

Art.14bis(2)(a) Berne Convention confirms the principle of territoriality and *lex loci protectionis* in Art.5.2 Berne Convention: a film may have different initial ownership status, and perhaps authorship status, under different national laws. As a result, further due diligence will be necessary before venturing in international exploitation of a film in order to secure that the chain of title of all assignment contracts for the production and distribution of the work be watertight under any applicable national laws and according to all possible different authorship statuses.⁴³ In the end, Art.5.2 Berne Convention and Art.14bis(2)(a) Berne Convention further reinforce the role of contracts in international exploitation of audiovisual works and foster the concentration of all copyrights in the hands of the producer.

³⁸ National and international instruments on applicable law confirm the principle of territoriality. See Art.5.2 Berne Convention and, in the EU, see Regulation (EC) No 864/2007 — the law applicable to non-contractual obligations (Rome II), Article 8: “*Infringement of intellectual property rights: 1. The law applicable to a non-contractual obligation arising from an infringement of an intellectual property right shall be the law of the country for which protection is claimed.*”

³⁹ See the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (1961), Art.19: “*Notwithstanding anything in this Convention, once a performer has consented to the incorporation of his performance in a visual or audio-visual fixation, Article 7 shall have no further application.*” In other words, once the performance has been fixed and released, the performer cannot prevent any further use of the fixed performance. See the *WIPO Guide to the Rome Convention and the Phonograms Convention* (1981) p.65-67: http://www.wipo.int/edocs/pubdocs/en/copyright/617/wipo_pub_617.pdf

⁴⁰ As the WIPO Guide to the Berne Convention explains, art.14bis Berne Convention takes “*account of the various legal systems mentioned above and to leave national laws free to decide who shall be that owner...This may be the maker in his own right, as under the “film copyright” system, or the maker by reason of a legal assignment, or it may be the various artistic contributors to the film. National legislation is free to adopt any of the systems.*” See C. Massouyé (1971) *WIPO Guide to the Berne Convention for the Protection of Literary and Artistic Works*, p.85: http://www.wipo.int/edocs/pubdocs/en/wipo_pub_615.pdf

⁴¹ *Ibid.*

⁴² However, this is a rather ineffective provision since the presumption does not apply to the main creators of audiovisual work, who are usually regarded as co-authors in civil law countries. See S. Ricketson, *The Berne Convention for the Protection of Literary and Artistic Works* #583

⁴³ In other words, any contributor who may be considered co-author under any applicable national law should have all of their exploitation rights granted to the producer.

The principle of territoriality and *lex loci protectionis* is particularly relevant for the purposes of this study because it also determines who and which authors will be entitled to unwaivable rights to equitable remuneration for the exploitation of audiovisual works.

EU attempts to harmonise authorship in audiovisual works

At a smaller geographical scale, the EU made two separate attempts to overcome this complex issue. In 1992 on the occasion of granting rental and lending rights to authors (also audiovisual authors), it required that the principal director “be considered as its author or one of its authors” for purposes of both rights, and leaving the rest of the co-authors to be designated by national law⁴⁴. A year later in 1993, the same rule was confirmed and imposed for general purposes by art.2.1 Term Directive 93/98/EEC (derogated and codified as Directive 2006/116/EC).

Accordingly, audiovisual works authorship has been partially harmonised in the EU. The principal director will always be either the author or a co-author of the audiovisual work. However, this rule was not enough to neither harmonise authorship in the EU and avoid the application of different national law solutions of authorship (also within the EU, audiovisual works authorship remains a matter of national law), nor secure a harmonised protection term throughout all Member States.⁴⁵ Since the harmonised term is to be calculated from the death of the last surviving co-author,⁴⁶ differences in allocating audiovisual authorship would still result in different protection terms throughout the European Community.

Instead of fully harmonising audiovisual works authorship, the EU legislator simply chose to “disconnect” the term of protection of an audiovisual work from its authorship by establishing a **special rule to calculate the term**. According to Art.2.2 Term Directive 93/98/EC, the term of protection “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.” (Emphasis added)

Authorship and first ownership of audiovisual works may be an issue far too complex to deserve any attempt at international harmonisation or even within the European Union, beyond the director’s authorship status. Difficulties derived from unharmonised audiovisual authorship and ownership under national laws could be dampened by trying to achieve harmonisation in other areas, such as harmonising the scope of the presumption of transfer to the producer⁴⁷ or securing (by means of a mandatory international provision) that audiovisual authors receive fair remuneration for the worldwide exploitation of their works, under collective management and regardless of what has been agreed on their production contracts. This would overcome some uncertainties deriving from unharmonised authorship and initial ownership status. It would facilitate cross-border audiovisual work exploitation and licensing.

In terms of choice of law, national laws and international instruments tend to subject contracts to the national law chosen by the parties or, in absence of such choice, to the law of the country that is most closely connected to the contract. This also applies to copyright contracts. However, it is important to distinguish between contract issues, which will be subject to *lex contractus*, and copyright issues, which will be subject to *lex loci protectionis*. In other words, even when authorship depends on the existence or the scope of a contract, *lex contractus* alone will not decide it; authorship is a “copyright” issue subject to copyright law, under *lex loci protectionis*.

⁴⁴ See Art.2.2 Rental and Lending Directive 92/100/EEC (derogated and codified as Directive 2006/115/EC).

⁴⁵ See Recital 3, Term Directive 93/98/EEC (derogated and codified as Directive 2006/116/EC): “... differences between the national laws governing the terms of protection of copyright and related rights ... are liable to impede the free movement of goods and freedom to provide services and to distort competition in the common market. Therefore, with a view to the smooth operation of the internal market, the laws of the Member States should be harmonized so as to make terms of protection identical throughout the Community.”

⁴⁶ See Art.1.2 Term Directive 93/98/EEC (derogated and codified as Directive 2006/116/EC).

⁴⁷ See CRIDS/KEA (2014) *Contractual Arrangements* ... Exec.Sum. p. 13: “The presumption of transfer of rights in audiovisual rights would merit some European harmonization and definition of its proper scope, its relationship with remunerations of authors and its legal opposability to third parties.”

b. Production contracts

National laws differences reinforce the fundamental role that contracts play in the exploitation of audiovisual works. The only way to facilitate worldwide audiovisual exploitation, overcoming obstacles deriving from diverging national solutions (e.g., authorship and ownership status, exploitation rights scope) under the principle of territoriality, is by securing all exploitation rights by contract. Thus, regardless of which law applies, the chain of title for exploitation of the audiovisual work will remain secured by contracts.

In addition, **practical and economic reasons help explain the concentration of all exploitation rights in the hands of the producer.**

(i) Central role of producers

Producers assume the entrepreneurial risk and, sometimes, the financial risk as well, managing the audiovisual project from its inception. Either *ab initio* or by transfer, the producer tends to own all or, at least the main, exploitation rights and are in control of the entire exploitation of the audiovisual work.

The need to overcome uncertainties resulting from a lack of harmonised solutions regarding authorship and ownership in audiovisual works can easily explain the importance of contracts in securing the chain of exploitation rights. This is especially understandable when dealing with productions aimed for international exploitation.

Yet other reasons may also account for it. On one hand, **multiple contributions and the high costs involved in producing an audiovisual work.** On the other, assuming the financial risk and the need to secure the widest exploitation of the production across several territories and over time. **A concentration of all exploitation rights in the hands of the producer allows both production and exploitation needs to be met** in a more efficient manner through multiple distribution channels, over time and across territories through a complex structure of licensing contracts, agents and intermediaries. Collective licensing through CMOs may also contribute to licensing specific activities along the exploitation chain.

In some predominately civil law countries, **the accumulation of authors' exploitation rights in the audiovisual work and the related rights in the audiovisual recording** reinforces the producer's position and the scope of rights assigned in its favour. This makes it virtually impossible for authors to resist a full transfer of their rights or to request revising the remuneration agreed upon in the production contract. In many countries, three layers of protection converge in the producer's hands: authors' rights in the audiovisual work (including -as applicable- rights in scripts, music and other pre-existing works included in it), neighboring rights granted to *performers* in their audiovisual *performances* and neighboring rights granted to the producer in the audiovisual *recording*. Since the audiovisual work exploitation cannot be separated from the exploitation of the audiovisual performances and recording, the accumulating regimes reinforce the producer's position. Exploitation of the recording requires, *de facto*, the previous assignment of exploitation rights in the audiovisual work and in the audiovisual performances.

(ii) Unbalanced bargaining position of producers and authors

These same reasons may also explain the **unbalanced bargaining position** of authors and producers in negotiating production contracts. The producer is generally in a position to unilaterally establish the contractual conditions for the assignment of rights. In some instances, this may lead to unfair contractual practices being imposed upon authors.⁴⁸

The audiovisual author is often required to transfer all exploitation rights in the work to the producer, on an exclusive basis, for all protection terms in exchange for a lump-sum. This sum is formally agreed upon as the only remuneration that the author will receive from the producer.

⁴⁸ See SAA, *White Paper...*, p.19. Unfair contractual terms imposed by producers or broadcasters in the individual negotiation of contracts were listed to include: excessive transfer of rights in terms of scope and duration, without remuneration other than the initial production fee (buy-out clauses); waiver of remuneration rights; clauses forcing the author to indemnify the producer against any and all claims from CMOs regarding remunerations for the exploitation of the work, etc.

Most production contracts fail **to establish specific remuneration for each means of exploitation, let alone new means of exploitation** that may develop and be licensed by the producer over time. Production contracts that are entered into long before the work is produced and exploitation begins are meant to last as long as the audiovisual work will be protected and, if so, exploited. Yet, they are usually unable to foresee a work's commercial success or specific means of exploitation it will be subject to. **Most audiovisual authors are not in a position to renegotiate** these contracts over time due to a variety of reasons. Sometimes renegotiation is expressly prohibited by contract. National laws may declare that no transfer of rights will cover unknown means of exploitation but, in practice, audiovisual authors rarely have the opportunity to renegotiate production contracts. Most national laws provide for specific contract rules to overcome these scenarios and help secure an equitable remuneration for authors; however, **these contract rules are hardly enforceable by audiovisual creators**. As a result, audiovisual authors end up “disconnected” from the exploitation of their works and revenue streams generated by it.

c. Audiovisual authors are “cut off” from exploitation revenues.

Contractual practices in the vast majority of European countries deprive audiovisual authors of the effective exercise of their rights and prevent them from receiving fair remuneration for the exploitation of their works.

In January 2014, the CRIDS/KEA Study on Contractual Arrangements⁴⁹ identified several reasons for this. In addition to unbalanced bargaining power between producers and authors, it noted a contradiction existing between the fact that contracts signed by authors are static and with an intention of permanence. New modes of exploitation are increasingly dynamic, less foreseeable at the time of assigning rights and controlled by new “secondary” exploiters (other than producers and publishers that used to be “primary” exploiters), which sometimes have more economic power than producers and CMOs. In this complex context, audiovisual authors end up assigning all rights in terms of scope and duration for means of exploitation unknown at that time, contradicting some national contract rules, with no other remuneration than the initial production fee, waiving rights to remuneration and basically accepting being disassociated from the exploitation of their works. In many instances, authors could sue producers to claim equitable remuneration for each means of exploitation, and especially for online markets; in practice, they rarely do. Other reasons that may explain this result include lack of transparency, problems in enforcing individual contracts as well as liability and security of the contractual chain of licensing.⁵⁰

“The Audiovisual Campaign”⁵¹ offers a very illustrative explanation of the production process and of how audiovisual creators end up disconnected from exploitation revenues generated by audiovisual productions. In the 2014 “Mexico Manifesto”,⁵² audiovisual writers and directors from all over the world expressed the desire to work together in favour of recognition of their rights, explained the important contributions of audiovisual creators to culture and the economy and called “on national governments and law makers to adopt legislation that provides writers and directors with an unwaivable right to remuneration that is compulsorily negotiated with users of these works and managed on a collective basis.”

⁴⁹ See CRIDS/KEA (2014) *Contractual arrangements...* p.100-102.

⁵⁰ See SAA (2015) *White Paper...* p.37.

⁵¹ <http://www.theaudiovisualcampaign.org/>

⁵² <http://www.writersanddirectorsworldwide.org/mexico-manifesto/>

3. WHAT CAN BE DONE?

The following measures may be implemented to deal with this challenge, yet not all are equally effective:

- In order to mitigate the unbalanced bargaining position of authors and producers, national laws provide for **several rules aimed at protecting the author. These rules alone have proven to be insufficient to secure authors remuneration.**
- Authors might improve the remuneration conditions by **undertaking negotiations collectively.** However, this requires appropriate market conditions and the existence of strong unions or CMOs, which are not a reality in all countries.
- Specific legislative action to secure **an unwaivable remuneration right paid by licensees** and managed by CMOs (if necessary, mandatory collective management or under an ECL) for audiovisual authors remains the most effective solution.

The following sections examine these measures.

a. Contract law rules to protect authors...not enough

Contract law rules in national copyright statutes are designed to protect the interests of authors and performers, who are usually the weaker party in an assignment of exclusive rights. In theory, these rules also apply to audiovisual production contracts, transferring exclusive rights to the producer. However, in practice, these rules have a very limited impact on remuneration of audiovisual authors for the transfer of their exclusive rights.⁵³

Copyright contract law has never been the focus of international copyright instruments nor of harmonisation at the European Union level. Additionally, **national laws diverge widely.** Some common basic measures may be found across national copyright laws⁵⁴ and especially across European Union laws:

- The principle that authors deserve to receive **equitable remuneration** for the exploitation of their works is generally acknowledged by all laws;⁵⁵
- Some laws provide that this remuneration should be **“proportional”** to the proceeds from exploitation;⁵⁶
- Some laws require **separate remunerations** for each type of assigned economic right;⁵⁷
- A **lump-sum** may be exceptionally allowed when it is difficult to calculate or monitor the proceeds from the exploitation.⁵⁸ It may be **revised** when the agreed amount is “disproportionate” to the proceeds from exploitation (“best-seller clause”);⁵⁹

⁵³ For a detailed study, see CRIDS/KEA (2014) *Contractual Arrangements...*

⁵⁴ See the national reports prepared on the basis of a common questionnaire for the 2015 ALAI Bonn Congress: <http://www.alai.org/en/congresses-and-study-days.html>

⁵⁵ See CRIDS/KEA (2014) *Contractual Arrangements...*, p.37. This does not mean that a transfer of rights for free (without a payment) is invalid since there is no obligation to remunerate the author for the transfer of rights (e.g., Belgium and Spain).

⁵⁶ See France, Germany, Netherlands, Poland and Spain. See IVIR (2015) *Remuneration of Authors...* p.39 and ff. Germany requires that remuneration of authors be “adequate” (s.11 and s.32 UrhG). See CRIDS/KEA (2014) *Contractual Arrangements...* p.62.

⁵⁷ See Spain and the Netherlands (see below Chapter III).

⁵⁸ See France and Spain; see CRIDS/KEA (2014) *Contractual Arrangements...*, p.38.

⁵⁹ See France, Belgium, Germany, Hungary, Poland and Spain; See CRIDS/KEA (2014) *Contractual Arrangements...*, p.39-40. A similar provision is included in the Proposal for a Directive on Copyright in the Digital Single Market proposed by the EU Commission, COM(2016)593 final, Art.15: “Contract adjustment mechanism: Member States shall ensure that authors and performers are entitled to request additional, appropriate remuneration from the party with whom they entered into a contract for the exploitation of their rights when the remuneration originally agreed is disproportionately low compared to the subsequent relevant revenues and benefits derived from the exploitation of the works or performances.”

- The assignment of rights for unknown or future means of exploitation is null and void in many countries.⁶⁰ In some countries, the author may transfer rights for unknown or future means of exploitation provided that “a remuneration is agreed in a manner ‘proportional’ to the profits from the exploitation”;⁶¹
- Statutory measures⁶² or case law calling⁶³ for a restrictive interpretation of the scope of any license and transfer of exclusive rights.

All of these well-intended measures and declarations seem to **have little impact in audiovisual production contracts** for the above reasons.

Evidence from the EU

This problem has been notably and widely identified within EU countries. Solutions have been proposed. In 2012, the EU Parliament stressed that “it is essential to guarantee authors and performers remuneration that is *fair and proportional to all forms of exploitation of their works*, especially online exploitation, and therefore calls upon the Member States to ban buyout contracts, which contradict this principle.”⁶⁴

As concluded by the IVIR in its study on the Remuneration of Authors (2015), **contract rules play a very limited role in securing remuneration for authors**: “the general provisions of contract law play a very limited role in granting support to authors and performers in the negotiation of exploitation agreements and the determination of the level of remuneration. General contract law may affect the way a contract is interpreted or executed, but in general it does not influence the outcome of the negotiation on the transfer of rights or on the remuneration to be paid.”⁶⁵

The assignment of authors’ exploitation rights in the audiovisual work to producers is usually done through individual contracts; either production or employment contracts. Although parties have almost absolute freedom to agree on any terms and conditions, producers hold a stronger bargaining position.⁶⁶ Authors may easily find themselves assigning their rights, including remuneration, in conditions that are far from equitable and sometimes unfair.

Contract rules are insufficient and ineffective to secure fair remuneration for authors.⁶⁷ Despite all of the legal safeguards, “authors and performers are not always able to negotiate different types of remuneration per line of exploitation, including digital media ... and have so far been unsuccessful in trying to reap the benefits of digital media.”⁶⁸

Contractual practices in the audiovisual industry should be improved. National laws on contract rules could do more to help protect the interests of authors. However, given the specific circumstances of production and exploitation of audiovisual works, it is unlikely that these rules would be sufficient to

⁶⁰ See Belgium, Hungary, Italy, Lithuania, Poland and Spain; See IVIR (2015) *Remuneration of Authors...* p.37 and ff.

⁶¹ See France (art.L131-6 CPI), the Netherlands (art.45.d DCA) and Germany (s.31a and 32c UrhG). For instance, in Germany, the author may transfer rights for unknown means of exploitation while having the possibility to withdraw within three months after having been informed by the contract partner about their intention to use the new means of exploitation. After three months from having been notified, the right to withdraw expires. It also expires if the parties agree to further equitable remuneration for the new means of exploitation.

⁶² See France and Spain.

⁶³ In general, “Courts tend to construe implied terms of a license narrowly, as covering only acts that are necessary to give business efficacy to the agreement.” See IVIR (2015) *Remuneration of Authors...* p.35 and ff.

⁶⁴ See EU Parliament (2012) *Report on the online distribution...* #46

⁶⁵ See IVIR (2015) *Remuneration of Authors...* p.4.

⁶⁶ In addition, the audiovisual producer is granted *ab initio* all exploitation rights in the audiovisual recording (the first fixation of the film in the EU *acquis*). To the extent that the audiovisual work cannot be exploited without the audiovisual recording, the role of the producer as owner of all exclusive rights necessary to license the exploitation of the work or recording is unquestionably strong.

⁶⁷ See CRIDS/KEA (2014) *Contractual arrangements...* p.13: “The existing contractual protection of authors, as included in copyright law and, in directly, in general contract law, appears not to be sufficient or effective to secure a fair remuneration to authors or address some unfair contractual provisions.”

⁶⁸ See IVIR (2015) *Remuneration of Authors...*, p.51.

secure an equitable remuneration in the near future for authors for online means of exploitation that are developing in the market. Even when so, contractual measures might help secure better authors' remuneration for new audiovisual productions. Yet it will hardly secure better remuneration for pre-existing audiovisual productions currently exploited in new and evolving digital markets.

In summary, **improving contract law rules is absolutely necessary, but it will hardly be sufficient** to secure equitable remuneration for audiovisual authors.⁶⁹

b. Collective bargaining with producers

Collective bargaining with producers may also help audiovisual authors secure more appropriate remuneration for the exploitation of their works, **but this is only a reality in a handful of countries** such as the United States. Successful collective negotiations require the existence of **strong trade unions, guilds or CMOs** to negotiate a minimum level of remuneration for their members (i.e., authors and performers) with production companies. These agreements subsequently need to be included in production contracts and enforced by the parties. In many countries, collectively negotiated minimum remunerations are directly trumped by express agreements in production contracts.

(i) In the United States

In the United States, strong labor unions such as the Directors' Guild of America (DGA) and the Writers Guild of America (WGA)⁷⁰ collectively negotiate terms of their members' agreements with producers. Collective bargaining includes remuneration terms, which typically consists of a flat-deal as well as separated and residual rights.⁷¹ *Residuals* secure audiovisual authors remuneration for the exploitation of their work beyond the initial exploitation. They can represent a significant portion of the author's income. Guilds also collect and distribute for their members⁷² remuneration from *residuals*.⁷³ *Residuals* are paid to audiovisual authors for specific uses that have been collectively negotiated over time, including online interactive uses.⁷⁴ They are based on gross receipts, television runs or pay TV subscription revenues.⁷⁵ *Residuals* are often paid⁷⁶ through a payroll company to the guild, which is in charge of processing and paying authors. Guilds also receive money from foreign CMOs, more often European CMOs, for levies (e.g., private copying, public lending) and other remuneration collected on behalf of US authors.

Collective bargaining may help secure remuneration for new means of exploitation that did not exist at the time of the production contract without the need to revise the contract. For instance, DGA's *residuals* for new media are calculated on the basis of the producers' gross revenues, depending on the type of audiovisual work. Different percentages apply for download and streaming. The following chart shows

⁶⁹ See SAA (2015) *White Paper*... p.37: "The SAA supports the improvement of contractual practices ...We do not believe that this will be enough to ensure fair remuneration to audiovisual authors for the exploitation of their works across Europe. ... A good contract that cannot be enforced does not help authors very much."

⁷⁰ See DGA: <http://www.dga.org/> and WGA: <http://www.wga.org/> .
Audiovisual performers also enjoy residuals. See SAG-AFTRA <http://www.sagaftra.org/content/residuals>

⁷¹ See IVIR (2015) *Remuneration of Authors* ... p.53 and ss. The "Minimum Basic Agreement" offer authors a minimal compensation or "flat deal" for the employment as well as the opportunity to be remunerated despite the work-made-for-hire doctrine by ensuring them separated rights (the writer of an original story can benefit from separaterights such as to publish the film script) and residual rights (additional payments for the exhibition of the film on a media other than what it was originally created for or for subsequent reuse on the same medium after the initial exhibition) based on screen credits.

⁷² To the extent that they have been collectively negotiated (not statutory mandated), the author needs to be a guild member to receive residual payments.

⁷³ In managing residuals, the guild's role is similar to a CMO. They process residual payments as well as monitor and enforce compliance with the reuse provisions of the collective bargaining agreement.

⁷⁴ For example, DGA and other guilds started negotiating residuals for domestic reuse of television programs in the mid-1950s. Residuals have since been agreed upon for other uses such as for films shown on free television, foreign reuse of TV programs, home video and TV reuse, pay TV and reuse on the internet. See DGA: <http://www.dga.org/The-Guild/Departments/Residuals.aspx>

⁷⁵ *Residuals* are not based on profitability; They are payable regardless of whether or not the project breaks even. See: <http://www.dga.org/News/Guild-News/2005/May-2005/RESIDUALS-How-the-DGA-tracks-collects-and-distributes-this-growing-source-of-revenue.aspx>

⁷⁶ *Residuals* are paid by producers or distributors, depending on the case.

the *residuals* negotiated and managed by DGA.

DGA: HOW RESIDUALS WORK (BASIC AGREEMENT)

Product	Re-Use					
	Pay TV	Home Video	Domestic Free TV	Foreign Free TV	New Media: Electronic Sell Through	New Media: Ad- Supported Streaming
Theatrical Feature	1.2% of "Distributor's gross" (DIR, UPM, 1AD, 2AD, Pension Plan)	1.5% / 1.8% of "Employer's gross"* (DIR, UPM, 1AD, 2AD, Pension Plan)	1.2% of "Distributor's gross" (DIR, Pension Plan)	1.2% of "Distributor's gross" (DIR, Pension Plan)	1.8/3.25% of "Employer's gross"*	1.2% of "Employer's gross"
Made for Free TV	1.2% of "Distributor's gross"	1.5% / 1.8% of "Employer's gross"*	Run-based payments	35% of residual base up to a gross receipts plateau; 1.2% of "Distributor's gross" above plateau	1.8/3.5% of "Employer's gross"*	After promotional window: percentage of residuals base; Gross receipts after year one
Made for Basic Cable	1.2% of "Distributor's gross"	1.5% / 1.8% of "Employer's gross"*	Run-based payments	35% of residual base up to a gross receipts plateau; 1.2% of "Distributor's gross" above plateau	1.8/3.5% of "Employer's gross"*	After promotional window: percentage of residuals base; Gross receipts after year one
Made for Pay TV/ Home Video	"Exhibition year" residual based on number of subscribers	2% of gross above 100,000 unit threshold	Run-based payments	35% of residual base up to a gross receipts plateau; 1.2% of "Distributor's gross" above plateau	1.8/3.5% of "Employer's gross"*	After promotional window: percentage of residuals base; Gross receipts after first year

*"Employer's gross" is deemed to be 20% of "Distributor's gross" where the Distributor is affiliated with the Employer.

Source: DGA, Residuals Department

<http://www.dga.org/The-Guild/Departments/Residuals.aspx>

Residuals granted in the United States are the result of a long and complex collective bargaining process between producers and authors. They are possible because of a specific professional and labor structure in the audiovisual sector.

The US *residuals* system is unique and is rarely found elsewhere.

(ii) In other common law countries

Similar results could hardly be achieved in other countries, let alone in European countries, with different audiovisual industry economic and professional structures.⁷⁷

In the **United Kingdom**, residuals and collectively negotiated payments for secondary uses have a far more limited impact. The professional association representing film directors in the United Kingdom, Directors UK⁷⁸, collects and distributes royalties to the principal director of film and TV programs. These are collected from UK and European broadcasters as well as by securing agreements with other CMOs and guilds, such as DGA (United States), DRCC (Canada) and ASDACS (Australia). Under "Directors' Rights Agreement" terms, Directors UK receives annual payments from BBC, ITV, Channel 4, Channel 5, Sky and S4C to compensate freelance television directors for secondary uses of works.⁷⁹ Additionally, Directors UK administers the BBC Residuals payments that are due to directors and producers for programs made under the 1976 and 1984 union agreements.

⁷⁷ despite not being considered co-authors of the audiovisual work, audiovisual creators in the United States have better chances of obtaining some proportional revenues from its exploitation than many European creators, who are granted co-authorship status.

⁷⁸ Directors UK: <https://www.directors.uk.com/distribution/distribution-policy>

⁷⁹ These amounts are distributed to individual directors according to type of work, transmission length and form of secondary exploitation (e.g. repeat transmissions, sales, DVD). Producers are contractually required to supply Directors UK with information on which to base distribution of payments under the Distribution Scheme. This includes details of all secondary exploitation of works.

In **New Zealand**, where producers are regarded as authors and copyright owners in audiovisual works, the directors' and writers' guilds offer standard contracts that are used only on a voluntary basis by producers and often adapted. Remuneration is a matter of strict contract law, negotiated on an individual basis. In addition to an up-front payment, authors only can bargain a percentage of net receipts.⁸⁰ Similarly in **Australia**,⁸¹ directors and writers of audiovisual works rarely take part in revenues generated from the exploitation of their works.⁸² In 2005, the Copyright Amendment Bill (i.e., Film Directors' Rights) recognised directors as copyright owners for the purpose of statutory retransmission royalties scheme when a free-to-air broadcast is retransmitted on a different network.⁸³ However, directors will not get this royalty if they fail to retain their right to receive royalty income in their contracts, which is an industry practice,⁸⁴ or when the film is commissioned or the director is an employee.

Similarly in **Ireland**, despite directors and producers are deemed co-authors and initial owners of copyright in a film, a presumption of transfer in favor of the employer applies, unless otherwise agreed upon, when a film is made under employment. For this reason, the SDGI advises film directors to state in their contracts that *"rental and lending rights payments and secondary rights and other payments collected by the Guild and/or any other collecting societies to be payable to the Director (and not the entitlement of the production company or any other entities)."*⁸⁵

In **Canada**,⁸⁶ audiovisual authors may benefit from a dual non-cumulative system. Collective agreements negotiated by unions and remuneration rights, managed by SACD for French-language works. The Canadian audiovisual industry is well-organised. Almost every working category is represented by collective agreements.⁸⁷ Unlike the United States, no contract-bargained residuals exist in Canada. Canadian screenwriters collect little royalty revenues beyond the up-front money received upon production. However, the Directors Guild Agreement includes a "Rights Acquisition Fee for Directors", often referred to as a buyout to pay for future use of the work. This is a one-time payment based on a fee that must be paid regardless of what future use is made of the work and regardless of its success. It differs from the US residual system, but at least secures a minimum contractual payment for directors. On top of that, the Canadian Screenwriters Collective Society⁸⁸ (CSCS) has been distributing secondary use monies (e.g., broadcast and cable retransmission, rentals and private copying levies) collected by CMOs in Europe and other jurisdictions as well as fees for cable retransmission by Canadian companies.⁸⁹

⁸⁰ See ScreenWriters Agreement (ch.5) presented by the New Zealand Writers Guild <http://www.nzwg.org.nz/members/contracts/contracts/>. The Directors and Editors Guild of New Zealand recommends in its standard agreement that if the director has been involved in developing the concept or script in addition to directing, they should get a 2.5% minimum profit share of production revenues. <https://www.degnz.co.nz/wp-content/uploads/2016/12/DEGNZ-RECOMMENDED-RATES-FOR-DIRECTORS-2017.pdf>

⁸¹ As a result of a combination of specific rules on commissioned works and works made under employment, authorship and ownership of an audiovisual work typically belongs to the producer.

⁸² In 2015, the Australian Government started a Productivity Commission Inquiry into Australia's intellectual property system. The union Australian Directors Guild (ADG) and the Australian Screen Directors Authorship Collecting Society (ASDACS), a CMO which represents the interests of film and television directors, documentary filmmakers and animators in Australia and New Zealand, proposed the need for copyright reform to recognise directors as authors of audiovisual works and ensure fair remuneration for their creative contribution in the inquiry. It pointed out the lack of incentives for creativity in the form of copyright for screen directors under the current IP arrangement. http://www.pc.gov.au/_data/assets/pdf_file/0005/194351/sub010-intellectual-property.pdf

⁸³ Under the Australian Copyright Act, free-to-air broadcasts can be retransmitted by another service, such as pay television, provided a license is obtained for screenrights. Screenrights licenses pay TV operators, mobile phone companies retransmitting broadcasts, Internet Protocol TV (IPTV) as well as retransmissions in hospitals and new housing developments. <https://www.screenrights.org/content-users/australian-services/retransmission-license>

⁸⁴ For this reason, ASDACS drafted a clause to reserve "retransmission rights" and recommends its inclusion in production contracts as follows: *"The Director is entitled to receive: (i) all payments from retransmission of the Film as a "cinematograph film" under Part VC of the Copyright Act 1968 (Cth) – Screenrights Retransmission Income; and (ii) any other payments by way of "secondary rights" (including, without limitation, for private copying, retransmission and statutory or voluntary licenses) either granted to the Director now or in the future under Australian or other law or that result from any collective bargaining agreement, and that are generally administered by or through a collecting society charged with the collection and distribution of such payments (including ASDACS, the Australian Screen Directors Authorship Collecting Society Limited).* <http://www.asdacs.com.au>

⁸⁵ Screen Directors Guild of Ireland <http://www.sdgi.ie/directors-copyright> The collecting society that manages directors' rights in Ireland is the Screen Directors Collecting Society of Ireland (SDCSI): <http://www.sdgi.ie/screen-directors-collecting-society>. For screenwriters, see the Writers Guild of Ireland <http://script.ie/join/>

⁸⁶ Canadian law offers no specific rules on audiovisual authorship or initial ownership. Accordingly, solutions derive from the circumstances of each case and from contracts agreed with producers.

⁸⁷ Canadian Guilds representing all areas such as actors, technicians and drivers negotiate collective agreements with producers (CMPA) that cover economic and creative terms.

⁸⁸ The Writers Guild of Canada (screenwriters) succeeded in retaining copyright in their works in the collectively-bargained production agreement and licensing it for audiovisual productions. Screenwriters retain separate exploitation of their works, such as for stage plays, merchandising and novelisation.

⁸⁹ See: <http://www.wgc.ca/cscs/about.html>

The same is done on behalf of audiovisual directors by the Directors Rights Collective of Canada (DGC), collecting and distributing royalties derived from foreign secondary uses including broadcasts of audiovisual works in Europe and elsewhere.⁹⁰ On the other hand, French Canadian audiovisual authors (e.g., directors, writers and composers) may become SACD members and receive public broadcast, cable retransmission and private copying remunerations in Europe on the basis of a voluntary mandate by the author according to the system in France.⁹¹

(iii) In civil law countries

In civil law countries, the impact of **collective bargaining in the audiovisual industry is far less significant**. Collective bargaining with producers is done by CMOs and, when done so, it results mostly in contractual model agreements including rules on minimum remuneration fees for authors and performers, which will not always be enforced by production contracts. The following are a few country examples.

In **France**, collective negotiations between SACD and audiovisual producers led to the “VOD Agreements” that were later authorised sanctioned by a 2007 decree to enlarge its effectiveness (see below).

In **Germany**, collective negotiations are generally accepted by law to agree on remuneration rules in a manner similar to the Guilds’ agreements in the United States; this includes how to define and calculate amounts for remuneration.⁹² So far, only a few agreements have been signed.⁹³

In **Spain**, minimal exploitation revenue percentages are agreed upon by collective bargaining to be paid on top of the salary, such as in the case for audiovisual performers. However, in practice, they are usually deducted from the salary.

In theory, promoting the authors’ ability to individually or collectively negotiate is the best way to maximise the value of authors’ exclusive rights. It is more in accordance with the exclusive nature of the authors’ exploitation rights. However, even when contractual terms have been successfully negotiated, they still need to be included and secured in production contracts and enforced by producers. This reduces its effectiveness. Furthermore, they could only benefit new audiovisual productions, failing to secure new revenue streams from upcoming and unforeseen markets for pre-existing audiovisual productions.

On the other hand, collective bargaining is currently an unrealistic option in most countries where neither the audiovisual industry nor the the level of development and establishment, of CMOs, unions or guilds are strong.⁹⁶

Collective bargaining of production contracts alone cannot be considered a feasible solution to secure remuneration for audiovisual authors in an imminent and effective manner worldwide.

⁹⁰ See: <http://www.dgc.ca/en/national/the-guild/drcc/>

⁹¹ This is why the “SACD Clause” must be included in production contracts. See SACD Canada: <http://www.sacd.ca/index.php/clause-sacd/> See also the Société des auteurs de radio, télévision et cinéma (SARTEC) <http://www.sartec.qc.ca/> For music composers, see *Société du droit de reproduction des auteurs, compositeurs et éditeurs au Canada* (SODRAC) and Society of Composers, Authors and Music Publishers of Canada (SOCAN).

⁹² Once remuneration rules have been agreed upon, they are presumed to be equitable and fair for purposes of complying with the “adequate” requirement in S.32 and S.36 UrhG.

⁹³ In the audiovisual sector, the German Director’s Guild (BVR) has also concluded an agreement with private broadcaster Pro7/Sat1 Deutschland establishing minimum fees and participation of the author in benefits generated by works through success related fees. The agreement applicable to fictional programmes, TV series and theatrical future films will be retroactive to 2002 (see FERA, Newsletter October 2013, p. 3.) In November 2012, German public broadcaster ZDF was obliged by the Court of Munich to negotiate with the German Director’s Guild (BVR) in order to agree on common rules for adequate remuneration on the basis of Section 32. See CRIDS/KEA (2014) Contractual Arrangements..., p.63

⁹⁴ As reported by AISGE, see IVIR (2015) *Remuneration of Authors...* p.95.

⁹⁵ See EU Commission (2011) Green Paper on the online distribution... p.16: “Another option would be to promote authors’ ability to undertake negotiations individually or collectively. This could be seen as the best way to maximize the value of authors’ exclusive rights, especially as the making available right could prove to be one of their most valuable negotiating assets in the future.”

See EU Parliament (2012) Report on the online distribution... #50: “Maintains that the best means of guaranteeing decent remuneration for rights-holders is by offering a choice, as preferred, among collective bargaining agreements (including agreed standard contracts), extended collective licenses and collective management organisations.”

⁹⁶ Countries where audiovisual trade unions and CMOs are the strongest include the United Kingdom, Denmark, France, Germany, Spain and Italy. See IVIR (2015) *Remuneration of Authors ...* p.49.

c. Securing remuneration from licensees via collective management.

Beyond payment obtained from producers, as agreed upon in production contracts, audiovisual authors may also receive **secondary revenues for specific forms of exploitation, which are directly paid by licensees and managed by CMOs**. In most countries, these secondary revenues provide the most substantial revenue stream for audiovisual authors.⁹⁷

Remunerating audiovisual authors via **collective management** is proving to be the best way to secure remuneration on a worldwide basis. Certain national laws expressly secure it by means of **statutory remuneration rights**.

(i) Collective management of rights in general

Collective management organisations (CMOs) are well established in many countries and rapidly developing in others. Since their inception at the end of the 18th century, CMOs have played a fundamental role in licensing exploitation and providing authors, including audiovisual authors, remuneration for exploitation of their works.⁹⁸ As new online markets, which can be more efficiently licensed by producers, evolve, the role of CMO in securing remuneration for authors becomes even more necessary.

CMOs are specifically designed and equipped to “*enable rightholders to be remunerated for uses which they would not be in a position to control or enforce themselves, including in non-domestic markets.*”⁹⁹

It is only natural that the pivotal role CMOs perform as facilitators in the copyright industry continues to evolve with time, constantly adapting to all different markets and new licensing scenarios.¹⁰⁰

However, the development of collective management in various countries is uneven, responding to **diverse market needs** and adjusting to different legal structures and provisions. Collective management is stronger in certain countries than others.¹⁰¹

Rights managed by national CMOs and specific licensed exploitation activities as well as the nature of these licenses depend on each national legal framework, national intellectual property market circumstances as well as the efforts and success of negotiations with those businesses exploiting copyright.

As a general rule, collective management comprises of a combination of **exclusive rights licenses** and **remuneration rights licenses** that have been entrusted to a CMO either by the author, by law under mandatory collective management or under compulsory or statutory licensing schemes.

Traditionally and historically collective management has been done on a **voluntary basis**. Authors entrust their rights to be managed by a CMO on their behalf. The oldest and more solid instances of collective management, both at national and international levels, have been built on voluntary mandates:¹⁰² public performance and broadcasting licenses for musical and audiovisual works.

⁹⁷ See SAA (2015) White Paper ... p.20. The same conclusion holds true for performers: “... most performers are depending much more on the remuneration rights and the remuneration from private copying than on the exclusive rights to receive an income from the exploitation of their rights;” See AEPO-ARTIS Study ... p.4

⁹⁸ Prof. Gervais explained that following Beaumarchais’ idea in 1777, collective management of rights has been -ever since- seen as a practical and the most efficient way of allowing creators to be compensated by facilitating establishing unified methods for collecting and dispersing royalties as well as negotiating licensing arrangements for works. Over time, the role of CMOs has evolved to oversee compliance, fight piracy and perform various social and cultural functions. See D. Gervais, “The Changing Role of Copyright Collectives” in (2006) *Collective Management of Copyright and Related Rights* (Gervais, ed.), Kluwer Law International, p.15-18.

⁹⁹ See Recital 2, Collective Rights Management Directive 2014/26/EU.

¹⁰⁰ See Gervais, *Collective Management* ... p.17-18.

¹⁰¹ Among European countries, France is probably the country where CMOs operate more widely on voluntary mandates, while Spain offers a few more instances of mandatory collective management for specific means of audiovisual exploitation.

¹⁰² In specific instances, national laws may provide for “presumptions” of collective management to facilitate the task of CMOs. For instance, to bring claims against infringers the law presumes that all authors are members of the CMO so that it does not need to produce evidence of each individual mandate. Yet this would be a presumption that can be deactivated by proving or agreeing otherwise.

In specific instances, national laws may subject a license to **mandatory collective management**, meaning that licensing this right can only be managed on a collective basis. Authors cannot exercise it themselves. Statutory and compulsory licensing,¹⁰³ in exchange for remuneration or compensation, is often subject to mandatory collective management. This is the case for cable retransmission in the European Union. Yet some other rights are managed collectively by statutory mandate. This is the case in a few European countries regarding remuneration for rental as well as several other remunerations deriving from the transfer of exploitation rights to producers (see Chapter III.3).

In Nordic countries, CMOs may grant **extended collective licenses**. When a CMO that is representative of a “substantial” number of author licenses (its repertoire), this license is automatically extended to cover also any other domestic and international authors in the same category, regardless of not being in the CMO’s repertoire. Unlike most compulsory or statutory licenses, an author may opt-out of an ECL and license his or her rights on an individual basis.

Licenses granted by CMOs may be based on exclusive rights or remuneration rights for acts of exploitation that have already been licensed either by the copyright owner or by the statute. (e.g., non-voluntary licenses, statutory limitations and exceptions). Collective licenses offered by CMOs tend to make no apparent distinction in this regard. This is understandable because when managed on a collective basis, the licensing mechanism is the same regardless of whether it is an exclusive right or a remuneration right. Rights and remunerations managed collectively can only be “authorised” on fixed conditions, not prohibited.¹⁰⁴ Yet for theoretical purposes and this study, the distinction is relevant.

To the extent that collective management regimes are stable, consolidated and share their repertoires globally by means of reciprocity agreements, **CMOs are in a much better position than producers to efficiently provide authors with equitable remuneration for the exploitation of their works worldwide**. CMOs have the knowledge and scale of economies in place to secure fair remuneration for authors in a manner that producers are not in a position to do and that is complementary to licensing done by them.

(ii) Remuneration of audiovisual authors via collective management

Historical experiences worldwide show that collective management is the best way to secure remuneration for authors for the exploitation of their works. This is especially true for audiovisual authors.

The exploitation of audiovisual works offers multiple **acts of lawful exploitation that can produce secondary revenues** for authors through CMOs:¹⁰⁵

- Theatrical exhibition: Box office share based on the sale of entrance tickets;
- Non-theatrical exhibition: Exhibition to the public without entrance fees;
- TV broadcasting, including by satellite, and pay TV;
- Cable retransmission of a TV broadcast beyond or within the original broadcast territory;
- Communication to the public in public spaces (e.g., bars, restaurants, hotels, public transit);
- Video sales and rentals of tangible copies of audiovisual works or recordings;
- On-demand online exploitation: This may include online video sales and rentals as well as on-demand access and revenues collected by online platforms from consumers as a subscription or pay-per-view basis;
- Private copying levies: Compensation for making private copies;
- Compensation for other limitations such as educational purposes and public lending.

¹⁰³ In principle, a statutory license is an authorisation granted by law to exploit works in specific conditions in exchange for the payment of a fee set by the same law or regulation. There is no need to apply for it because the law already authorises the use. A compulsory license is a license that needs to be compulsorily granted by the copyright owner and applied for by the licensee to authorise the exploitation of the work in certain conditions and in exchange for a fee to be agreed by the parties. See *Guide to the Copyright and Related Rights Treaties Administered by WIPO and Glossary of Copyright and Related Rights Terms*, 2003, p.277

¹⁰⁴ CMOs must license anyone who applies for it. CMOs can neither prohibit an act of exploitation nor discriminate among licensees by establishing different licensing conditions. Licensing conditions as well as applicable fees are fixed and equally applied to all licensees. CMOs may initiate infringement proceedings against anyone who fails to obtain the corresponding license be it of exclusive or remuneration rights.

¹⁰⁵ For detailed information regarding the audiovisual industry supply chain, such as for film or television, see IVIR (2015) *Remuneration of Authors...* p.83 - 102.

Even though licensing of some of these acts of exploitation is done directly or indirectly by producers or rightsholders, audiovisual authors may still receive remuneration for them via CMOs paid directly by the licensees. **Opening secondary revenue streams through CMOs does not conflict with licensing audiovisual works**, which remains in control of producers. Rather, it complements it.

Securing remuneration for audiovisual authors for these secondary uses through CMOs is already a reality in some countries.

Music composers

Music composers, particularly of music specifically created for audiovisual work, have been traditionally remunerated for the exploitation of their compositions in through secondary revenues under voluntary collective management films (e.g., theatrical exhibition, broadcast) nearly everywhere. Music composers have traditionally entrusted the exercise of their exclusive rights to collective management, separate from the film licensing done by the producer. This may be explained for historical reasons as well as by the specific strength of music composers CMOs. During the silent film era, the accompanying music was performed live in the theatre along with the film showing, and subject to a separate license. In addition, when pre-existing music is synchronised into a film, separate licenses are required not only for its production but for all subsequent acts of exploitation of the film since authors of synchronised music are not generally deemed to be co-authors of the audiovisual work.

In order to do so, music composers must retain the exclusive right of communication to the public to be entrusted to a CMO. Thus, expressly trumping the presumption of transfer to the producer where applicable.¹⁰⁶ CMOs facilitate it, but it is ultimately a matter for contracts and markets.

Music composers used to be the only co-authors who enjoyed secondary remuneration for the exploitation of audiovisual works. This is starting to change as more and more countries secure for audiovisual authors, at least for directors and writers, remuneration rights that will be paid directly by licensees and managed by CMOs.

In certain countries, audiovisual authors receive remuneration for one or more of the following exploitations through CMOs: theatrical exhibition (i.e., box office share), communication to the public (in public places), TV broadcasting, rental, public lending, cable retransmission, online uses, private copying (when compensated typically by a levy system) as well as remuneration for other uses (primarily to compensate for statutory limitations such as for educational purposes).

Far less common is remuneration for online means of exploitation. Despite authors having been granted an exclusive right of making available, this has yet to produce additional remuneration for audiovisual authors. This is because it is usually transferred in favour of producers with no extra remuneration for authors. CMOs can hardly efficiently manage it on a voluntary basis. Recent legislative action in some European countries (e.g., France, Italy, Spain, Poland, Estonia, Lithuania, Bulgaria and Romania) as well as in Georgia, Armenia, Chile, Colombia and Mexico is meant to secure equitable remuneration for audiovisual authors, including for online uses. In other countries, remuneration for online uses is being secured through collective negotiations. This is the case for France and, more recently, the Netherlands.

As previously explained, remunerations that audiovisual authors receive through collective management vary from one country to another. **No international standards exist.** The scope and nature of these remunerations remain a matter for each national law. For instance, audiovisual author remuneration for online uses in one country may have been achieved by negotiation with producers and voluntary mandates from authors (e.g., France), while the same remuneration in another country was mandated by law and entrusted exclusively to collective management (e.g., Spain).

¹⁰⁶ In the SGAE model contract for music composers, they exclusively transfer the rights of reproduction and distribution of the musical composition in the film, but retain the right of communication to the public to be entrusted to SGAE, assuring that it will not be exercised to prohibit any act of exploitation authorised by the producer. See: http://www.sgae.es/recursos/doc_interactivos/guia/docs/contrato_compositor.pdf

Even within **Europe** where collective management is widespread, differences among countries are important as the following examples show:

Rights managed by SAA members in Europe

The following tables reflect the situation of collective administration of authors' rights in the audiovisual sector across the 25 CMO members of Society of Audiovisual Authors. It shows licensed activities and generated revenues by country.

Table 3

Rights managed by SAA members (2014)

Country	SAA member	Cable retransmission	Private copying	Other retransmission right*	Online/ on demand uses	TV broadcasting	Video sales	Educational uses	Video rental	TV archives	Video lending	Cinema / Public performance
Austria	Literar-Mechana											
Austria	VDFS											
Belgium	SABAM											
Belgium	SACD / SCAM											
Czech Republic	DILIA											
Estonia	EAAL											
Finland	Kopioosto											
France	SACD											
France	SCAM											
Germany	VG Bild-Kunst											
Germany	VG Wort											
Hungary	Filmjus											
Italy	SIAE											
The Netherlands	LIRA											
The Netherlands	VEVAM											
Poland	ZAPA											
Portugal	SPA											
Slovakia	LITA											
Spain	DAMA											
Spain	SGAE											
Sweden	Copyswede											
Switzerland	SSA											
Switzerland	SUISSIMAGE											
UK	ALCS											
UK	Directors UK											
TOTALS		24	23	19	17	16	15	15	11	11	9	8
Percentage		96%	92%	76%	68%	64%	60%	60%	44%	44%	36%	32%

* Satellite, IPTV

Figure 5

Respective share of the main categories of royalty collected by SAA members (2013)

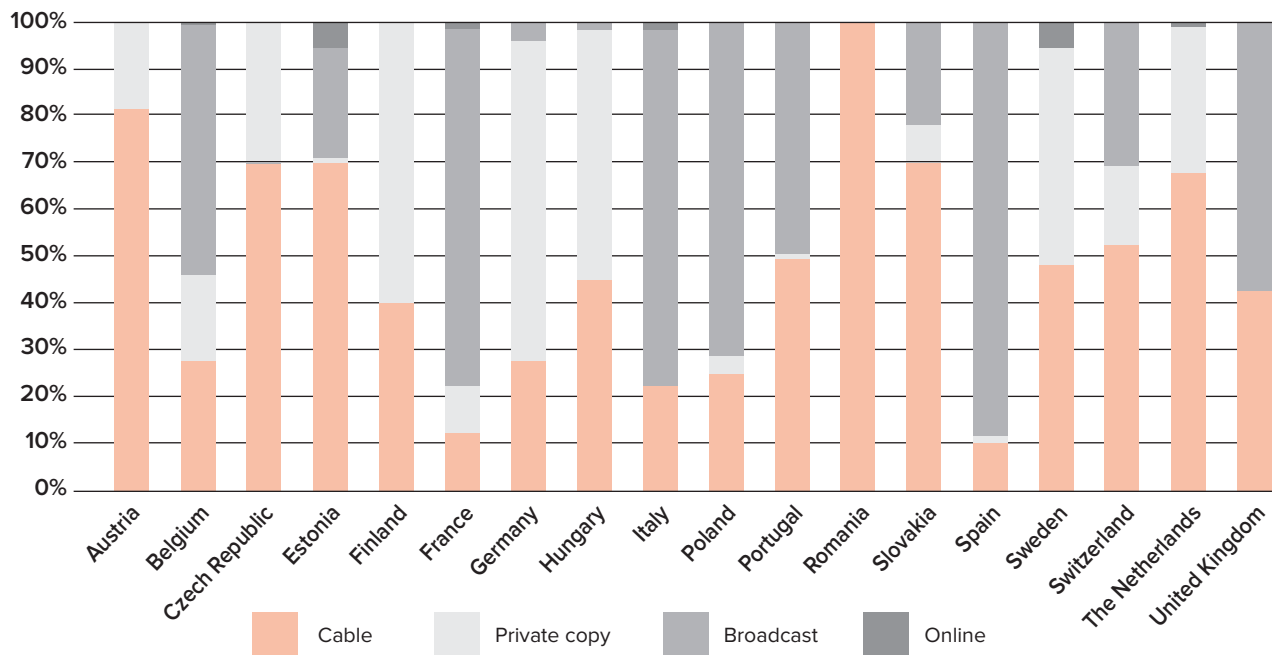


Figure 5 clearly shows how different CMOs depend on rights for the remuneration of their members.

Source: SAA (2015) White Paper *Audiovisual Authors' Rights and Remuneration in Europe* (p.25-27)

<http://www.saa-authors.eu/file/13/download>

Two major rights collectively managed by SAA members are **cable retransmission and private copying levies**.¹⁰⁷ This can be explained because both rights have been (to differing extents) harmonised by EU *acquis* and are subject (to differing extents) to mandatory collective management. Cable retransmission right is collectively managed across all European countries except in Italy, following the mandate in the Satellite and Cable Directive 93/83/EEC (see Chapter III.2). Applied on supports and devices used to make copies, levy systems to compensate for the limitation of private copying are in place in virtually all countries that provide this limitation.¹⁰⁸

For **other remunerations**, revenues differ from country to country depending on several factors. These include the success of particular voluntary agreements (for instance, CMOs administer television broadcasting licenses on behalf of audiovisual authors in France and Belgium); the specific remuneration rights granted by national law (for instance, box office shares exist only in Spain and Poland)¹⁰⁹; or the implementation of statutory remuneration schemes mandatorily managed by CMOs (for instance, for making available online in Spain) or extended collective licensing (ECL). Similarly, collective management of remuneration rights for online exploitation is only carried out in 12 countries within the EU. These collections are very small.

As far as remuneration rights for rental (ex Art.5.1 Rental Directive), the empty squares under “video rental” show that **unwaivable rights and mandatory collective management** are two measures that are absolutely necessary to secure the effectiveness of a remuneration right.¹¹⁰

¹⁰⁷ See SAA, *White Paper ...* p.20: “The two major rights that are collectively managed which result in payments for audiovisual authors in Europe are **cable retransmission** (as a result of harmonization of rights in Directive 93/83/EEC) and private copying in the countries where levies exist. On a country by country basis, other secondary rights like the rental and public lending rights are collectively administered and result in additional payments for audiovisual authors.

¹⁰⁸ In the UK, the limitation exists, but it is not compensated. In Spain and Finland, the statutory limitation was -at the time of the Study-compensated by the state budget.

¹⁰⁹ The SAA table includes theatrical exhibition and communication in public places in the same column.

¹¹⁰ In addition, express mention that remuneration fees will be paid by the licensee is also advisable. See SADC, *Contribution to Green Paper ...* p.15: “Outre la mention de la gestion collective, il conviendrait de préciser au niveau européen, d’une part, **le caractère obligatoire du recours à ce mécanisme** et d’autre part, que **cette rémunération sera acquittée par le distributeur final (le service de média audiovisuel)**. En effet, l’expérience de la transposition du droit de location, prévu à l’article 5 de la directive 2006/115 « droit de prêt et location », a montré que sans ces précisions pratiques, le versement des sommes dues aux auteurs n’était pas assuré.”

In summary, the SAA charts show not only the **diverse and unharmonised scope of remuneration rights** in Europe, but also **that the role of collective management organisations in securing remuneration for audiovisual authors is vital and especially efficient when remunerations are the same, unwaivable and entrusted by law to exclusive, mandatory collective management across different countries.**

Scenarios around the world to secure remuneration of audiovisual authors are also diverse.

Collective management in **the former Soviet States** is uneven and at different stages of development. For instance, particular remuneration rights for audiovisual authors are secured, at least on paper, in Georgia and Armenia, but no audiovisual CMO exists in Russia. All rights are transferred to producers. Only music composers are allowed to receive some remuneration for exploitation of the audiovisual work (e.g., RAO).¹¹¹

Despite the fact that CMOs have been historically available in **Latin American** countries¹¹² and that collective management is rapidly developing, CMOs are unevenly developed and the needs of audiovisual authors and performers are far from fully satisfied. With a few exceptions, no audiovisual authors other than music composers¹¹³ are receiving remuneration for the exploitation of their works beyond what they negotiated with producers. This is why recent statutory amendments in Chile and Colombia have granted unwaivable remuneration rights to audiovisual authors (to writers and directors in Chile) managed by CMOs, paid by licensees, and safeguarded from production contracts.

The legal, economic and market conditions in most **Asian countries** do not facilitate collective management for audiovisual authors, or for authors in general. Collective management arrived late in Asia. Until the last decades of the 20th century, the existence of collective management in some countries only existed “on paper” and was far from being operational. In countries where collective management is developed (e.g., Japan¹¹⁵, Singapore, Malaysia, India, China and Thailand), the work of CMOs focuses on licensing musical works and sound recordings as well as literary works (e.g., reprography and private copying). Other than music composers, audiovisual authors do not receive any secondary sources of remuneration via CMOs for the exploitation of their works.

Be it with *copyright* or *droit d’auteur* traditions, the reality in **Africa and Arabian countries** is hardly supportive of neither collective bargaining or collective rights management for audiovisual authors. Only a few national laws regulate collective management (e.g., Kenia, Nigeria, Lebanon, Morocco and Tunisia). In most countries, CMOs are only developing, particularly in regards to audiovisual authors. As elsewhere around the world, audiovisual performers and music composers receive some remuneration for the exploitation of audiovisual recordings and works, but not the rest of audiovisual authors. For instance, no CMO represents audiovisual authors in Kenya or Nigeria; yet CMOs exist in both countries to manage the rights of audiovisual performers and music composers. Audiovisual authors may receive some equitable remuneration from television broadcasting in very rare instances (e.g., Burkina Faso and Senegal). In general, national laws do not grant any remuneration rights to audiovisual authors. Their remuneration remains a matter for contract law.

Unwaivable remuneration rights subject to mandatory collective management have been proven more efficient to secure remuneration for authors than remuneration rights, which can be waived or are not subject to mandatory collective management. Putting aside the particular case of music composers, securing remuneration through statutory remuneration rights is more efficient than through exclusive rights, which must be reserved by authors in production contracts and entrusted to CMOs on a voluntary basis.

¹¹¹ See Russian Authors Society (RAO): <http://rao.ru/en/>

¹¹² Argentina, Brazil and Mexico are countries with a longer history of collective management and strong CMOs.

¹¹³ Argentina offers an example of how audiovisual authors remuneration has been successfully secured on the basis of voluntary mandates of rights to CMOs.

¹¹⁴ Music composers do receive remuneration through collective management for some acts of exploitation (e.g., box office, broadcasting).

¹¹⁵ See K. Okumura, “Collective Management in Japan”, in *Collective Management of Copyright and Related Rights* (Gervais, ed.), Kluwer Law International (2006).

d. Statutory remuneration rights for audiovisual authors.

The role of CMOs in securing remuneration for audiovisual authors is substantially facilitated by means of statutory remuneration rights. Statutory remuneration rights are not new to copyright law. Several precedents can be found in international instruments as well as in national laws.

Both international instruments and national laws have recognised the value of remuneration rights to secure equitable remuneration for authors and performers. This study briefly summarises them. For a more detailed analysis of these provisions, refer to Chapter III.

(i) International instruments

International conventions have always acknowledged unwaivable remuneration rights as a mechanism to secure remuneration of authors and performers for the exploitation of their works and performances beyond the transfer of exploitation rights. This is the case of the authors' remuneration rights allowed for broadcasting and communication to the public (Art.11bis (2) Berne Convention and Art.8 WCT) or the resale right granted for artworks (Art.14ter Berne Convention) as well as for performers and producers, the single equitable remuneration shared for the broadcasting or the communication to the public of a phonogram (Art.12 Rome Convention and Art.15 WPPT). The most recent examples of remuneration rights envisioned by an international instrument are found in the the Beijing Treaty on Audiovisual Performances (2012). In addition to recognizing audiovisual performers a right to equitable remuneration for broadcasting or communication to the public (Art.11.2 BT), it allows Member States to introduce a general right of equitable remuneration for "any use" of audiovisual performances (Art.12.3 BT), clearly intended to also cover online exploitation. It is important to mention that Art.12.3 BT offers equitable remuneration together with an alternative "to receive royalties" namely via contractual (individual or collective) agreements.¹¹⁶ This remuneration right is not conventional minima; it is optional for Member States. Nevertheless, the importance of Art.12.3 BT should not be diminished, to the extent that it acknowledges -for the first time, in an international instrument- the possibility of granting a statutory remuneration right for "any use" (of an audiovisual performance), including by online means.

These conventional remuneration rights have not always translated into effective protection for authors and performers at national levels. The reasons are easy to identify. Adopting these remuneration rights is typically optional for Member States. Even when set as conventional minima, Member States are free to determine conditions for exercising them, often failing to make them unwaivable or subject to mandatory collective management.

EU *acquis* provides more examples of remunerations applicable to audiovisual authors that may be managed by CMOs; a few are exclusively managed by CMOs:

- The "right to obtain an equitable remuneration" retained by authors after the transfer of the exclusive rental right to the producer (Art.5 Rental & Lending Directive): This remuneration right is mandatory for all Member States, but since national legislators had a lot of room for its implementation (e.g., whether it is subject to mandatory collective management and whether the user should be paying for it), audiovisual authors fail to receive any remuneration for the rental of their works;¹¹⁷
- Remuneration of authors for public lending: Either in exchange for a limitation to the exclusive right or as a remuneration right where no exclusive lending right (Art.6 Rental and Lending Directive);
- Remuneration for cable retransmission licensing and subsequent remuneration, which is subject to compulsory collective management (Art.8 Satellite and Cable Directive);
- Remunerations, or compensations, due in exchange for limitations allowed under Art.5 InfoSoc Directive, notably for private copying.

¹¹⁶ For instance, residuals agreed in the Screen Actors' Guild Basic Agreement in the USA, <http://www.sagaftra.org/production-center/documents>

¹¹⁷ The importance of this remuneration depends on its implementation by each national law. See Walter/von Lewinski (2010) *European Copyright Law*, OUP, #6.4.33. In practice, audiovisual authors only effectively receive any remuneration where it is subject to mandatory collective management and paid by the user (e.g., Spain).

Member States may choose not to implement these remunerations or subject them to collective management. Accordingly, little harmonisation has been achieved throughout the European Union.¹¹⁸ This is why, beyond cable retransmission, the involvement of collective management in these remunerations varies widely among Member States.

On top of that, EU Member States have chosen to enact other remuneration rights. In the end, the scenario of remuneration rights across EU countries is far from harmonised.

(ii) National laws

Unlike exclusive rights, which are more or less uniform across countries, **remuneration rights vary widely among national laws.**¹¹⁹

Where available, remuneration rights tend to cover traditional acts of audiovisual exploitation such as **theatrical exhibition (box office share), public communication (without an entrance fee), broadcasting, cable retransmission and rental. Online means of exploitation** coverage is far less common. For a detailed analysis of national provisions, refer to Chapter III.3.

Some national laws grant audiovisual authors a remuneration right for **any acts** of exploitation of their works, including online. This is the case for **Italy**,¹²⁰ as well as **Estonia, Bulgaria, Romania, Georgia, Armenia** and **India** (for screenwriters). Other countries prefer to grant a remuneration right for particular acts of exploitation, most notably communication to the public. This can include by online means (e.g., **Spain, Chile** and **Colombia**). **Poland** and **Lithuania** also grant audiovisual authors a remuneration right for specific acts of exploitation, but do not cover online exploitation.

France grants unwaivable remuneration rights for writers and directors of audiovisual works for any act of exploitation, including online. Its management can be entrusted to CMOs. A clause introduced in production contracts enables authors to entrust its payment to CMOs. **The Netherlands** expressly excludes online uses from the remuneration rights granted to writers and directors of audiovisual works and subject to mandatory collective management. Dutch CMOs are currently negotiating with VOD operators to obtain equitable remuneration based on general statutory provisions that grant authors a remuneration right for each means of exploitation of their works. Implementation of this remuneration, performed on a voluntary basis, is far from settled.

Although not always formally expressed, these remuneration rights are granted to audiovisual authors in exchange for the transfer of the exploitation to producers usually under a presumption, transfer or *cessio legis*. This is why some countries exclude music composers, which were not covered by that presumption of transfer. This is the case of **the Netherlands** and **Chile**, which grant remuneration rights only to **writers and directors**.¹²¹

Most national laws make these remuneration rights **unwaivable**. When silent, the remuneration tends to be waived or assigned in production contracts (e.g., Lithuania). In Bulgaria and Romania specifically, remuneration, which is due for any use, may be done through a CMO or the producer. It is an option that, given the bargaining power of authors in front of producers, will clearly diminish - if not exclude - the enforcement of these remuneration rights through CMOs.

¹¹⁸ Similarly, the Resale Right Directive 2001/84/EC offered Member States the possibility to subject the resale right to mandatory collective management. A significant number of Member States chose not to.

¹¹⁹ This is true even in the European Union, where certain national laws grant further and different remuneration rights to audiovisual authors beyond the EU *acquis* (notably, for the rental right).

¹²⁰ Italy grants remuneration rights to cinematographic work authors.

¹²¹ All of these countries have mechanisms in place to remunerate music composers directly by collective management.

As a result, these remuneration rights are to be **managed by CMOs**, but on different grounds:

- Some are subject to mandatory collective management (e.g., **Spain, Netherlands, Poland, Estonia and Georgia**);
- When the law is silent (e.g., **France, Italy, Bulgaria, Armenia, Chile, Colombia and Mexico**), authors will need to entrust the remuneration right management to a CMO with all the inefficiencies this implies.¹²² However, collective management may be indirectly reinforced by statute. In Italy for instance, fee negotiation is entrusted only to SIAE, which *de facto* facilitates the management of subsequent remunerations by SIAE. In Chile and Colombia, the unwaivable and inalienable character of the remuneration right granted to directors and writers will easily translate into a mandate to the respective CMOs.¹²³ In France, the **voluntary mandate of rights to CMOs** is facilitated by contractual practice.
- A few are based on **extended collective licensing** (e.g., Sweden).

In practice, **remuneration rights set by law as unwaivable, inalienable and subject to mandatory collective management will be most effective assuming that market conditions exist to generate them.**¹²⁴

Legislative action would be required to secure a remuneration right for any uses of their works for audiovisual authors under collective management.

e. Conclusions

Of all the possible above measures, granting **statutory remuneration rights under collective management** has proven to be the best way to secure remuneration for audiovisual creators at an international level, especially when unwaivable, inalienable and subject to mandatory collective management.

Remuneration rights are not foreign to copyright law. They are known and used worldwide at international and national levels to secure remuneration for authors, including audiovisual authors. In addition, statutory remuneration rights may indirectly help consolidate the development of collective management.

In some countries, remuneration for traditional forms of audiovisual exploitation (e.g., box office, performance in public places, rental, TV broadcast, satellite and cable) has been secured over centuries through collective management on a voluntary basis. The efficiency of these remuneration schemes has been improved, at times, by legislative measures that make them unwaivable and subject to mandatory collective management.

Music composers benefit from a very particular ecosystem that allows them to entrust certain exclusive rights to collective management and to obtain some equitable remuneration along the exploitation of the audiovisual works. Yet the same circumstances do not exist for other audiovisual authors.

Waiting for the development of remuneration schemes based on voluntary collective management of exclusive rights or on negotiation or renegotiation of production contracts denies authors the opportunity to obtain economic revenues from the exploitation of their works. This is true for both traditional and new evolving markets, such as online. Authors are hardly in a position to negotiate or renegotiate terms of production contracts and to entrust remuneration for their transferred exclusive rights to collective management.

¹²² When collective management is based only on voluntary mandates by authors, CMOs must check that the language in production contracts will recall authors to entrust CMOs with their rights, secure that mandate and then proceed with its enforcement. This does not always come easily, sometimes requiring costly and time-consuming judicial proceedings to even start negotiations.

¹²³ Despite that enacted remuneration rights in Chile and Colombia do not formally require collective management, no one questions that they will be managed by CMOs in practice.

¹²⁴ For example, remuneration rights granted by national laws for online means of exploitation are sometimes slow to generate substantial revenues for audiovisual authors. See Spain, Estonia, Lithuania, Georgia and Mexico. Reasons vary for each country. They range from slow development of the online audiovisual offer to internal reporting practices (e.g., remuneration may be reported under the general concept of communication to the public, along with broadcast) or to waivers remuneration rights in production contracts, as in Lithuania.

The residuals system in the United States, and in other common law countries to a lesser extent, has also proven effective in securing remuneration for audiovisual authors. Residuals are secondary payments done by producers and obtained by collective bargaining between trade unions or guilds and production companies. However, it is impossible to effectively export this regime beyond the specific legal and economic conditions existing in those countries.

Despite being very different in nature, **residuals and statutory remuneration rights ultimately achieve the same objective** to remunerate audiovisual authors fairly for the entire exploitation of their works. At the same time, they do not conflict with the exclusive rights of producers that are necessary to secure a smooth and efficient licensing practice. This is why introducing remuneration right, as proposed in this study, should safeguard the residuals system wherever it is effective.

In summary, securing remuneration for audiovisual authors for all means of exploitation of their works will require **legislative action** to grant unwaivable and inalienable remuneration rights upon the transfer of exclusive rights of exploitation to producers but independent from it, and subject to mandatory collective management if needed.



2 | Proposal: an unwaivable remuneration right under collective management

A basic principle in copyright law is that authors must receive remuneration for the exploitation of their works. However, beyond the typical lump-sum payment cashed upfront for their contributions to the audiovisual work, **authors rarely obtain any equitable remuneration from the subsequent exploitation of their audiovisual works.**

Several factors may explain why audiovisual authors are not equitably remunerated for the exploitation of their works. These factors include contractual practices in the audiovisual industry as well as the current changing, dynamic and global markets of exploitation. Diverging national solutions defining authorship and ownership of audiovisual works as well as the principle of territoriality functioning in a non-harmonised worldwide context also are elements explaining why authors are not equitably remunerated. National laws should do more to prevent this.

Contract law rules existing to protect the authors' interests in national laws have proven to be insufficient to secure fair remuneration for audiovisual authors and, in general, to shelter them from strict contractual freedom and unbalanced bargaining positions.

Collective bargaining can only help secure contractual equitable remuneration for authors in a few countries with very particular market and labor structures (e.g., the United States). Similarly, only in a few countries, such as France, collective management, on a voluntary basis, is sufficiently developed and consolidated so as to provide for authors equitable remuneration for the exploitation of their works beyond contractually agreed upon upfront remuneration for making the film. This is not the case in most other countries where CMOs are not in a position to achieve contractual "carve-outs" from the transfer of rights to producers so that authors can entrust their remuneration to collective management, at least for certain specific acts of exploitation. In these scenarios, **unwaivable and inalienable statutory remuneration rights subject to collective management -mandatory, when necessary- have proven to be the most efficient means to secure fair remuneration for authors.** This is especially true regarding new means of exploitation and evolving markets.

The study will examine in the following chapters the nature of the proposal, its compliance with international and EU *acquis* and provide comments regarding possible implementation options. A more detailed proposal analysis is provided under the Annex.

1. AN UNWAIVABLE REMUNERATION RIGHT UNDER COLLECTIVE MANAGEMENT

This study proposes introducing a statutory provision securing an unwaivable and inalienable right to obtain equitable remuneration for audiovisual authors in exchange for the transfer of their exploitation rights to producers, subject to collective management (administered by CMOs on a voluntary or mandatory basis or under ECL) and paid directly by the user or who ever carries out the exploitation activity for each act of exploitation.

For this purpose, the following text is proposed:

Without prejudice to any other agreements or regimes that guarantee remuneration to audiovisual authors, the authors of an audiovisual work shall retain, in exchange for the transfer of exclusive rights to the producer, an unwaivable and inalienable right to receive equitable remuneration for any acts of exploitation of their works, under collective management, and paid directly by the users.

The language may be adjusted depending on the context of implementation (see below Chapter II.4). Such a provision should preferably be introduced at international levels and on a mandatory basis in order to enhance its efficiency. However, it can also be effective if introduced on a national or supra-national basis such as at the European Union level. Specific exploitation acts subject to remuneration will be defined upon the specific particular circumstances of each national market and revenue streams.

In 2015, SAA's White Paper ¹²⁵ proposed a similar provision envisioning remuneration for online means of exploitation only.

1. When an audiovisual author has transferred or assigned his making available right to a producer, that author shall retain the right to obtain an equitable remuneration.

§2. This right to obtain an equitable remuneration for the making available of the author's work(s) cannot be waived.

§3. The administration of this right to obtain an equitable remuneration for the making available of the author's work(s) shall be entrusted to collective management organizations representing audiovisual authors, unless other collective agreements already guarantee such remuneration to audiovisual authors for their making available right.

§4. Authors' collective management organizations shall collect the equitable remuneration from audiovisual media services making audiovisual works available to the public in such a way that members of the public may access them from a place and at a time individually chosen by them.

The current proposal follows the same approach but with a wider scope to cover all means of exploitation. It seeks to secure audiovisual authors remuneration for **current exploitation markets, including online**, but also for **any future means of exploitation**, securing equitable remuneration for audiovisual authors directly from licensees.

Remuneration must be **equitable** (i.e., proportional to revenues), secured for **different means of exploitation** (i.e., separate remunerations) and **paid by the licensee**. Remuneration **cannot be waived or transferred** in any manner. Thus, it cannot be deducted from the upfront remuneration agreed with the producer. Its management may be entrusted by the author to a CMO on a voluntary basis, or it can be subjected by the legislator to mandatory collective management, depending on the circumstances of each country and/or market of exploitation. Its unwaivable and inalienable nature¹²⁶ ensures protection against production contracts and facilitates its **collective management**, also on a voluntary basis.

¹²⁵ See SAA (2015) *White Paper* ... p.38

¹²⁶ See CJEU, 9 Feb.2012, *Luksan v. Van der Let* (C-277/10), where the court concluded that an unwaivable remuneration right also includes its inalienability.

a. Reasons

The complex structure of authors' rights in audiovisual works combined with contractual practices and exploitation needs of the audiovisual industry **fail to secure equitable remuneration for audiovisual authors for the exploitation of their works** through all existing and developing means of exploitation in current dynamic and global markets.

Several reasons justify the need for this proposal.

Territoriality of copyright laws → Audiovisual productions are meant to have a long exploitation life and, usually, worldwide. In order to overcome diverging and complex structures allocating authorship and ownership of audiovisual works under different applicable national laws, production contracts tend to concentrate all exploitation rights in the hands of the producer for all territories and means of exploitation. As a result, authors are “cut off” from the exploitation of their audiovisual works and from the revenues generated by it.

Unbalanced bargaining position of authors vis-a-vis producers → “Air-tight” transfers of exploitation rights in favour of producers combined with the usually unbalanced position of authors and producers force authors to accept buy-outs and waivers of proportional remuneration¹²⁷ or even an assignment of means of exploitation unknown at the time of the transfer, despite potentially being null and void in certain countries. The contractual unbalance is aggravated by the fact that, in many countries, the producer’s position is reinforced by the ownership of neighboring rights in the audiovisual recording.¹²⁸

Unpredictability of exploitation markets → Production contracts are entered into before audiovisual works are created. The transfer of exploitation rights to producers can hardly foresee all means of exploitation of the work, let alone foresee the revenues produced over time and across countries. Most authors are not in a position to negotiate or revise remuneration clauses in production contracts. Contract rules existing in national laws aimed at protecting authors are insufficient in securing effective remuneration for audiovisual authors for all existing and new markets and all territories of exploitation.

Legislative action is required to secure equitable remuneration for audiovisual authors for the whole exploitation of their works across different markets and territories.

b. Benefits

The proposal benefits all parties involved in exploitation of audiovisual works.

The proposal is respectful to **producers’ interests** because it does not interfere with either the production or exploitation of the audiovisual work. It provides a flexible way to secure remuneration for authors without having any negative effect on production budget.¹²⁹ Remuneration rights do not disturb the assignment of rights done at the time of the audiovisual production; production contracts need not be revised to renegotiate new remunerations for new markets of exploitation. Furthermore, remuneration rights have no negative effect on the licensing process and revenue streams controlled by producers. Remuneration rights do not disturb the producer’s role in licensing the exploitation of the audiovisual work, since the producer remains the owner of all exclusive exploitation rights. In fact, remuneration rights help producers fulfill their responsibility towards audiovisual authors.¹³⁰ Remuneration rights reduce pressure from authors claiming equitable remuneration and the producers’ liability for their remuneration. Having a secured remuneration from CMOs would facilitate transferring exclusive rights

¹²⁷ Sometimes authors are forced to sign a denial of collective management and are required to indemnify producers from any direct or indirect claims from CMOs.

¹²⁸ The accumulation of two sets of exclusive rights, authors’ rights and producers’ related rights, in the same work or recording enhances the position of producers and forces authors to assign all rights in the work so that the audiovisual recording can be exploited.

¹²⁹ SACD, *Contribution to Green Paper* ... p.16

¹³⁰ See SAA, *White Paper* ... p.20: “Such a system has not hindered the production of feature films and audiovisual works. It can be cost effective for producers who do not have sufficient means and infrastructure to monitor the works on behalf of the audiovisual authors and ensures that the latter receive remuneration proportionate to each use of the works.”

of making available to producers. This would also reduce management costs for producers in distributing remuneration to authors, across territories and means of exploitation. It would facilitate the clearance and licensing process for online exploitation of works. Ultimately, remuneration rights also safeguard the licensing done by producers, since remuneration only applies to licensed acts of exploitation. This would especially be so if the right is implemented at an international level, securing authors' remuneration across all countries of licensed exploitation. Securing equitable remuneration of audiovisual authors will ultimately facilitate licensing new markets.

Remuneration rights managed by CMOs secure a constant and direct flow of remuneration for different means of exploitation to **authors** as long as revenues are generated from the exploitation of their works. Remuneration rights work as an “unwaivable minimum” secured by law and enforced by CMOs, while authors may still agree with producers on other remuneration for these or other means of exploitation. Fees will be negotiated with licensed operators and enforced by CMOs afterwards¹³¹ usually with a stronger bargaining position than authors themselves. Another beneficial aspect is that fees are based on the exploitation done by the operator, not on profits made by the producer. Introducing statutory remuneration rights would be especially useful in securing remuneration for works currently being exploited because there would be no need to renegotiate the remuneration conditions in pre-existing production contracts. Statutory remuneration rights are especially useful in overcoming contractual uncertainties deriving from unknown or unpredictable means exploitation included in the transfer of rights to the producer, typically operating under a rebuttable statutory presumption or a *cessio legis*.¹³²

Furthermore, statutory remuneration rights simplify management and enforceability through CMOs¹³³ regardless of where authors reside and regardless of countries of exploitation. They allow enough flexibility to adjust remuneration of authors to new and evolving markets, to the extent that they are being licensed by producers.

The proposal also **benefits licensees and consumers**. Remuneration of authors does not become an extra cost in payments done by licensees and, ultimately, consumers for the services. This remuneration is part of the exclusive rights license obtained from the producer. It is paid separately through CMOs directly to authors. In this manner, remuneration rights foster the production of more audiovisual content¹³⁴ and promote audiovisual creations.

“The effect on consumers would be to ensure that they had available ... a diverse selection of creative works, since an unwaivable right would extend the number of those able to support themselves as dedicated professional creators. In comparison with this benefit, we confidently predict that the cost would be very reasonable.”¹³⁵

In addition to facilitating licensing new markets, remuneration rights help licensees fulfill an indirect obligation towards audiovisual creators to make sure they are fairly remunerated. Securing equitable remuneration for audiovisual authors through collective management will ultimately facilitate the global development of new licensed markets to the benefit of all: producers, authors, operators and consumers.

“The above mentioned systems are promising as to the responses they bring to many challenges of the digital era (unpredictability, enforceability, uneven bargaining power of creators and exploiters), while at the same time being respectful of the producer's interests.”¹³⁶

¹³¹ SACD, *Contribution to Green Paper* ... p. 14-15: “...dans la majorité des cas, le rapport de force est défavorable aux auteurs. Cela se traduit pour les créateurs par la double difficulté, au moment de la négociation contractuelle, de prévoir une rémunération supplémentaire, proportionnelle (selon un taux qui ne soit pas purement symbolique) aux revenus générés par les exploitations en ligne de leurs oeuvres mais également, en aval, dans le cas où de telles dispositions protectrices existeraient, de les faire appliquer.”

¹³² This is especially important in countries where law requires that unknown means of exploitation are not included in the transfer.

¹³³ SACD, *Contribution to Green Paper* ... p.16: “...le recours à ce mécanisme, loin d'ajouter une couche supplémentaire de complexité, permettrait de simplifier la tâche de la plupart des sociétés de production qui ne disposent pas de l'infrastructure et des moyens suffisants pour suivre l'exploitation des oeuvres pour le compte des auteurs et leur assurer une rémunération effective.”

¹³⁴ SACD, *Contribution to Green Paper* ... p.16: “Enfin, la mise en place de cette rémunération permettra d'encourager la création et donc de favoriser à moyen et long termes, l'accès des usagers européens à la diversité de l'expression culturelle européenne.”

¹³⁵ CRA (2011) Response to Green Paper on online distribution of audiovisual works :

http://ec.europa.eu/internal_market/consultations/2011/audiovisual/registered-organisation/creators-rights-alliance_en.pdf

¹³⁶ See CRIDS/KEA (2014) *Contractual Arrangements*... p.75.

At the European Union level, any measure that tends to harmonise equitable remuneration rights for audiovisual authors across the EU will contribute to building the internal market.

The proposed remuneration right may ultimately work in favour of legitimising the copyright system as a whole by “putting authors first” and ensuring fair remuneration for their works as well as by encouraging lawful access.¹³⁷

c. Endorsements

The proposal to grant authors of audiovisual works an unwaivable right to obtain equitable remuneration for all means of exploitation, including online, paid by licensees and managed by CMOs has been **considered and endorsed by governments, stakeholders and international academic experts** as the best solution to secure equitable remuneration for audiovisual authors.

In 2012, the European Union Parliament confirmed the need to “rebalance” the bargaining position of authors in front of producers with an unwaivable right to remuneration “**for all forms of exploitation of their works**”, including the making available right.¹³⁸

This option has been **endorsed the SAA** in its 2011 and 2015 white papers: *Audiovisual Authors’ Rights and Remuneration in Europe*.¹³⁹

The following studies have also considered and endorsed unwaivable statutory remuneration rights as the best solution to secure remuneration for authors and performers:

- IVIR (2015) Remuneration of Authors and Performers for the Use of their Works and the Fixations of their Performances;¹⁴⁰
- CRIDS/KEA (2014) Contractual Arrangements Applicable to Creators: Law and Practice of Selected Member States;¹⁴¹
- KEA (2010) Multi-Territory Licensing of Audiovisual Works;¹⁴²
- Association of European Performers’ Organisations (2014) *AEPO-ARTIS Study: Performers’ Rights in International and European Legislation: Situation and Elements for Improvement*.¹⁴³

2. NATURE OF THE PROPOSED REMUNERATION RIGHT

In common language, the term remuneration may be self-explanatory: “money paid for work or a service.”¹⁴⁴ However, the term has different layers of significance in copyright statutes.

a. Remuneration rights

International instruments and most national statutes commonly refer to **two types of economic rights**: exclusive rights and remuneration rights.

For instance, the Agreed statement concerning Art.12 WCT reads “infringement of any right covered by the Treaty or the Berne Convention” to include both exclusive rights and rights of remuneration.

¹³⁷ SACD, *Contribution to Green Paper ...* p.16.

¹³⁸ See EU Parliament (2012) *Report on the online distribution...* #48 : “[The EU Parliament] Calls for the bargaining position of authors and performers vis-a-vis producers to be rebalanced by providing authors and performers with *an unwaivable right to remuneration for all forms of exploitation of their works*, including ongoing remuneration where they have transferred their exclusive ‘making available’ right to a producer.

¹³⁹ Society of Audiovisual Authors (2015) “*SAA White Paper: Audiovisual Authors’ Rights and Remuneration in Europe*”:

http://www.saa-authors.eu/dbfiles/mfile/6100/6137/SAA_White_Paper_2015.pdf;

Executive Summary: http://www.saa-authors.eu/dbfiles/mfile/6100/6141/SAA_WP_Exec_SummaryEN.pdf

See Joint-Statement 10 April 2012: <http://www.saa-authors.eu/en/news/61/>

¹⁴⁰ Study prepared for the European Commission, DG Communications Networks, Content & Technology:

<https://ec.europa.eu/digital-single-market/en/news/commission-gathers-evidence-remuneration-authors-and-performers-use-their-works-and-fixations>

¹⁴¹ Study prepared for the European Parliament:

[http://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/493041/IPOL-JURL_ET\(2014\)493041_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/493041/IPOL-JURL_ET(2014)493041_EN.pdf)

¹⁴² Study prepared for the European Commission, DG Information Society and Media: <http://keanet.eu/docs/mtl%20-%20full%20report%20en.pdf>

¹⁴³ <http://www.aepo-artis.org/usr/AEPO-ARTIS%20Studies/AEPO-ARTIS-study-on-performers-rights-1-December-2014-FINAL.pdf>

¹⁴⁴ As defined by the Oxford Dictionary.

“Exclusive rights” grant, in exclusivity, a power to authorise or prohibit the exploitation of the work as recognised by most national laws: reproduction, distribution, communication to the public and transformation. By exercising exclusive rights, authors may obtain economic revenues from their works. Exclusive rights are at the core of the economic component of the authors' rights. Exclusive rights can be assigned and transferred usually to a publisher or producer. When so, authors will obtain remuneration for the exploitation of their works through the publisher or producer according to agreed contract terms.

Remuneration rights grant no “control power.” They only grant an entitlement to claim an economic payment, known as remuneration.

Remuneration rights are also commonly referred to as “other rights”,¹⁴⁵ “other economic rights”,¹⁴⁶ “rights to special remuneration”¹⁴⁷ or as a “mere right to equitable remuneration.”¹⁴⁸ All these names are meant to distinguish them from “exclusive” rights.

The WIPO Guide and Glossary further distinguishes between the general term “remuneration” and “right to remuneration” as follows: ¹⁴⁹

- (1) Payment to be made by those who perform an act in respect of a work... On the basis of an exclusive right of authorization, the owner of rights is in a position to subject the authorization of any act covered by the right to the payment of an appropriate remuneration (therefore, in the case of an exclusive right, it is not necessary to state in the copyright law that owners of rights have the right to receive remuneration for the authorization of the acts concerned).
- (2) A “right to remuneration” as such may exist on two differing legal bases. Either an exclusive right of authorization is limited in certain specific cases to a mere right to equitable remuneration (such as, for example, in certain specific cases of reprographic reproduction); or the right is provided for in the international copyright and related rights norms, and in national copyright laws, as a right to such remuneration (such as the resale right).

Remuneration rights share common characteristics:

- They are recognised by a copyright statute or instrument;
- They may vest in any copyright owner (be it author, performer or producer);
- They grant no “control” faculty to authorise or prohibit any acts of exploitation;
- They grant an entitlement to obtain economic income;
- The payment is done by the end user or final exploiter-;
- They are very often unwaivable, inalienable and managed on a collective basis by CMOs-al though not always, mandatorily.

Whether or not these common traits are enough to confer an autonomous nature as a third category of rights granted to authors in addition to moral rights and exploitation rights remains in the eye of the beholder. ¹⁵⁰

¹⁴⁵ This is the term used in Spanish law to distinguish between moral rights, economic rights and “other rights” comprising only the resale right and the compensation right for private copying.

¹⁴⁶ See J.A.L. Sterling (1998) *World Copyright Law*.

¹⁴⁷ See Swedish Copyright Act including the resale right and compensation for private copying.

¹⁴⁸ Among others, the WIPO website uses the term “a mere right to equitable remuneration” when explaining that the Berne Convention grants a “right to broadcast, with the possibility that a Contracting State may provide for a *mere right to equitable remuneration* instead of a right of authorization” (meaning an exclusive right); See http://www.wipo.int/treaties/en/ip/berne/summary_berne.html

¹⁴⁹ See *Guide to the Copyright and Related Rights Treaties Administered by WIPO and Glossary of Copyright and Related Rights Terms*, 2003, p.307

¹⁵⁰ See LL. Cabedo Serna (2011), *El derecho de remuneración de autor*, Dykinson, p.192. This author contends that the only “true” remuneration rights are the ones that derive from an exception or limitation to the exclusive rights.

Remuneration rights have an **inherent economic component and are intrinsically related to the scope of exploitation rights granted to authors**.¹⁵¹ Beyond that, remuneration rights have a diverse nature and respond to different justifications to the extent that even all-encompassing definitions like those offered by WIPO fail to take into account the full diaspora of remuneration rights granted in national laws and international instruments.

Ficsor distinguishes three types of remuneration rights:¹⁵²

- Where a right is not provided for as an exclusive right of authorization but rather as a mere right of remuneration (as in the case of the resale right under Art.14ter Berne Convention);
- Where the restriction of an exclusive right (in)to a mere right to remuneration is allowed on the basis of some other wording (as is the case in respect to Art.9.2 Berne Convention concerning limitations to the reproduction right);
- “Residual” remuneration rights: rights to receive remuneration usually for authors or performers, which “survives” the transfer of certain exclusive rights. Such “residual” remuneration right by definition cannot be in conflict with the exclusive nature of the right concerned since it only applies once the exclusive right has been exercised. According to Ficsor, the remuneration right in Art.5.1 Rental and Lending Directive would qualify as a “residual” remuneration right surviving the transfer of an exclusive right.

This study will retain a simpler approach with two broad categories of remuneration rights:

- Remunerations based on a statutory **derogation or restriction** of an exclusive right;¹⁵³
- Remunerations based upon the **exercise of an exclusive right** by the author.

The first group of remuneration rights **are granted when the law deprives the author from exercising their exclusive rights** in specific circumstances. This includes any compensation for limitations, non-voluntary licensing (e.g., cable retransmission) and even the resale right would qualify here since it results from the statutory “exhaustion” of the right upon the first sale of the tangible copy.¹⁵⁴ In all these cases, the legislator is denying authors the possibility to enforce an exclusive right under specific circumstances. Exploitation is being directly authorised by the statute and authors will be duly remunerated or compensated. These remuneration rights for a statutory derogation or restriction are justified for the protection of external interests and rights, such as other fundamental rights or the need to secure the development of a service on behalf of public interest.

The second group of remuneration rights relies on **the author voluntarily exercising their exclusive rights in specific circumstances that justify legislative intervention in order to secure remuneration**. This is referred as “a right to obtain an equitable remuneration”, but for the sake of simplification, the name (ex. Ficsor) of **residual remuneration rights** may be retained. These are **justified** by the general principle that authors are entitled to obtain remuneration for the exploitation of their works. “Residual” remuneration rights are specific legislative measures aimed at ensuring that authors will receive adequate remuneration for the exercise of their exploitation rights. In particular circumstances, the legislator intervenes to secure revenue for authors that they might not obtain from the sole exercise of their exploitation rights (i.e., due to the lack of bargaining power of authors in contract negotiations).

¹⁵¹ Like exclusive rights, remuneration rights have an economic nature as opposed to moral rights, and are only granted for a limited time. They both ultimately provide authors with economic revenues through remuneration or compensation mechanisms for the exploitation of their works. However, unlike exploitation rights which are granted “in exclusive” to authors and rights holders, remuneration rights only afford an economic claim with no control power. At most, they could be regarded if necessary as a subcategory of the exploitation rights based on the commonalities they share. Yet, it would be difficult to define them all uniformly.

¹⁵² See Ficsor (2006) “Collective Management of Copyright and Related Rights in the Digital, Networked Environment: Voluntary, Presumption-Based, Extended, Mandatory, Possible, Inevitable?” in *Collective Management of Copyright and Related Rights* (Gervais, ed.), Kluwer Law International pp.37-83, p.42.

¹⁵³ It is not clear where in Ficsor’s three-tier approach that remunerations for compulsory or statutory licenses (such as the one for cable retransmission in Satellite and Cable Directive) would qualify, such as perhaps under (ii) “restriction of an exclusive right”.

¹⁵⁴ Even EU legislation avoided calling the resale right a “remuneration right”, but referred to it as a “royalty” (Art.1.1) or “an economic interest” (Recital 1) in the Resale Right Directive.

The remuneration right proposed by this study relates to this second type: a residual remuneration from a transfer of the exclusive right.

Remuneration rights as legislative instruments

In both cases, remuneration rights become a **fundamental tool to secure a balanced copyright system** either in favour of the public (exceptions, limitations, statutory or compulsory licensing) or in favour of authors (residual remuneration rights). A healthy copyright law should integrate both exclusive rights and non-exclusive remuneration rights in a balanced manner. This is so that public and private interests are duly secured, free from contractual and market imposition. Remuneration rights afford legislators a necessary layer of flexibility to regulate in favour of other general public interests such as exceptions and limitations subject to compensation as well as statutory and compulsory licenses subject to remuneration. It also affords to regulate in favour of authors' interests ("residual" remuneration rights). To the extent that residual remuneration rights confer no faculty to authorise or prohibit, they are precious legislative tools to achieve proportionality: "the need to maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to information, as reflected in the Berne Convention" (WCT, Preamble). It also recognises "the outstanding significance of copyright protection as an incentive for literary and artistic creation" (WCT, Preamble).

b. "Residual" remuneration rights

Residual remuneration rights are granted in exchange for a voluntary transfer by the author and a voluntary exercise by the producer of an exclusive right of exploitation. If the transfer and/or the license do not take place, the author enjoys no remuneration right because still enjoys the full scope of the exclusive right. In other words, the "residual" remuneration right is neither restricting nor derogating any exclusive exploitation rights, nor authorising any acts of exploitation. Instead, it is a statutory mechanism to secure remuneration of authors following a **voluntary exercise of their exclusive rights**. The legislator intervenes to secure remuneration for authors when the exploitation of the transferred exclusive right will be done **in circumstances that do not ensure effective remuneration for the author**. Contractual and market failure in the audiovisual exploitation to secure remuneration of authors justifies the need for a statutory residual remuneration right.

Spanish scholars and case law have had the opportunity to analyse and explain the nature of these remuneration rights as "contractual insurance" established by law when dealing with "means of exploitation which, due to their dimension and characteristics," the author cannot "follow"¹⁵⁵ or "which are, de facto, uncontrollable."¹⁵⁶ The inability to "control" or "follow" revenues may take place *a posteriori* because of the difficulty to track specific uses and calculate corresponding fees (e.g., remuneration for rental). The inability to follow revenues may also occur *a priori*: revenues are impossible to identify at the time of assigning rights (e.g., modes of exploitation that are included in the transfer of exploitation rights but cannot be specified or foreseen).

"Residual" remuneration rights are especially useful to secure remuneration of authors in **long and complex markets**, especially in rapidly evolving markets such as online means of exploitation. Legislative action is required because remuneration claims will extend beyond the contractual obligations between authors and producers that triggered them. A third person (e.g., user or licensee) will be required to do the payment

¹⁵⁵ See Provincial Audience of Madrid of 3 Dec.2004 (JUR 2005/39301): the author cannot license or authorise each and every activity exploiting their work. They cannot know the number of people who will exploit their work and determine the corresponding remuneration (FJ2 and FJ3).

¹⁵⁶ See S. Martín Salamanca (2004) *Remuneración del autor y comunicación pública*, Ed. Reus, p.19. In similar terms, Martín Villarejo explains that these remuneration rights are justified for "factual reasons" regarding the exploitation of the works, such as mass uses, inability to negotiate individual licenses, etc. See A. Martín Villarejo (2001) "La gestión colectiva de los derechos de propiedad intelectual sobre las creaciones audiovisuales", en *Creaciones audiovisuales y propiedad intelectual* (Rogel Vide, coord.) Ed. Reus, p.221-222

that results from a transfer of rights from audiovisual authors to the producer. Precedents of “residual” remuneration rights may be found in international instruments as well as in national laws (see Chapter III). The statutory language used confirms that they are not separate rights independent from and cumulative with exploitation rights, but an integral part of them. This can be found in Art.5.1 Rental and Lending Rights Directive:

Article 5. Unwaivable right to equitable remuneration. 1. Where an author or performer has transferred or assigned his rental right concerning a phonogram or an original or copy of a film to a phonogram or film producer, that author or performer shall retain the right to obtain an equitable remuneration for the rental.

The fact that authors and performers “**retain**” **unwaivable remuneration** upon transferring their exclusive right to producers does not duplicate the rights to be licensed. Regardless of how it is obtained (through producers or CMOs), remuneration results from the exercise of an exclusive right.¹⁵⁷

Remuneration rights envisioned for phonogram and audiovisual performers in Art.15 WPPT and Art.12 Beijing Treaty, respectively, follow the same nature and structure.

The exclusive right is transferred along with the faculty to authorise and prohibit the act exploitation, but a right to be remunerated for it is retained by the author and can be exercised against third parties (e.g., licensees). After all, the cumulation of an exclusive right and a remuneration right could only be seen as an anomaly.

In short, the remuneration right proposed by this study is granted upon the transfer of an exclusive right to the producer and depends on two voluntary facts:

- That authors transfer their exclusive rights to the producer;
- And that the producer licenses/authorises the act of exploitation.

Only then is the user obliged to pay remuneration to authors through CMOs.

3. COMPLIANCE WITH INTERNATIONAL NORMS AND EU ACQUIS

The remuneration right proposed by this study complies and is fully compatible with EU *acquis* and international obligations of Berne Union members.

a. Compliance with international obligations

The protection granted by the Berne Convention and the WIPO Copyright Treaty is a minimum of protection that Member States abide to in order to enforce towards works and authors from other Member States. The principle of minimum of protection under Art.19 Berne Convention states:

The provisions of this Convention shall not preclude the making of a claim to the benefit of any greater protection which may be granted by legislation in a country of the Union.

The conventional minima cover the absence of formalities, the minimum term of protection, the minimum rights, including the making available online under the WIPO Copyright Treaty, and the scope of permissible exceptions and limitations to these rights. These minima cannot be derogated by national law, at least not as far as the protection of Union authors and works beyond their country of origin (Art.5.1 Berne Convention).

Since many remuneration instances will accrue from the right of communication to the public as well as making available online, Berne Convention and WIPO Copyright Treaty provisions are especially relevant to this analysis. Art.11 Berne Convention grants exclusive rights of public performance and of communication to the public. Art.11bis Berne Convention allows Member States to determine the conditions for the exercise

¹⁵⁷ “Producers and the collecting societies (together rather than separately) could then negotiate the entire amount to be paid by the rental outlets, which would be shared between the producers and the collecting societies (of authors and performers)” See Walter/von Lewinski (2010) *European Copyright Law* #6.4.29

of these rights. Art.11bis Berne Convention is read to mean that Member States can turn these rights into “mere remuneration rights” by subjecting them to mandatory collective management or non-voluntary licensing, provided that no prejudice is caused to the author’s moral rights and that an “equitable remuneration” is secured.¹⁵⁸ Art.8 WCT expanded the right of communication to the public to all works (“communication to the public, by wire or wireless means, including the making available to the public ...”), but said nothing regarding the possibility of Member States determining the “conditions to exercise” it or the possibility of providing remuneration rights.

It is generally accepted that while exclusive rights under Art.11 Berne Convention may be substituted in national laws by a remuneration right and may be subject to mandatory collective management (e.g., a non-voluntary license),¹⁵⁹ the exclusive right under Art.8 WCT cannot. Hence, it is important to distinguish the scope of both provisions and specifically whether all acts of online exploitation fall under Art.8 WCT or only “interactive” acts of exploitation.¹⁶⁰

The distinction between interactive and non-interactive transmissions for purposes of Art.11 Berne Convention and Art.8 WCT and exclusive rights in national laws is academically relevant¹⁶¹ and may have substantial economic effects.¹⁶² Yet, it is not decisive in terms of international compliance in the present proposal. The remuneration right proposed here does not interfere with these conventional minima because it does not grant a remuneration right instead of an exclusive right. Rather, it secures a remuneration right retained by the author upon the transfer of the exclusive right to the producer.

As Ficsor explains, the possibility of establishing conditions for its exercise restricted to non-digital means (Art.11bis (2) Berne Convention) refers to “exclusive rights”. The proposed remuneration right does not condition the exercise of any exclusive right. Furthermore, Art.11bis (2) Berne Convention does not mean that mandatory collective management can not be used in other cases. According to Ficsor, mandatory collective management is also permissible in the case of “mere rights of remuneration” such as the resale right (Art.14ter Berne Convention), to compensate for limitations (Art.9.2 Berne Convention), as well as in the case of “a right to remuneration (usually of authors or performers) which “survives” the transfer of certain exclusive rights (such a “residual right” by definition cannot be in conflict with the exclusive nature of the right concerned, since it is only applicable after the latter has been duly exercised).”¹⁶³

For the same reasons, subjecting a remuneration right for interactive making available online to mandatory collective management would not contradict Art.11bis Berne Convention or Art.8 WCT either. Similarly, when the EU Rental and Lending Directive granted an exclusive right of rental and a residual remuneration upon its transfer, and allowed Member States to subject its exercise to mandatory collective management, it was not found to contradict the exclusive right of rental granted as conventional minima by Art.7 WCT.

Statutory granting of “residual” remuneration rights (retained upon the transfer of an exclusive right of communication to the public or making available to the public), even when subject to mandatory collective management, would not be contrary to either Art.11bis Berne Convention or Art.8 WCT.

¹⁵⁸ Mandatory collective management may be one such “conditions;” See Ficsor (2006) *Collective Management* ... p.42.

¹⁵⁹ Non-voluntary licensing refers to statutory and compulsory licenses. A statutory license is an authorisation granted by law to exploit works in specific conditions in exchange for the payment of a fee set by the same law or a regulation. There is no need to apply for it because law already authorises the use. A compulsory license is a license that needs to be compulsorily granted by the copyright owner and thus applied for by the licensee to authorise the exploitation of the work under certain conditions and in exchange for a fee agreed by parties. See WIPO (2003) *Guide to the Copyright and Related Rights Treaties Administered by WIPO and Glossary of Copyright and Related Rights Terms* p.277

¹⁶⁰ If the scope of making available online is interpreted restrictively to require some degree of interactivity by the user, non-interactive acts of online exploitation would be covered under Art.11 Berne Convention. On the other hand, nothing prevents Member States from establishing non-voluntary licenses for the exclusive right of communication to the public for purposes of a limitation under the three-step test, ex art.10.1 WCT.

¹⁶¹ See Ricketson/Ginsburg (2006) *International Copyright International Copyright and Neighbouring Rights – The Berne Convention and Beyond*, OUP 2nd ed., #12.49-51. According to these authors, despite the Berne Convention traditionally envisioned “push” technologies to a passive public, the concept of communication to the public in Art.11 Berne Convention is technology-neutral and wide enough so that it could also cover “pull” (on-demand) technologies. However, the Berne Convention was “ambiguous” as to whether the act of communication to the public could take place at different times, deferring to national laws. This ambiguity was only overcome by Art.8 WCT.

¹⁶² For instance, the distinction between interactive and non-interactive acts of online exploitation will have substantial economic effects where authors and performers are granted a “residual” remuneration right for the making available to the public (ex Art.8 WCT)..

¹⁶³ See Ficsor (2006) *Collective Management*... p.42-43.

b. Compliance with EU *acquis*

The same must be concluded under EU law. Introducing the proposed right at national law or in contracts is perfectly **in accordance with EU *acquis***.

Under current EU *acquis*, Member States are obliged to grant authors harmonised exclusive rights of reproduction, distribution and communication to the public including an exclusive rental right¹⁶⁴ as well as an exclusive making available right as part of the communication to the public right.¹⁶⁵ Member States are obliged to grant a “right to obtain an equitable remuneration” only upon the transfer or assignment of the rental right.¹⁶⁶ Nothing is provided for regarding other exclusive rights. Member States may choose to do the same regarding transfer of other rights without contravening EU *acquis*. Member States cannot unilaterally extend the scope of rights (at least, not as long as it may adversely affect the functioning of the internal market). This was a conclusion reached by CJEU in the *Svensson* case:¹⁶⁷

Article 3(1) of Directive 2001/29 must be interpreted as precluding a Member State from giving wider protection to copyright holders by laying down that the concept of communication to the public includes a wider range of activities than those referred to in that provision.

However, securing an unwaivable right by law retained upon the transfer of an exclusive right would hardly qualify as “giving a wider protection” or including “a wider range of activities” within the scope of exclusive right. Despite being referred to as a right, the “residual” remuneration right does not enlarge the scope of exclusive rights of exploitation. It is only a statutory mechanism imposed by law to effectively secure remuneration of authors for the exploitation of their works—an exploitation that they cannot control.

Since copyright harmonisation in the EU has been done on the basis of the **principle of subsidiarity** and as a minimum of harmonisation except where the contrary is indicated, Member States are free to apply *mutatis mutandis* the instrument of Art.5.3 Rental and Lending Directive in relation with other exploitation rights, as long as it does not interfere with the functioning of the internal market. Certain scholars defend it “for the sake of consistency”. It would be appropriate that national law provides that authors retain an unwaivable right to obtain equitable remuneration for the transfer of other exclusive rights of exploitation.¹⁶⁸

It could also be argued that “residual” remuneration rights are contractual measure and that copyright contract law remains a matter for national law, having not yet been harmonised by the EU legislation.¹⁶⁹

Several European countries (e.g., Spain, Netherlands, Italy, Belgium and France) have enacted such a residual remuneration right for the making available online of audiovisual works.

¹⁶⁴ Art.3.1 InfoSoc Directive, Art.3.1 Rental & Lending Directive, Art.1.2 Computer Program Directive.

¹⁶⁵ Art.3.1 InfoSoc Directive

¹⁶⁶ Art.5.1 Rental & Lending Directive, Art.1.2 Computer Program Directive.

¹⁶⁷ CJEU 13 Feb.2014 (C-466/12) *Svensson*.

¹⁶⁸ See Walter/von Lewinski (2010) *European Copyright Law...* #6.2.55

¹⁶⁹ For a study on copyright contract practices in EU Member States, see IVIR (2015) “*Remuneration of Authors and Performers for the Use of their Works and the Fixations of their Performances*”:

<https://ec.europa.eu/digital-single-market/en/news/commission-gathers-evidence-remuneration-authors-and-performers-use-their-works-and-fixations>

4. IMPLEMENTATION OPTIONS

The proposed remuneration right should **preferably be introduced at an international level** and on a mandatory basis to enhance its effectiveness. It can also be effective if introduced at a national or supra-national level, such as at the EU level, as well as even on contractual grounds. These options are not mutually exclusive and can be pursued cumulatively.

The higher the implementation level of the proposal (e.g., international, European Union, national), the higher its benefits. Optimal scenarios would be adopting the proposed remuneration right by WIPO and implementing it at an international scale or at least an EU and national level.

Especially when done on the basis of the same proposal and elements, a national or regional implementation could be an easier path that might lead to a bottom up harmonisation in this field. National implementation would allow for more flexibility in deciding the scope and exploitation acts affected by it to better fit the needs of each national market, but it would still require being established as an unwaivable right and subject to mandatory collective management.

Soft law and contractual implementation options are sub-optimal options.

a. *International*

Because of the cross-border nature of online markets, **the wider the implementation, the more efficient** it will be in securing audiovisual authors remuneration for online exploitation of their works. This would be particularly the case if it is enacted **as an obligation for Member States**.

Implementation could be done by means of an instrument managed by WIPO. The precedent of a similar remuneration right envisioned for audiovisual performers in a recent instrument, such as Art. 12.3 Beijing Treaty, could favour at least opening discussions for its implementation for audiovisual authors. There may be some irony in this scenario since performers' protection has historically mirrored authors' protection. The time has come to acknowledge for authors what has already been acknowledged for performers in general and audiovisual performers more specifically.

However, any conventional attempt to **revise international instruments** is a slow and complex route. Revising the Berne Convention cannot be seen as a realistic option. Two other reasons weight against this. On one hand, the Berne Convention does not cover the right of making available and it is expected that remuneration from markets of online exploitation would be a relevant part of the proposed remuneration right. On the other, the only provision specifically referring to audiovisual works (Art.14bis Berne Convention)¹⁷⁰ refers to general rights granted to authors, making it structurally complicated to envision a remuneration right only for audiovisual authors. In short, it would not only be unrealistic, but unnatural to include such specific provisions for audiovisual authors in the Berne Convention. Although it would not be any less difficult, revising the WIPO Copyright Treaty would at least have an advantage. The rights of reproduction, distribution and making available are expressly granted for cinematographic works. In light of recent convention history, the true chances of amending the Berne Convention or the WIPO Copyright Treaty are highly unlikely.

A separate instrument would be another and perhaps more feasible option. Art.20 of the Berne Convention permits union members "to enter into special agreements among themselves, in so far as such agreements grant to authors more extensive rights than those granted by the Convention, or contain other provisions not contrary to this Convention." The proposed provision would certainly qualify under both conditions.

Its implementation could be either as a "conventional minimum" (mandatory) or as a possibility (optional) open to Member States.

¹⁷⁰ Art.14bis (1) Berne Convention: "Without prejudice to the copyright in any work which may have been adapted or reproduced, a cinematographic work shall be protected as an original work. The owner of copyright in a cinematographic work shall enjoy the same rights as the author of an original work, including the rights referred to in the preceding Article."

The **conventional minimum** approach is preferable since it would have direct effects upon Berne Union authors. Ultimately, it might also have indirect effects upon national authors. In other words, foreign authors and works would benefit from the conventional minima in countries of protection other than their countries of origin. Even though successfully implemented at an international level (e.g., as a separate instrument) as conventional minima, the **remuneration right would not afford protection for national authors**. However, by raising the conventional minima, a state may be forced to grant foreign authors better treatment, which may ultimately result in raising national law to meet that minima.¹⁷¹

Synergies may also apply if **implemented as an option** for Member States instead of as conventional minimum. "Residual" remuneration rights provided for in a national law would apply to both national and foreign authors and works¹⁷² through the national treatment principle and *lex loci protectionis* in Art.5.2 of the Berne Convention.¹⁷³

In summary, implementing remuneration rights at an international level, either as conventional minimum or as an option for Member States, would be a significant step.

b. European Union

Implementing the proposed remuneration right at the European Union level seems to be a more realistic option.

First, the **precedent** of Art.5.1 Rental and Lending Directive is deeply rooted in EU *acquis*. Second, exploitation of audiovisual works is often offered as a cross-border activity (e.g., online) with direct implications on the internal market. Third, national precedents, such as those in Spain, Italy and France, could weight in favour of its introduction. Last but not least, the solid system of interconnected CMOs in Europe would certainly facilitate its implementation at the EU level.

Implementation does not need to be a specific amendment in the InfoSoc Directive.¹⁷⁴ It could be in another directive. The **recently proposed Directive on Copyright in the Digital Single Market**¹⁷⁵ could easily accommodate it because it already contains a specific chapter dealing with "Fair remuneration in contracts of authors and performers" (Arts. 14 to 16),¹⁷⁶ which goes beyond the Digital Single Market portrayed in the proposed directive's title.

Once implemented at the EU level, the possibilities of expanding the provision into other national laws by means of trade agreements signed with other countries, as has been done with most of the EU *acquis*, should not be underestimated.

c. National

The implementation of the proposed remuneration right may be also achieved at a national level. Spain, Chile and Colombia are good examples (see below Chapter III).

¹⁷¹ Based on the principle of national treatment, the minimum of protection afforded by the Berne Convention applies "in countries of the Union other than the country of origin" (Art.5.1 Berne Convention) but, in the long run, a Berne Union country may be willing to grant national authors the same minimum of protection granted to non-national Berne Union authors.

¹⁷² Assuming that remuneration for foreign authors was not subject to reciprocity.

¹⁷³ Regardless of the nature of the proposed remuneration right under national law, Art.5.2 Berne Convention expressly subjects the "extent of protection, as well as the means of redress afforded to the author to protect his rights" to *lex loci protectionis*; this is the law of the country for which protection is sought.

¹⁷⁴ SACD, Contribution to *Green Paper* ... p.14: "L'introduction d'une telle disposition en droit européen ne nécessiterait pas d'harmonisation quant à la notion de titularité des droits, ni de révision de la directive de 2001, mais elle pourrait intervenir dans un autre texte européen de même portée juridique."

¹⁷⁵ Proposal for a Directive on Copyright in the Digital Single Market, COM(2016) 593 Final, 14.09.2016; <https://ec.europa.eu/transparency/regdoc/rep/1/2016/EN/1-2016-593-EN-F1-1.PDF>

¹⁷⁶ So far, the proposed measures simply consist of transparency obligations (Art.14), dispute resolution (Art.16) and an adjustment mechanism (i.e., best-seller clause) that entitles authors to "request additional, appropriate remuneration... when the remuneration originally agreed is disproportionately low compared to the subsequent relevant revenues and benefits derived from the exploitation of the work" (Art.15).

National implementation suffices when dealing with local acts of exploitation that have a domestic impact (e.g., theatrical release and rental). However, any national implementation will suffer the disadvantages of territorially-limited solutions, which are critical when considering online markets, which are becoming fundamental for audiovisual exploitation. Hence, the more global the implementation, the more effective it will be.

Furthermore, national implementation might lead to a **bottom-up harmonisation** in the long run by means of the Berne Convention national treatment principle and *lex loci protectionis*, as explained above.

Implementation at national level would also allow for more flexibility in deciding the scope and acts of exploitation affected by it to better fit each national market's needs. However, it would still require that it is established as an unwaivable right and subject to mandatory collective management, as proven by the rental "residual" remuneration right in EU *acquis*.

Even in the event that the proposed remuneration right was implemented at the international or EU level, follow-up regulation would be necessary at national levels to establish the specific circumstances for its implementation such as uses subject to remuneration, fees and collective management.

d. Contractual provisions

A soft law approach for implementing the proposed remuneration right might also be an option. When licensing audiovisual services, producers could impose an obligation to directly and separately remunerate authors through CMOs as part of their license.

Separate remuneration paid to authors directly by the licensee or operator could also be implemented as a contractual clause in production contracts between audiovisual authors and producers. This is the solution that was achieved in France through SACD's negotiations (see below). However, this requires specific market conditions such as strong guilds or CMOs capable of collective bargaining with producers, which are not available in most countries.

In any case, soft law and contractual solutions **require full collaboration of producers to be successful**. An apparent reluctance of producers¹⁷⁷ and the lack of bargaining power of authors and their CMOs in contract negotiations make these solutions unlikely.

In addition, the **territorial scope and difficult enforceability** of these soft-law solutions would also constitute a major drawback.

¹⁷⁷ Apparent from responses to the green paper on online distribution of audiovisual works. See contributions: http://ec.europa.eu/internal_market/consultations/2011/audiovisual_en.htm



3 | Remuneration rights of audiovisual authors in international instruments, EU *acquis* and national laws

Several precedents exist in comparative national law, as well as within EU *acquis*, granting authors remuneration rights for the exploitation of their works as well as specifically for audiovisual works.

These remuneration rights have different natures and justifications. Sometimes they are not equally granted authors and related rights owners. They can vary from one country to another. Remuneration rights may be granted with different scopes and means of exploitation (e.g., box office, rental, broadcast, cable distribution and online). They may be set as unwaivable and inalienable or not. Regardless, they have one thing in common: they are mostly managed by CMOs.

This chapter intends to map and assess existing statutory provisions granting direct and unwaivable remuneration for audiovisual authors.

1. INTERNATIONAL CONVENTIONS

International instruments have availed for remuneration rights on several occasions and under different conditions, easily explained on account of when they were adopted and conventional compromises. These provisions are never enacted as conventional minima, but rather as an option for Member States. They are rarely set as unwaivable (the most visible exception is the remuneration rights for performers in Beijing), let alone subject to mandatory collective management. For all of these reasons, these provisions have failed to secure a harmonised playing field in national laws.

a. Authors' rights

Both the Berne Convention and the WIPO Copyright Treaty grant several remuneration rights for authors based on different acts of exploitation.

(i) Resale right ("*droit de suite*")

Despite not applying to audiovisual works, a fundamental remuneration right found in the Berne Convention is the **resale right** (i.e., *droit de suite*) granted to visual artists (Art.14ter Berne Convention). It consists of a right to obtain a share, typically a percentage, of the proceeds or gross sales price of each public sale of a work of art. At the time of its introduction¹⁷⁸ in the Berne Convention in 1948, only a handful of countries had recognised it. This is why it is offered only as an option: Member States are not obliged to grant such a right as part of the convention's minimum. A resale right can only be claimed in countries whose legislations provide for it under *lex loci protectionis*. Even there, it is subject to the reciprocity requirement.¹⁷⁹ As we mentioned in Chapter II.2, the resale right is different in nature from the "residual" remuneration right proposed in this Study.

¹⁷⁸ There was uncertainty whether the new right was to be seen as part of the authors' right system or whether it was an entirely separate right. See Ricketson/Ginsburg (2006) *International Copyright and Neighbouring Rights – The Berne Convention and Beyond*, OUP 2nd ed. #11.54

¹⁷⁹ See Ricketson/Ginsburg (2006) *International Copyright ...* #11.61

(ii) Public performance and communication to the public

Another remuneration right acknowledged in the Berne Convention concerns **the exclusive rights of public performance and of communication to the public** granted to authors of audiovisual works (Art.11 Berne Convention). Member States are free to determine the conditions for the exercise of these rights. This means they can subject these rights to mandatory collective management or to non-voluntary licensing,¹⁸⁰ on two conditions. First, that no prejudice is caused to the author's moral rights. Second, that "his right to obtain equitable remuneration" is secured.

Art.8 WCT expanded the right of communication to the public as "communication to the public, by wire or wireless means, including the making available to the public ..." yet said nothing regarding the possibility of "conditions to exercise" and remuneration rights.

The combined reading of Art.11bis(2) Berne Convention and Art.8 WCT has raised questions: whether making a work available to the public over the internet can be seen as already covered by the Berne Convention and thus subject to mandatory collective management;¹⁸¹ and whether a distinction should be made between interactive and non-interactive transmissions for purposes of Art.11 Berne Convention and Art.8 WCT.¹⁸²

Regardless of these uncertainties, many countries have expressly introduced residual remuneration rights for both communication to the public and online means of exploitation in national laws (see below). Imposing mandatory collective management on a remuneration right or non-voluntary licensing is different from subjecting an exclusive right to mandatory collective management or to a non-voluntary license, and is perfectly aligned with Art.11bis (2) Berne Convention (see above Chapter II.3.a).

(iii) Rental

The WIPO Copyright Treaty granted authors of computer programs, cinematographic (i.e., audiovisual) works and works embodied in phonograms an "exclusive right of authorizing commercial rental to the public of the originals or copies of their works" (Art.7 WCT). According to the Agreed Statement concerning Art. 6 and 7, this right will only refer "to fixed copies that can be put into circulation as tangible objects."

The TRIPs Agreement had already granted an exclusive right of rental to these works (Art.11 TRIPs),¹⁸³ but an attempt to extend this right to all categories of works under the WIPO Copyright Treaty failed.¹⁸⁴

¹⁸⁰ Under a statutory license, the law is directly authorising a specific use of the work against a remuneration that will be fixed as determined by the statute. Under a compulsory license, the copyright owner is instead being forced by law to grant that license. See Blomqvist (2014) *Primer on International Copyright and Related Rights*, Edward Elgar, p.134.

¹⁸¹ However, since any non-voluntary license afforded under Art.11bis (2) Berne Convention would be restricted to the territory of the state granting it, it could not cover cross-border online communications. However, nothing prevents Member States from establishing non-voluntary licenses under a limitation to the exclusive right of communication to the public, under the three-step-test in Art.10.1 WCT.

¹⁸² See Ficsor (2006) *Collective Management...* p.55: Ficsor distinguishes between interactive transmissions (e.g., downloads) that would qualify only under Art.8 WCT and non-interactive transmissions (e.g., webcasting, simulcasting and streaming), which could qualify as a communication to the public under Art.11 Berne Convention. However, he denies art.11bis Berne Convention could be applied to non-interactive transmissions either (e.g. to justify applying a non-voluntary license). See Ricketson/Ginsburg (2006) *International Copyright...* #12.49-51; According to these authors, despite the Berne Convention envisioned "push" technologies to a passive public, the concept of communication to the public in Art.11 Berne Convention is technology-neutral and wide enough to cover "pull" (on-demand) technologies. However, the Berne Convention was "ambiguous" as to whether the act of communication to the public could take place at different times, deferring to national laws. This ambiguity was overcome by Art.8 WCT.

¹⁸³ Art.14(4) TRIPs deals with rental rights for phonogram producers and "any other holders in phonograms as determined in a Member's law". Apparently, this includes phonogram performers as well as authors of the musical works embodied in the phonogram. Yet in this later case, only if domestic law grants them rental rights. Otherwise, a Member State is not obliged to grant rental rights to authors of musical works in phonograms. See Reinbothe/von Lewinski (2002) *The WIPO Treaties of 1996*, Butterworths, p.99.

¹⁸⁴ See Ricketson/Ginsburg (2006) *International Copyright ...* #11.86

Three specific issues regarding the exclusive right of rental deserve to be mentioned for purposes of this study:

- Rental right in cinematographic works will only apply if “such commercial rental has led to widespread copying of such works materially impairing the exclusive right of reproduction” (Art.7.2(ii) WCT and Art.11.2(ii) TRIPs). Also known as the “impairment test”, this condition has resulted in Member States feeling no obligation to provide rental rights in analogue formats. The test is fundamental for rental right by means of tangible digital supports, such as CDs or DVDs.
- According to the Agreed Statement Art.7 WCT, rental right is only limited to physical objects. However, “this does not mean that member states may not classify digital transmissions as a form of distribution, but only that the WCT does not require them to do so.”¹⁸⁵ Thus, introducing an equitable remuneration right for online rental of audiovisual works (e.g., downloads) would be in compliance with Art.7 WCT.
- Neither TRIPs nor the WIPO Copyright Treaty infer any remuneration right from this exclusive rental right, yet so did the EU in its Rental and Lending Directive (see below). Similarly, one of the residuals contractually agreed upon by the DGA results from online rental of audiovisual works.

(iv) Limitations and the three-step test

Remuneration rights recognised under the Berne Convention may also result from implementing limitations in national laws and specially resulting from the need to comply with the **three-step test**.

According to Art.9(2) Berne Convention, Member States are allowed to maintain and introduce exceptions and limitations to reproduction right in national laws, provided that three cumulative conditions are met:

Art.9(2) Berne Convention: It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.

Under the three-step test, causing “unreasonable prejudice to the legitimate interests of the author’s” may be avoided by means of remuneration.¹⁸⁶

Art.13 TRIPs and Art.10.1 WCT extended the application of the three-step test to all exclusive rights of authors, beyond reproduction, including the digital environment.¹⁸⁷

Accordingly, national laws have maintained and developed limitations to exclusive rights. Among these limitations, it is worth mentioning the exception or limitation for **private copying**. This limitation is important because of its conceptual relevance as well as for the amount of revenue it generates for audiovisual authors in those countries where private copying is subject to remuneration or compensation schemes.¹⁸⁸

Since this study is not concerned with limitations to exclusive rights, it will not consider remunerations that may result from them in further detail. As previously explained, these have a different nature and respond to different justifications than the “residual” remuneration right proposed in this study.

¹⁸⁵ See Ricketson/Ginsburg (2006) *International Copyright ...* #11.94

¹⁸⁶ See Ricketson/Ginsburg (2006) *International Copyright ...* #13.25

¹⁸⁷ According to the Agreed Statement to Art.10 WCT, countries may “appropriately extend into the digital environment limitations and exceptions in their national laws which have been considered acceptable under the Berne Convention... and devise new exceptions and limitations that are appropriate in the digital network environment.”

For related rights, see Art.15.1 Rome Convention and Art.16 WPPT, mirroring art.9.2 Berne Convention and Art.10 WCT, respectively. See also Art.13 Beijing Treaty.

¹⁸⁸ For a detailed and updated study of limitations for private copying exceptions and limitations existing worldwide, see WIPO/Stichting de ThuisKopie (2016), *International Survey on Private Copying Law & Practice 2015*: http://www.wipo.int/edocs/pubdocs/en/wipo_pub_1037_2016.pdf

b. Related rights

International instruments for protecting related rights have often granted remuneration rights to performers and producers.¹⁸⁹ Examining these instances are useful for the purposes of this study.

(i) Broadcasting and communication to the public of phonograms

The 1961 Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations granted a “single equitable remuneration right” to performers and producers for some “secondary uses of phonograms,” namely “for broadcasting or for any communication to the public” to be paid by the user (Art.12 Rome Convention).

Art.12 Rome Convention:

If a phonogram published for commercial purposes, or a reproduction of such phonogram, is used directly for broadcasting or for any communication to the public, a single equitable remuneration shall be paid by the user to the performers, or to the producers of the phonograms, or to both. Domestic law may, in the absence of agreement between these parties, lay down the conditions as to the sharing of this remuneration.

The 1996 WIPO Performances and Phonograms Treaty (WPPT) added the adjective “direct or indirect”.¹⁹⁰

Article 15 WPPT- Right to Remuneration for Broadcasting and Communication to the Public. (1) Performers and producers of phonograms shall enjoy the right to a single equitable remuneration for the direct or indirect use of phonograms published for commercial purposes for broadcasting or for any communication to the public.

Both the Rome Convention and the WPPT provide it as a “single and equitable” remuneration. **Single** because it is **shared by performers and phonogram producers**. **Equitable** because the frequency of the use and the value thereof are to be the main parameters¹⁹¹ to calculate its amount. Remuneration may be claimed “from the user” by either the performer or the producer as well as on behalf of the other.

Since this is established as a conventional minimum, national laws may grant performers further rights¹⁹² be it as exclusive exploitation rights or remuneration rights. Ironically, performers might be better off with a “simple” unwaivable remuneration right managed through CMOs than with a “full” exclusive right that will be necessarily transferred to, and bought out by, producers. After all, the remuneration right under Art.15 WPPT is among the most economically important rights for performers and phonogram producers.¹⁹³ Despite so, contracting states may reserve its application by restricting its scope or simply by denying it (see Art.16 Rome Convention and Art.15 WPPT).

¹⁸⁹ Mainly because divergent national laws on the protection of related rights made it difficult to achieve any conventional agreement on minimum exclusive rights beyond authorising the first fixation and broadcasting of performances and recordings.

¹⁹⁰ Similar to what Art.8 WCT did for authors, but narrower in scope, Art.10 and Art.14 WPPT respectively grant performers and phonogram producers an “exclusive right of authorizing the making available to the public of their phonograms, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them.”

¹⁹¹ See Reinbothe/von Lewinski (2002) *The WIPO Treaties of 1996*, Butterworths, p.381. For a comparison of Art.12 RC and Art.15 WPPT, see Ficsor (2002) *The Law of Copyright and the Internet – The 1996 WIPO Treaties, their interpretation and implementation*, OUP # PP15.03-06

¹⁹² See Agreed Statement to Article 15 WPPT.

¹⁹³ See Reinbothe/von Lewinski (2002) *The WIPO Treaties of 1996*, Butterworths, p.379 and Reinbothe/von Lewinski (2015) *The WIPO Treaties on Copyright – A Commentary on the WCT, the WPPT, and the BTAP*, OUP 2nd ed., # 8.15.14.

(ii) Unwaivable equitable remuneration right for “any uses” of audiovisual performances

In addition to granting audiovisual performers a bundle of exclusive rights (e.g., fixation, reproduction, distribution, rental, making available, broadcasting and communication to the public), the **Beijing Treaty on Audiovisual Performances** (2012) formally envisions two instances of remuneration rights.

Art.11.2 Beijing Treaty allows Member States to:

“... establish a right to equitable remuneration for the direct or indirect use of performances fixed in audiovisual fixations for broadcasting or for communication to the public.”

Furthermore, Art.12.3 Beijing Treaty allows Member States to introduce a general right of equitable remuneration for “any uses” of audiovisual performances:

*“Independent of the transfer of exclusive rights described above, national laws or individual, collective or other agreements may provide the performer with **the right to receive royalties or equitable remuneration for any use** of the performance, as provided for under this Treaty including as regards Articles 10 [that is, making available online] and 11 [that is, broadcasting and communication to the public].”*

The unwaivable remuneration right (Art.12.3) to receive an equitable remuneration for any uses of the audiovisual performance is only an option for Member States. The other option is the “right to receive royalties”, notably through contractual agreements (e.g., any residuals agreed in the Screen Actors’ Guild Basic Agreement in the United States).¹⁹⁴

These provisions are not mandatory (“may provide”) for Member States and do not constitute conventional minima. The remuneration right is neither unwaivable nor subject to mandatory collective management. Nevertheless, **the importance of Art.12.3 Beijing Treaty should not be diminished** to the extent that it establishes in an international instrument for the first time: the possibility of a statutory remuneration right envisioned for “any use” of an audiovisual performance, including by online means.

In other words, despite leaving it to Member States to decide, the “right to obtain an equitable remuneration” was already endorsed in 2012 as the most efficient means to secure remuneration of performers for the exploitation of audiovisual works, including for online markets. It is hard to justify that the same endorsement should not be made for authors too.

The existence of a direct international precedent endorsing residual remuneration rights for audiovisual performers should facilitate the current proposal.

¹⁹⁴ See Screen Actors’ Guild Basic Agreement: <http://www.sagaftra.org/production-center/documents>

2. EU ACQUIS

European national laws as well as EU *acquis* offer many examples of rights to equitable remuneration in favour of authors.

EU law has partially¹⁹⁵ harmonised **exclusive rights** of reproduction, distribution and communication to the public including the making available online. Nevertheless, harmonisation has been done through a rather complex jigsaw puzzle of directives, usually abusing the “without prejudice to” approach, that may lead to inconsistencies.

Under EU *acquis* specifically, audiovisual authors have been granted the following exclusive rights:

- To authorise or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part;
- To authorise or prohibit any form of distribution to the public, by sale or otherwise, of the original of their works or of copies thereof;
- To authorise or prohibit rental and lending of their works;
- To authorise the communication to the public of their works by satellite;
- To authorise or prohibit any communication to the public of their works, by wired or wireless means including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them.

In addition, EU *acquis* has granted authors and performers a few unwaivable **remuneration rights** regarding specific acts of exploitation of their works. These remuneration rights are far less harmonised than the exclusive exploitation rights and scattered across the following several directives.

a. Rental and Lending Directive 92/100/EC (derogated and codified as 2006/115/EC).

The Rental and Lending Directive 92/100/EC¹⁹⁶ applies to audiovisual works and was not affected by InfoSoc Directive 2001/29/EC.

Art.3.1 grants authors, performers and producers **exclusive rights to authorise or prohibit the rental and lending** of their audiovisual works. Since it is an exclusive right, it can be assigned and/or transferred by the author (Art.3.3). The author may or may not be remunerated for it. Exclusivity does neither require nor always result in remuneration. Both exclusive rights of rental and lending are to be mandatorily granted in all EU countries.

Article 3 Rightholders and subject matter of rental and lending right

- 4. Without prejudice to paragraph 6, when a contract concerning film production is concluded, individually or collectively, by performers with a film producer, the performer covered by this contract shall be presumed, subject to contractual clauses to the contrary, to have transferred his rental right, subject to Article 5.*
- 5. Member States may provide for a similar presumption as set out in paragraph 4 with respect to authors.*
- 6. Member States may provide that the signing of a contract concluded between a performer and a film producer concerning the production of a film has the effect of authorizing rental, provided that such contract provides for an equitable remuneration within the meaning of Article 5. Member States may also provide that this paragraph shall apply mutatis mutandis to the rights included in Chapter II.*

¹⁹⁵ The harmonised scope does not cover acts of communication that take place “in situ” (e.g., performance, display) and is without prejudice to existing directives (Computer Programs, Databases, Rental & Lending and Satellite and Cable).

¹⁹⁶ Directive 2006/115/EC, of 12 Dec. 2006, derogated and codified Council Directive 92/100/EEC on rental right and lending right and on certain rights related to copyright in the field of intellectual property, 19 Nov. 1992. From now on, we will exclusively refer to articles under codified Directive 2006/115/EC: <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32006L0115&from=EN>

Beyond any remuneration for the transfer of these rights, the directive secures **remuneration to be paid by users** in two different ways. First, on the basis of a remuneration retained after the transfer of the rental right to the producer. Second, on the basis of a derogation or limitation of the lending right in favour of public institutions (see above Chapter II.2).

(i) Rental

According to Art.5, when the author, individually or collectively, transfers or assigns their rental right to a film producer, the author “retains the right to obtain an equitable remuneration for the rental.” This “right to obtain an equitable remuneration” cannot be waived.

Article 5 Unwaivable right to equitable remuneration

- 1. Where an author or performer has transferred or assigned his rental right concerning a phonogram or an original or copy of a film to a phonogram or film producer, that author or performer shall retain the right to obtain an equitable remuneration for the rental.*
- 2. The right to obtain an equitable remuneration for rental cannot be waived by authors or performers.*
- 3. The administration of this right to obtain an equitable remuneration may be entrusted to collecting societies representing authors or performers.*
- 4. Member States may regulate whether and to what extent administration by collecting societies of the right to obtain an equitable remuneration may be imposed, as well as the question from whom this remuneration may be claimed or collected.*

As its title indicates, this provision establishes an “**unwaivable right to equitable remuneration**”¹⁹⁷ that is **triggered by a transfer or assignment** of the rental right to producers: a “residual” remuneration right.

The transfer of exclusive right may be done **in any manner or form**, individually or collectively, in production contracts, labor contracts or specific contracts. The transfer may operate by virtue of a rebuttable presumption or by signing any production contract. The directive already establishes a presumption of transfer for performers¹⁹⁸ (mandatory for Member States in this case) and permits Member States to implement a remuneration right in exchange for it. What is important is that the author transfers their exclusive right to the producer.¹⁹⁹ How this transfer occurs is not important. Thus, if a Member State chooses to do so, the presumption of transfer might automatically trigger the unwaivable right to equitable remuneration.

Remuneration must be **equitable**. It must take into account “the importance of the contribution of the authors and performers concerned to the phonogram or film” (Recital 17),²⁰⁰ and bear in mind the producers’ share (for their exclusive rental right).

Unwaivability is an essential element of Art.5.²⁰¹ The remuneration “cannot be waived” yet nothing is said regarding assignability. In other words, the remuneration right can be assigned in exchange for an equitable payment, which could be a flat rate²⁰² but not for free. What is important is that the author receives

¹⁹⁷ The initial Commission’s proposal COM (90) 586 final — SYN 319 (13 December 1990) was more neutral with its title “Authorization of rental and lending” and used more complex wording to convey the same idea: “If the rightholders authorize to a third party against payment the rental or lending of a sound recording, visual recording or visual and sound recording, then each of the rightholders set out in Article 2(1) shall retain the right to obtain an adequate part of the said payment, notwithstanding any assignment of the rental or lending right or granting of licenses. This right to obtain an adequate part of the payment cannot be waived, but its administration may be assigned.”

¹⁹⁸ According to Art.3.4, by signing the (individual or collective) film production contract, the performer’s exclusive rental right is presumed to be transferred to the producer unless parties agreed to the contrary. In short, a presumption of transfer with a double layer of protection. It is rebuttable and subject to the equitable remuneration in Art.5.

Art.3.5 offers a similar but alternative solution to apparently accommodate one Member State that already provided an overall balanced regulation of the relationship between performing artists and film producers under its national law. See Walter/von Lewinski (2010) *European Copyright Law* 6.2.40

¹⁹⁹ If authors do not transfer rental right to producers, but to another person or entity, art.5 would not seem to apply unless this is meant to fraudulently evade this provision. See Walter/von Lewinski, *European Copyright Law* #6.4.6

²⁰⁰ “...and is intended to strengthen their bargaining position vis-à-vis with producers” See Walter/von Lewinski, *European Copyright Law* #6.4.12.

²⁰¹ See Walter/von Lewinski (2010) *European Copyright Law* #6.4.17: “Without this provision, authors and performers would, in practice, run the risk of being forced by the producer to waive the right.”

²⁰² According to recital 16, equitable remuneration may be paid on the basis of one or several payments any time on or after concluding the contract.

some equitable remuneration for the rental activity, which must be separate from remunerations received for other forms of exploitation²⁰³ and any received for making the audiovisual contribution.

According to Art.5.2 and 3, the “residual” remuneration right **may be entrusted to collective management**, but Member States are not obliged to require this. This was evident at the time of enacting the directive that contractual freedom alone was not leading to equitable results²⁰⁴ and that legislative action was necessary to ensure that authors and performers receive equitable remuneration for the rental of their works and recordings. Unfortunately, the adopted measures fell short of that goal.

The reason is that Art.5.3 allows Member States:

- To choose whether to entrust administration of this remuneration right to collecting societies and, if so, to regulate whether collective management will be mandatory or on a voluntary basis;
- To regulate “the question from whom this remuneration may be claimed or collected”. *A priori*²⁰⁵ permitting that it is transferred or assigned to a producer in exchange for a fee.²⁰⁶

EU legislation did neither see the need to require mandatory collective management nor to specify that the debtor²⁰⁷ for this remuneration be the rental business carrying out the rental activities.²⁰⁸ Member States may choose that this remuneration be managed or even paid by producers to authors.²⁰⁹

Time has proven this to be a **poor policy choice**. As a result of the leeway offered to Member States, no harmonisation exists. Generally, authors and performers can only effectively rely on this remuneration in countries where it has been subject to collective management. According to the SAA white paper, remuneration for rental of audiovisual works is only collectively managed in eight countries.²¹⁰ This notably restricts the effect of this remuneration right.

Remuneration for online rental?

In the United States, online rental of audiovisual works generates residual payments for authors, despite the fact that rental right has not been granted formally as an exclusive right by the US Copyright Act. In most European countries, authors fail to get any remuneration for “e-rentals” despite it having been formally granted as an exclusive right by the Directive and by national laws. The next question would be: how to distinguish between an “e-rental” and VOD? Should we apply the rental and remuneration right provisions to VOD?

Scholars agree that “in order to reach its objective, (Art.5) should have been implemented by a statutory remuneration right subject to mandatory collective administration and the debtor should be determined to be the professional user.”²¹¹

²⁰³ See Walter/von Lewinski (2010) *European Copyright Law* #6.4.14

²⁰⁴ See Walter/von Lewinski (2010) *European Copyright Law* #6.4.1

²⁰⁵ Unless the CJEU's conclusion in *Luksan* is extended beyond private copying compensation to “residual” remuneration rights. An unwaivable remuneration also implies that it cannot be assigned for free.

²⁰⁶ For instance in the Netherlands where the equitable remuneration for rental was not subject to compulsory collective management, it is usually deemed to be included in the lump sum paid to authors when they assign their rental right in respect of works fixed on a phonogram or film works to producers. ALAI 2015, Report from *The Netherlands*, p. 11 <http://www.alai.org/en/congresses-and-study-days.html>

²⁰⁷ However, the national law must unambiguously determine the debtor from whom the remuneration will be claimed and collected. See CJEU C-61/05 *Commission v. Portugal*.

²⁰⁸ Although Art.5 clearly favours collective management (it is mentioned twice in paragraphs 3 and 4), other forms of administration are possible under the directive, such as through producers by means of individual assertion in production contracts or by means of collective assertion by CMOs, or via a direct claim to professional users (e.g., rental outlets or their professional associations). See Walter/von Lewinski (2010) *European Copyright Law* #6.4.27

²⁰⁹ If producers are determined as debtors, there will often be no remuneration in practice for authors and performers as referred by Walter/von Lewinski (2010) *European Copyright Law* #6.4.26.

²¹⁰ See above Table 3 and Figure 5: SAA (2015) White Paper Audiovisual Authors' Rights and Remuneration in Europe, p.25 and p.27: http://www.saa-authors.eu/dbfiles/mfile/6100/6137/SAA_White_Paper_2015.pdf A compilation of national implementation choices is available in Walter/von Lewinski (2010) *European Copyright Law* pp.356-390. Apparently, only Spain seems to require remuneration for rental under mandatory collective management.

²¹¹ See Walter/von Lewinski (2010) *European Copyright Law* #6.4.33

(ii) Lending

Lending right is even less harmonised in Europe. Authors, performers and producers are once again granted an exclusive **public lending** right, but the Directive offers Member States the possibility to derogate or limit it in exchange for a remuneration, “at least” for authors.²¹²

Article 6 Derogation from the exclusive public lending right

- 1. Member States may derogate from the exclusive right provided for in Article 1 in respect of public lending, provided that at least authors obtain a remuneration for such lending. Member States shall be free to determine this remuneration taking account of their cultural promotion objectives.*
- 2. When Member States do not apply the exclusive lending right provided for in Article 1 as regards phonograms, films and computer programs, they shall introduce, at least for authors, a remuneration.*
- 3. Member States may exempt certain categories of establishments from the payment of the remuneration referred to in paragraphs 1 and 2.*
- 4. The Commission, in cooperation with the Member States, shall draw up before 1 July 1997 a report on public lending in the Community. It shall forward this report to the European Parliament and to the Council.*

Unlike under the rental right, this remuneration is set **in exchange for a derogation or limitation** of an exclusive right and, for this reason, it is less interesting for this study.

Nothing is said regarding the implementation of this remuneration except for the fact that “certain categories of establishments” may be exempted to pay²¹³ whether it be managed by CMOs, if so on a voluntary or under mandatory basis or by any other means of collecting and distributing remuneration, who will be liable to pay it (e.g., libraries, governments), how will remuneration be calculated and distributed, etc.

The relationship between Art.5 and Art.6 is also unclear in the sense that if a Member State chooses to provide for an exclusive right of lending rather than derogating from it under Art.6, could this lending right be subject to the presumptions of transfer set in Art.3.4 and equitable remuneration retained by authors in Art.5? According to von Lewinski, that would be the “logical and preferable approach.”²¹⁴ Yet not all EU countries have done so.²¹⁵ As the SAA white paper reports, public lending remuneration is only managed in seven countries by nine CMOs,²¹⁶ securing little harmonisation once again.

²¹² Since remuneration of authors is only set as a minimum, performers and producers could also benefit from derogation of the exclusive right and remuneration for the limitation if the Member State chooses.

²¹³ See CJEU, C-36/05, *Commission v. Spain*

²¹⁴ See Walter/von Lewinski (2010) *European Copyright Law* #6.2.51. See also S. von Lewinski (2012) “Collectivism and its role in the frame of individual contracts”, *Individualism and collectiveness in intellectual Property Law* (J.Rosen ed.), ATRIP Intellectual Property series, Edward Elgar Publishing, pp.117-127

²¹⁵ See Walter/von Lewinski (2010) *European Copyright Law*, Country reports, pp.356–390. See also IVIR (2015) *Remuneration of Authors...*, p.31: In Spain, Denmark, Lithuania and the UK, authors can exercise their rental right individually – and in the latter two, remuneration is only due regarding the public lending of books.

²¹⁶ See above Table 3 and Figure 5: SAA (2015) *White Paper Audiovisual Authors' Rights and Remuneration in Europe*, p.25 and p.27: http://www.saa-authors.eu/dbfiles/mfile/6100/6137/SAA_White_Paper_2015.pdf

E-lending

In Europe, rental and lending have traditionally been regarded as parts of the distribution right and only applicable to tangible copies. Yet depending on how these concepts evolve, remunerations set in the Rental and Lending Directive could help exponentially increase revenues for audiovisual authors.

One may argue that since the 2001 InfoSoc Directive “leaves intact” rental and lending rights in the 1992 Directive, their provisions do not need to be interpreted as meaning the same. Thus, while the distribution right “in respect of the original or copies of the work” (granted by Art.4 InfoSoc Directive) refers to “tangible copies” (Recital 28 InfoSoc Directive), rental and lending rights “of originals and copies of copyright works” (granted by Art.1 Rental & Lending Directive) could be interpreted to cover acts developed online, non-existent at the time when the Rental and Lending Directive was passed in 1992, such as e-book lending or perhaps VOD as a rental? In that sense, see the CJEU ruling of November 10th, 2016, *VOB v Stichting Leenrecht* (C174/15) concluding that unless the copy was obtained from an illegal source, “the concept of ‘lending’ ...covers the lending of a digital copy of a book, where that lending is carried out by placing that copy on the server of a public library and allowing a user to reproduce that copy by downloading it onto his own computer, bearing in mind that only one copy may be downloaded during the lending period and that, after that period has expired, the downloaded copy can no longer be used by that user”. This reading may increase the opportunities for authors being remunerated for public e-lending, despite not being fully harmonised across all States (and not uniformly subject to collective management).

b. The Satellite and Cable Directive 1993/83/EEC ²¹⁷

This directive offers another mechanism that results in remuneration rights for authors and related rights owners: the licensing of cable retransmission rights subject to compulsory collective management.

Article 9 Exercise of the cable retransmission right

- 1. Member States shall ensure that the right of copyright owners and holders or related rights to grant or refuse authorization to a cable operator for a cable retransmission may be exercised only through a collecting society.*
- 2. Where a rightholder has not transferred the management of his rights to a collecting society, the collecting society which manages rights of the same category shall be deemed to be mandated to manage his rights. Where more than one collecting society manages rights of that category, the rightholder shall be free to choose which of those collecting societies is deemed to be mandated to manage his rights. A rightholder referred to in this paragraph shall have the same rights and obligations resulting from the agreement between the cable operator and the collecting society which is deemed to be mandated to manage his rights as the rightholders who have mandated that collecting society and he shall be able to claim those rights within a period, to be fixed by the Member State concerned, which shall not be shorter than three years from the date of the cable retransmission which includes his work or other protected subject matter.*
- 3. A Member State may provide that, when a rightholder authorizes the initial transmission within its territory of a work or other protected subject matter, he shall be deemed to have agreed not to exercise his cable retransmission rights on an individual basis but to exercise them in accordance with the provisions of this Directive.*

Article 10 Exercise of the cable retransmission right by broadcasting organizations

Member States shall ensure that Article 9 does not apply to the rights exercised by a broadcasting organization in respect of its own transmission, irrespective of whether the rights concerned are its own or have been transferred to it by other copyright owners and/or holders of related rights.

²¹⁷ Council Directive 93/83/EC on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission, 27 Sept. 1993: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:31993L0083>

This remuneration is different from the ones examined for rental and lending rights.

Here, remuneration results from a specific condition imposed when exercising (i.e., licensing) *the exclusive right of cable retransmission*. It will only be exercised collectively through CMOs. **Mandatory collective management** is strengthened by means of an extended licensing in that the CMO represents all rights holders, regardless of having mandated rights to a CMO.

Since it was set under mandatory collective management, cable retransmission remunerations are managed by all SAA collectives, except in Italy where there is no broadcast retransmission by means of cable, and amount to approximately 19% of their total collections.²¹⁸ Enforcement problems here are related to this licensed scope.

Based on the Directive's language, cable retransmission was meant to cover the "simultaneous, unaltered and unabridged retransmission by a cable or microwave system ...of an initial transmission from another Member State, ...of television or radio programmes intended for reception by the public."²¹⁹ As a separate act of communication to the public, this secondary communication to the public will only be licensed by collective management. Its goal was to facilitate cross-border retransmission of television programs. In that sense, the Directive has been a success due to mandatory collective management.²²⁰ However, the scope of this "cable retransmission" has already been questioned as new online technologies such as webcasting and simulcasting developed. Which acts of exploitation qualify as a "cable retransmission"²²¹ and how "technologically neutral" this license should be? Some operators are challenging the scope of the cable retransmission license by claiming that operators that "directly inject"²²² TV broadcast online are not making an act of "re-transmission"²²³ or that they have already been licensed by rightsholders and thus do not need to obtain any collective license for cable retransmission.²²⁴

All of these problems put pressure not only on the need for a more nuanced definition of the scope of this non-voluntary license, but also on the territorial structure and licensing methods of CMOs and their shortcomings in order to efficiently manage rights across countries' online markets.

c. Limitations in the InfoSoc Directive 2001/29/EC

Without prejudice to exceptions and limitations granted under previous directives (e.g., Computer Programs, Databases and Rental & Lending Directives), Art.5 **InfoSoc Directive**²²⁵ provides an exhaustive list of exceptions and limitations to reproduction, distribution and communication to the public rights that may or may not be implemented by Member States in national laws.

Only a few limitations set forth in Art.5 InfoSoc Directive specifically require "fair compensation". This is the case for reprography, private copying and copies of broadcasts by certain institutions.

²¹⁸ See above Table 3 and Figure 5: SAA (2015) *White Paper Audiovisual Authors' Rights and Remuneration in Europe*, p.25 and p.27: http://www.saa-authors.eu/dbfiles/mfile/6100/6137/SAA_White_Paper_2015.pdf

²¹⁹ The Directive only applies to "simultaneous, unaltered and unabridged" retransmissions of an initial TV or radio broadcast programs ... "from other Member States" (Art.1.3).

²²⁰ See P.B. Hugenholtz (2005) *Copyright without Frontiers: is there a Future for the Satellite and Cable Directive?* <http://www.ivir.nl/publicaties/download/946>.

²²¹ See P.B. Hugenholtz et al (2006) *The Recasting of Copyright & Related Rights for the Knowledge Economy*, p.56: http://ec.europa.eu/internal_market/copyright/docs/studies/etd2005imd195recast_report_2006.pdf
See also CJEU C-325/14 *SBS Belgium NV v. SABAM*.

²²² In some instances, new media operators refuse to pay collective licensing fees for the cable-retransmission of broadcast programmes claiming that the original communication does not qualify as an "initial transmission" and its retransmission would be subject to a non-voluntary license managed by a CMO. See Dutch Supreme Court 28 March 2014, [ECLI:NL:HR:2014:735](https://www.eclil.nl/hr:2014:735), (Norma/NL Kabel).

²²³ It is a matter of interpretation whether re-transmission needs to be done by another operator, different from the one doing the "initial transmission." Despite the Satellite and Cable Directive did not expressly refer to it, implying such a requirement would deprive authors from a substantial income by excluding "direct injection" scenarios from this remuneration.

²²⁴ For instance, does TV broadcast content delivery via third parties (e.g., cable companies, satellite TV companies) qualify as "cable retransmission" subject to remuneration right under mandatory collective management? In some countries (e.g., Netherlands, Belgium and Czech Republic), TV operators claim that they have already cleared all of the necessary rights with producers on a "free-from-rights" basis and refuse to pay cable retransmission remuneration to CMOs. The CJEU ruling in *TVCatchup* (C-275/15), concluding that immediate cable retransmission of a wireless broadcast does not amount to a new act of exploitation "to the extent that the broadcast is made for reception in the area in which it is re-transmitted by cable and forms part of a qualifying service," may further complicate the question for online uses.

²²⁵ Directive 2001/29/EC on the harmonization of certain aspects of copyright and related rights in the information society, 22 May 2001: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32001L0029:EN:HTML>

Art.5.2 InfoSoc Directive: “Member States may provide for exceptions or limitations to the reproduction right provided for in Article 2 in the following cases:

- (a) in respect of reproductions on paper or any similar medium, effected by the use of any kind of photographic technique or by some other process having similar effects, with the exception of sheet music, provided that the rightholders receive fair compensation;*
- (b) in respect of reproductions on any medium made by a natural person for private use and for ends that are neither directly nor indirectly commercial, on condition that the rightholders receive fair compensation which takes account of the application or non-application of technological measures referred to in Article 6 to the work or subject-matter concerned; ...*
- (e) in respect of reproductions of broadcasts made by social institutions pursuing non-commercial purposes, such as hospitals or prisons, on condition that the rightholders receive fair compensation.”*

However, even where the provision is silent,²²⁶ **fair compensation may be necessary to comply with the three-step test.** According to Art.5.5 InfoSoc Directive:

“ The exceptions and limitations provided for in paragraphs 1, 2, 3 and 4 shall only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder.”

The three-step test had been previously introduced in EU *acquis* under Art.6(3) Database Directive “interpreted... in a manner which unreasonably prejudices the right holder’s legitimate interests or conflicts with a normal exploitation of the database” and in similar terms under Art.6(3) Computer Programs Directive.²²⁷ Both directives were unaffected by the InfoSoc Directive. Their three-step tests remain applicable within their scope.

An exhaustive examination of the three-step test in EU *acquis* would deviate from this study’s main objective. It suffices to refer to the general assessment performed under Art.9(2) Berne Convention (see above)²²⁸ and the fact that the three-step test may be “cleared” by means of compensation set in favour of rights holders.²²⁹

In relation with limitations, the current tendency in EU *acquis* is to use “**fair compensation**” rather than “**remuneration**.” Recital 25 InfoSoc Directive 2001/29/EC offers some guidance to determine what “fair compensation” is:

(35) In certain cases of exceptions or limitations, rightholders should receive fair compensation to compensate them adequately for the use made of their protected works or other subject-matter. When determining the form, detailed arrangements and possible level of such fair compensation, account should be taken of the particular circumstances of each case. When evaluating these circumstances, a valuable criterion would be the possible harm to the rightholders resulting from the act in question. In cases where rightholders have already received payment in some other form, for instance as part of a license fee, no specific or separate payment may be due. The level of fair compensation should take full account of the degree of use of technological protection measures referred to in this Directive. In certain situations where the prejudice to the rightholder would be minimal, no obligation for payment may arise.

²²⁶ See Recital (36) InfoSoc Directive: “The Member States may provide for fair compensation for rightholders also when applying the optional provisions on exceptions or limitations which do not require such compensation.”

²²⁷ Notice that the three-step test in these directives contained only the second and third steps in different orders as well as disjunctive (“or”) rather than cumulative (“and”).

²²⁸ Unlike Art.9.2 Berne Convention, EU *acquis* has never given much importance to the specific order of the steps. There is a different order between the Database and Computer Programs EU Directives and unlike Art.5.5 InfoSoc Directive, the Database and Computer Programs Directives provide for a two-step test.

²²⁹ EU *acquis* refers to “right holders”, which includes authors, performers, producers and broadcasting organisations and any other rights holders identified in a directive.

“**Fair compensation**” must be directed to “compensate ... adequately” for damage caused to rights holders by a statutory limitation.²³⁰ Accordingly, fair compensation is an “autonomous concept of EU law” that will be interpreted uniformly across all EU countries.²³¹ The CJEU has had the opportunity to elaborate on its meaning, mostly in cases regarding private copying and reprography,²³² based on two elements: “fair compensation must necessarily be calculated on the basis of the criterion of the harm caused to authors ... by the introduction of the private copying exception” and a fair balance must be achieved between the interests of rights holders and users.²³³

In *Luksan*,²³⁴ the CJEU had the opportunity to conclude that, as far as the director of an audiovisual work, compensation²³⁵ for private copying is **unwaivable** because it “arises in order to compensate for harm”.²³⁶ This conveys an unalienable character to it. Accordingly, an author’s right for fair compensation under limitation could neither be waived nor transferred. It could not be affected neither by the *cessio legis* of exploitation rights for works created under employment nor by any other contract signed by the author and the publisher. The CJEU ruling in *Luksan* only refers to the audiovisual director since it is the only one who has harmonised authorship status under EU *acquis*. Yet it must equally be applied to any other audiovisual authors as determined by national law since EU *acquis* relies on national laws after all to determine authorship in audiovisual works (see above).

In Europe,²³⁷ among the several limitations subject to fair compensation, private copying is the one that provides a **higher source of revenues for audiovisual authors**.²³⁸ This may be explained by two reasons. First, virtually all national laws provide for this limitation with an unwaivable and *ex Luksan* inalienable compensation, subject to mandatory collective management. As reported by the SAA, private copying remuneration, typically based on a levy system,²³⁹ is managed by SAA societies in all countries.

Remunerations to compensate for other statutory limitations, such as for public lending, teaching and research uses, or archiving, may be in place in national laws. Some may be subject to mandatory collective management. Limitations, compensation regimes and management solutions as well as the amount of collected remuneration vary across countries, depending on each national law. Success in providing equitable remuneration for audiovisual authors depends on several factors including its mandatory collective management, and its unwaivable and inalienable nature.

²³⁰ See Recital (35) InfoSoc Directive.

²³¹ The notion of “fair compensation” is a novelty in European copyright law. Until the adoption of the Information Society Directive, the payment of a fee to rights holders for unauthorised use of copyright-protected works was referred to in terms of “equitable remuneration”. The notion of “equitable remuneration” is an internationally recognised concept (Art. 11bis(2) and 13(2) Berne Convention) rooted in notions of natural justice and based on the theory that authors have a right to remuneration for every act of use of their copyrighted works, notwithstanding any consideration of harm to the rights holders. In practice, the co-existence of the two concepts of “equitable remuneration” and “fair compensation” is likely to lead to friction in the application of particular limitations since the criteria for calculating “equitable remuneration” and “fair compensation” differ. See IVIR (2006), *The Recasting of Copyright & Related Rights for the Knowledge Economy*: p.70-71: http://ec.europa.eu/internal_market/copyright/docs/studies/etd2005imd195recast_report_2006.pdf

²³² See CJEU Padawan (C 467/08), *Stichting de Thuiskopie* (C 462/09), *VG Wort* (from C 457/11 to C 460/11), *Copydan* (C 463/12) and *Reprobel* (C 572/13); See also *Luksan* (C-277/10).

²³³ See Recital (31) InfoSoc Directive: “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.”

²³⁴ See CJEU, 9 Feb.2012, *Luksan v. Van der Let* (C-277/10).

²³⁵ In this case, the CJEU used both terms interchangeably, suggesting that “the conceptual difference between remuneration and compensation is not large;” See *Concise European Copyright Law* (Dreier/Hugenholtz, eds.), Wolters Kluwer, 2nd ed., p.459.

²³⁶ See *Luksan* #103. Notice that in *Luksan* (#99) the question is “solely” answered from the point of view of the private copying exception and compensation (Art.5(2)(b) ISD).

²³⁷ For a detailed and updated study of limitations for private copying existing worldwide, including most EU countries, see WIPO/Stichting de Thuiskopie (2016), *International Survey on Private Copying Law & Practice 2015*: http://www.wipo.int/edocs/pubdocs/en/wipo_pub_1037_2016.pdf

²³⁸ Despite having dropped in recent years, it still amounts to a substantial part of collections by SAA members. See above Table 3 and Figure 5: SAA (2015) *White Paper Audiovisual Authors’ Rights and Remuneration in Europe*, p.25 and p.27: http://www.saa-authors.eu/dbfiles/mfile/6100/6137/SAA_White_Paper_2015.pdf

²³⁹ In general terms, the UK, Ireland, Malta, Cyprus and Luxembourg do not apply any compensation regime for private copying. Since 2015 in Norway and Finland, the private copying limitation is compensated by a contribution from the state budget rather than based on a levy system. In 2016, Spain reintroduced a levy system, after the CJEU concluded in *Egeda* (C-470/14) that the compensatory regime for private copying based on the state budget designed by Spanish law was not in compliance with EU law.

d. Resale Right Directive 2001/84/EC

The resale right grants authors of works of art a right to participate in the sale price of subsequent sales of the originals of such works. In Europe, the resale right was harmonised by Directive 2001/84/EC.²⁴⁰ Resale rights were already granted in several European countries before being specifically recognised in the Berne Convention (see above). This remuneration is not relevant for the purposes of this study since it does not apply to audiovisual works. However, it is important to stress the following characteristics:

- It is not an exclusive right, but an unwaivable and inalienable remuneration right (Art.11 refers to “royalty” and Recital 1 to “an economic interest”).
- The main reason for the resale right is to “ensure that authors... share in the economic success of their original works of art” (Recital 3) and “substitute” for the exhaustion of the exclusive right of distribution once the original has been sold (i.e., first sale doctrine).
- The resale right amount is based on a percentage of the sale price obtained for any resale in the market.
- Fees are to be paid by the seller.
- Member States may choose to subject it to mandatory collective management.²⁴¹

e. EU Commission’s Public Consultation on online distribution of audiovisual works

It is worth briefly considering the public consultation opened in 2011 by the EU Commission regarding online distribution of audiovisual works because some contributions presented at that time recommended granting statutory remuneration rights to secure equitable remuneration for audiovisual authors.²⁴²

Some of the questions asked in the Green Paper dealt with the unwaivable right to remuneration to ensure adequate remuneration of authors and performers. Specifically, it asked:

*“16. Is an unwaivable right to remuneration required at European level for audiovisual authors to guarantee proportional remuneration for online uses of their works after they transferred their making available right? If so, should such a remuneration right be compulsorily administered by collecting societies?”*²⁴³

Among the contributions authorised for publication,²⁴⁴ a few responses deserve attention.

Governments from different countries proposed and defended their respective national solutions. Spain,²⁴⁵ Cyprus,²⁴⁶ Hungary,²⁴⁷ and Slovakia²⁴⁸ favoured implementing a statutory unwaivable remuneration right, retained by audiovisual works authors after transferring their exploitation rights to producers, paid by licensees and subject to mandatory collective management in all EU countries. Spain further considered specific issues regarding its harmonisation. France opposed any further rules on transfer of rights and defended its own model based on the collective agreement of authors and producers and later enforced by statutory sanction.²⁴⁹ The Swedish government proposed extended collective licensing as the best

²⁴⁰ Directive 2001/84/EC on the resale right for the benefit of the author of an original work of art, 27 Sept. 2001: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32001L0084>

²⁴¹ “While the majority of Member States provides for mandatory collective management of the resale right, a significant number opted for optional collective management.” See the Report on the Implementation and Effect of the Resale Right Directive (2001/84/EC): http://ec.europa.eu/internal_market/copyright/docs/resale/report_en.pdf

²⁴² EU Commission (2011) “Green Paper on the online distribution of audiovisual works in the European Union: opportunities and challenges towards a digital single market” COM(2011) 427 final: http://ec.europa.eu/internal_market/consultations/docs/2011/audiovisual/green_paper_COM2011_427_en.pdf
Full Public consultation: http://ec.europa.eu/internal_market/consultations/2011/audiovisual_en.htm

²⁴³ Other questions were: 17. What would be the costs and benefits of introducing such a right for all stakeholders in the value chain, including consumers? In particular, what would be the effect on the cross-border licensing of audiovisual works? 20. Are there other means to ensure the adequate remuneration of authors and performers and if so which ones?

²⁴⁴ See all contributions: http://ec.europa.eu/internal_market/consultations/2011/audiovisual_en.htm

²⁴⁵ Spain: http://ec.europa.eu/internal_market/consultations/2011/audiovisual/public-authorities/ministerio-de-cultura-de-espana_es.pdf

²⁴⁶ Cyprus: http://ec.europa.eu/internal_market/consultations/2011/audiovisual/public-authorities/government-of-cyprus_en.pdf

²⁴⁷ Hungary: http://ec.europa.eu/internal_market/consultations/2011/audiovisual/public-authorities/hungarian-government_en.pdf

²⁴⁸ Slovakia: http://ec.europa.eu/internal_market/consultations/2011/audiovisual/public-authorities/ministerstvo-kultry-slovenskej-republiky_en.pdf

²⁴⁹ France: http://ec.europa.eu/internal_market/consultations/2011/audiovisual/public-authorities/republique-francaise_fr.pdf

system to secure equitable remuneration for audiovisual authors.²⁵⁰ The Swedish Parliament instead favoured a statutory unwaivable right to equitable remuneration.²⁵¹ The Dutch government examined both options, remuneration via production contracts and remuneration via statutory rights, proposing the adoption of legislative measures for all of them. In the first case, to strengthen the negotiation position of authors via CMOs in front of producers. In the second case, to smooth out an operating system of European collective collection societies.²⁵² The Estonian government disliked the idea of an unwaivable remuneration right because it hindered, in their view, the development of new online and cross-border services and would make them more expensive for consumers. Yet if it was to be implemented, it suggested mandatory collective management as the only operational possibility.²⁵³ This position is quite surprising considering that Estonian law provides a wide statutory remuneration right for audiovisual authors (see above and below).

CMOs and authors' societies across all countries and origins, such as SAA, GESAC, SACD, SCAM, Directors UK, ALCS and CRA, responded in unison in favour of unwaivable residual remuneration rights under collective management as the more efficient and transparent way to secure equitable remuneration for authors and performers.

SAA²⁵⁴ proposed to make the most of remunerations already existing in EU *acquis* by providing that “when an audiovisual author has transferred his making available right to a producer, he retains the right to obtain an equitable remuneration for the making available which cannot be waived, as is the case for the rental right;” and by stressing the importance of mandatory collective management and payment by audiovisual media services that make audiovisual works available on-demand to the public.

In similar terms, GESAC supported “the introduction at EU level of such an unwaivable, non-transferable and inalienable right of authors to remuneration for the commercial exploitation of their works, based on the revenues generated by the exploitation and paid by the final distributor. This entitlement should exist even when exclusive rights have been transferred to the producer and would secure a financial reward for authors proportional to the real exploitation of the works. The administration of this remuneration right should be entrusted to collective management societies and so establish a direct revenue stream between the exploitation stage and the audiovisual authors.”²⁵⁵ SACD also concluded it was indispensable to avoid the making available right of authors becoming a “dead letter” and to accompany it with “an inalienable right to a proportional remuneration based on the revenues generated by the online exploitation of works.”²⁵⁶ CRA fully supported “the detailed arguments ... made by the SAA” and answered “in both cases, absolutely: yes” to the need for an unwaivable remuneration right at the European level for audiovisual authors and performers to guarantee proportional remuneration for online uses of their works after they transferred their making available right and the need for compulsory collective management.²⁵⁷

Broadcasting organisations, exhibitors, media conglomerates, telephone companies and producers opposed any “residual” remuneration right for reasons of licensing complexity and extra costs, calling it a deterrent to investment in new audiovisual productions in Europe. Instead, they all supported contractual freedom, bargained solutions and the *status quo*.

²⁵⁰ Sweden: http://ec.europa.eu/internal_market/consultations/2011/audiovisual/public-authorities/swedish-government_en.pdf

²⁵¹ Sweden: http://ec.europa.eu/internal_market/consultations/2011/audiovisual/public-authorities/swedish-parliament_en.pdf

²⁵² The Netherlands: http://ec.europa.eu/internal_market/consultations/2011/audiovisual/public-authorities/dutch-government_en.pdf

²⁵³ Estonia: http://ec.europa.eu/internal_market/consultations/2011/audiovisual/public-authorities/estonian-government_en.pdf

²⁵⁴ SAA, *Contribution to the public consultation on the “Green Paper on the online distribution of audiovisual works in the European Union: opportunities and challenges towards a digital single market*, p.13-15:

http://ec.europa.eu/internal_market/consultations/2011/audiovisual/registered-organisation/societe-des-auteurs-audiovisuels_fr.pdf

²⁵⁵ GESAC, *Contribution to the public consultation on the “Green Paper on the online distribution of audiovisual works in the European Union: opportunities and challenges towards a digital single market*, p.12:

http://ec.europa.eu/internal_market/consultations/2011/audiovisual/registered-organisation/gesac_en.pdf

²⁵⁶ SACD, *Contribution Au Livre Vert Sur La Distribution En Ligne D’œuvres Audiovisuelles Dans L’union Européenne-Vers Un Marche Unique Du Numerique : Possibilites Et Obstacles*, p.13-15:

http://ec.europa.eu/internal_market/consultations/2011/audiovisual/registered-organisation/sacd_en.pdf

²⁵⁷ Creators' Rights Alliance, *Contribution to the public consultation on the “Green Paper on the online distribution of audiovisual works in the European Union: opportunities and challenges towards a digital single market”* (COM (2011) 427 final), 18.11.2011;

http://ec.europa.eu/internal_market/consultations/2011/audiovisual/registered-organisation/creators-rights-alliance_en.pdf

f. EU Commission's Proposal for a Directive on Copyright in the Digital Single Market

The proposed *Directive on Copyright in the Digital Single Market*,²⁵⁸ which is being examined by the Parliament at the time of concluding this Study, would seem to be the natural place to introduce an equitable remuneration right for audiovisual authors, at least as a measure directed to ensure fair remuneration in the digital market.

The proposal contains a specific chapter dealing with “*Fair remuneration in contracts of authors and performers*” (Arts.14 to 16), which could easily accommodate this proposal for online exploitation, at least. As it stands, the directive proposal does very little to secure effective remuneration of authors and performers as its title pretends to do. The proposed measures simply consist of transparency obligations (Art.14), dispute resolution (Art.16) and an adjustment mechanism (commonly referred to as the “best-seller clause”) that entitles authors to “*request additional, appropriate remuneration... when the remuneration originally agreed is disproportionately low compared to the subsequent relevant revenues and benefits derived from the exploitation of the work*” (Art.15). In other words, a set of measures that will likely remain ineffective as proven by the fact that they are already envisioned in most European national laws with no positive impact on protecting authors. Instead, an unwaivable remuneration right for the online exploitation of their works, subject to mandatory collective management and paid by operators would certainly be an effective measure to secure fair remuneration for authors and performers that could ultimately justify the title used.

The same criticism has been made by the European Copyright Society, pointing at the Directive’s “**lack of ambition**” and calling for “more comprehensive and effective forms of protection” for authors and performers in view of the “real and urgent need to improve the negotiating position of authors and performers... to protect creators against overbroad transfers of rights, inequitable remuneration and other unfair practices”, and stating that “authors and performers should be given the proper means to claim fair remuneration, modify or opt out of unfair contracts and control the benefits yielded by all exploitations of their works.”²⁵⁹ ALAI endorses the contractual measures in the proposed directive as “first steps toward a fairer economic balance in the relations between authors and performers, on the one hand, and users, on the other.”²⁶⁰

Reasons justifying introducing such a “residual” remuneration right for online exploitation are already found in the proposed directive recitals:

(40) “...As authors and performers tend to be in a weaker contractual position when they grant licenses or transfer their rights ...”

(42) “Certain contracts for the exploitation of rights harmonized at Union level are of long duration, offering few possibilities for authors and performers to renegotiate them with their contractual counterparts or their successors in title”.

At the time of concluding this study, the **European Parliament’s** Committee on Culture and Education (CULT) and Committee on Industry, Research and Energy (ITRE) had adopted their respective opinions. Both propose introducing a new provision granting an unwaivable right to remuneration for authors and performers for the making available online of their works and performances.

²⁵⁸ Proposal for a Directive on Copyright in the Digital Single Market, COM(2016) 593 Final, 14.09.2016:
<https://ec.europa.eu/transparency/regdoc/rep/1/2016/EN/1-2016-593-EN-F1-1.PDF>

²⁵⁹ See ECS General Opinion on the EU Copyright Reform Package (24 January 2017):
<https://europeancopyrightsocietydotorg.files.wordpress.com/2015/12/ecs-opinion-on-eu-copyright-reform-def.pdf>

²⁶⁰ See ALAI Resolution on the European proposals of 14 September 2016 to introduce fairer sharing of the value when works and other protected material are made available by electronic means (18 February 2017):
<http://www.alai.org/assets/files/resolutions/170218-value-gap-en.pdf>

Proposals in the Parliament

The CULT Opinion of 14 July 2017 proposed the following Amendment 92:

Article 14a - Unwaivable right to fair remuneration for authors and performers

1. Member States shall ensure that where authors and performers transfer or assign the right of making available to the public their works or other subject-matter for their use on information society services that make available works or other subject-matter through a licensed catalogue, those authors and performers retain the right to obtain fair remuneration from such use.
2. Member States shall proscribe the waiving of the right of an author or performer to obtain fair remuneration for the making available of his or her work as described in paragraph 1. Paragraph 1 shall not apply where an author or performer grants a free non-exclusive right for the benefit of all users for the use of his or her work.
3. The administration of the right to fair remuneration for the making available of an author's or performer's work shall be entrusted to the respective collective management organisation. That collective management organisation shall collect the fair remuneration from information society services making works available to the public.
4. Where the right to fair remuneration has been already provided for in agreements relating to audiovisual works or in collective agreements, including voluntary collective management agreements, between the author or the performer and his or her contractual counterparty, the provisions in this Article shall be deemed to have been complied with.

The ITRE Opinion of 1 August 2017 proposed the following Amendment 46:

Article 14 a - Unwaivable right to fair remuneration for authors and performers

1. Member States shall ensure that when authors and performers transfer or assign their right of making available to the public, they retain the right to obtain a fair remuneration derived from the exploitation of their work.
2. The right of an author or performer to obtain a fair remuneration for the making available of their work is inalienable and cannot be waived.
3. The administration of this right to fair remuneration for the making available of an authors or performers work shall be entrusted to their collective management organisations, unless other collective agreements, including voluntary collective management agreements, guarantee such remuneration to authors, audio-visual authors and performers for their making available right.
4. Collective management organisations shall collect the fair remuneration from information society services making works available to the public.

Both proposals retain the fundamental elements of our current proposal: an **unwaivable and inalienable** right to receive **fair/equitable remuneration** retained by authors **upon the transfer** of their exclusive right of **making available to the public** (as envisioned in Art.3 InfoSoc Directive), subject to **mandatory collective management** and **paid directly by operators/licensees** without prejudice to any other mechanisms in place to secure such remuneration.

However, the proposal would only cover remuneration for the right of “making available to the public” as harmonised by Art.3 InfoSoc Directive and thus restricted to “*interactive on-demand transmissions characterised by the fact that members of the public may access them from a place and at a time individually chosen by them*”.²⁶¹ At the time of closing this report, the final position by the Parliament’s Committee on Legal Affairs (JURI) has not been issued.

²⁶¹ See Recital (25) InfoSoc Directive. See also, CJEU rulings in *SCF v. Del Corso*, (C-135/10) #59 and *C-More Entertainment* (C-279/13) #26.

If the EU wants to efficiently secure remuneration for authors as has been agreed upon over years by the Commission and Parliament as well as supported by academics and professional entities, **a mandatory “residual” remuneration right for audiovisual authors would be an important step forward.** The *Directive on Copyright in the Digital Single Market* presents itself as an excellent opportunity to implement this study’s proposal at least to secure equitable remuneration of audiovisual authors for the online exploitation of their works.

On the other hand, Directive 2014/26/EU on collective rights management ²⁶² has already established the basis to facilitate collective management of remuneration rights across EU countries.

3. NATIONAL LAWS

The following are examples of statutory remuneration rights that have been implemented in national laws. Although considerable effort has been taken to identify as many as possible, the provided scenarios do not intend to be exhaustive but rather to serve as examples of national statutory remuneration rights for audiovisual authors. Examples have been chosen **prioritising laws that address online and digital uses. Available translations** were a decisive factor in making the selection.²⁶³

This section will not consider the **residuals system**, notably in the United States, because they are contractual solutions, not statutory, and were examined in Chapter I.3.b. Neither will be considered remuneration and compensation that audiovisual authors may be entitled to in exchange for **exceptions and limitations existing in national laws**. Despite often providing a considerable source of income for audiovisual authors, which may be the case of private copying in some countries, these remunerations are of a different nature than the “residual” remuneration right proposed by this study.

a. Europe

Collective management is well developed in Europe, although different across countries. The number of existing CMOs in European countries varies widely as do the rights managed and management forms of each CMO. The recent Collective Rights Management Directive 2014/26/EU harmonised some minimum requirements applicable to collective management “in order to ensure a high standard of governance, financial management, transparency and reporting.” Beyond this minimum, national legislators have a lot of freedom to regulate CMOs and collective management.

As a general rule, **collective management is done on a voluntary basis**. Authors entrust CMOs with exercising their rights. Quite often, collective management of remuneration rights is imposed by law voluntarily or mandatorily. Rights are managed collectively because it would be **impractical, if not impossible, for authors to enforce them individually**.

Across Europe,²⁶⁴ collective management is widely used to remunerate or compensate authors for limitations, often under mandatory collective management (e.g., private copying, reprography and public lending), to remunerate authors and performers for the transfer of their rental right to producers (not always under mandatory collective management) for communication to the public by means of broadcast and public performance (usually, on a voluntary basis), for cable retransmission (under statutory license and mandatory collective management as imposed on all Member States by Satellite and Cable Directive 93/83/EEC) as well as for the resale right (i.e., *droit de suite*) on a voluntary or mandatory basis. In Nordic countries such as Denmark, Sweden and Finland, results similar to mandatory collective management may be achieved by means of extended collective licensing. This is where the agreement negotiated by a CMO with a group of users is extended by law to apply to any other authors of the same category despite not being members of that particular CMO.

²⁶² Directive 2014/26/EU on collective rights management and multi-territorial licensing of rights in musical works for online, 04.02.2014: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32014L0026>

²⁶³ Unless otherwise indicated, statutes have been obtained from WIPOLEX: <http://www.wipo.int/wipolex/en/>

²⁶⁴ See KEA, The Collective Management of Rights in Europe The Quest for Efficiency (July 2006), p.62-65: http://www.europarl.europa.eu/meetdocs/2004_2009/documents/dv/study-collective-management-rights-study-collective-management-rights-en.pdf

As far as audiovisual works, most audiovisual authors remunerations managed on a collective basis relate to cable retransmission, rental, and public performance. Theatrical exhibition (i.e., box office) remuneration is not available in all countries. Remuneration rights for online means of exploitation is granted by statute or secured by contract only in a handful of countries.

It is important to bear in mind that **disparities** also exist as to which **authors** are entitled to receive these remunerations and specifically whether music composers are included or not. Some countries only grant remuneration rights to **directors and writers** of audiovisual works because music composers tend to already be remunerated for the means of exploitation on the basis of voluntary mandates to relevant CMOs.

(i) France

France is an example of successful collective negotiations to secure remuneration for audiovisual authors on the basis of **voluntary management** with a little help from legislators.

Beyond compensation for limitations (e.g., reprography, private copying and public lending), mandatory collective management of remuneration rights is only envisioned for statutory license of cable retransmission. All other rights managed by a CMO, including rental right, (which was not formally implemented in France) are based on voluntary mandates from authors.

Except for music composers, a *iuris tantum* presumption of transfer of exploitation rights in audiovisual works derives from production contracts (Art.L132-24). According to Art.132-25, when the user pays an individual price to access the work, this remuneration will be proportional and paid by producers to authors.

According to **Art.L132-25-1 CPI** introduced in 2006, any remuneration agreements entered between CMOs and organisations representing producers or their licensees may be extended to all authors by the Ministry of Culture. This provision was meant to offer authors the same treatment that performers had been enjoying since 1985 (under Art.L212-8 CPI). It also strengthens the role of CMOs in collective bargaining production contracts and helps explain the unique collective management ecosystem in France.

The CMO for audiovisual directors and writers, *Société des auteurs et compositeurs dramatiques* (SACD), had been successfully negotiating over the years a **“clause de réserve”**²⁶⁵ to be included in audiovisual production contracts. This provision recalls that SACD is entrusted by authors of their rights and that any user of a work, such as a broadcaster, has to pay royalties to SACD for certain kinds of exploitation: communication in public places, TV broadcasts, cable and satellite, pay-per-view and VOD including free VOD such as YouTube and SVOD such as Canalplay or Netflix.

Since 1999, **SACD negotiated with audiovisual producers associations and agreed on a minimum remuneration**: a percentage of gross proceeds from all means of communication allowing public access to cinematographic and audiovisual works in exchange for fees, such as pay-per-view and VOD. This remuneration, subject to collective management, is to be paid directly by online providers to SACD. It will not affect any payments due by producers to authors as agreed upon in production contracts for that particular means of exploitation. The remuneration provided for in the 1999 agreement, was extended and consolidated by a 2007 decree.²⁶⁶ Even though this decree has expired, the system is still in force for the majority of works in SACD’s repertoire.

France’s experience proves that collective bargaining alone, even when successful, is not enough to secure audiovisual author remuneration even in countries with a consolidated collective management system. Some sort of statutory intervention is necessary, at least to expand effectiveness. The status of CMOs in France is rather unique. CMOs in other countries lack the required bargaining power as well as statutory endorsement to achieve similar results.

²⁶⁵ The author may choose to be remunerated by the producer (as agreed in the production contract) or by the CMO, but it is imperative that all co-authors of the same audiovisual work must abide to the same rule.

²⁶⁶ Memorandum of Understanding of October 12th, 1999 (completed on February 2nd 2002, April 12th 2002 and February 17th 2004) and ratified by Decree of 15 February 2007. See also **SACD**: <http://www.sacd.fr/>

(ii) Italy

Italian law grants authors of cinematographic and assimilated works a remuneration right for any act of exploitation. SIAE collects remuneration for both offline and online uses.

Under Italian law:

- Audiovisual authors²⁶⁷ are granted a remuneration right for **rental** in exchange for its transfer to producers (Art.18bis-5),
- Authors of cinematographic and assimilated works are entitled to separate remuneration for public performance. Since 1997, these remunerations cover any means of **communication to the public via air, cable and satellite** according to Art.46bis(1):
 - For **music composers**, remuneration will be paid directly by licensees (Art.46.3);²⁶⁸
 - **Writers and directors** will only be entitled to this remuneration if not remunerated on the basis of a percentage share in revenues from public performance and nothing has been otherwise agreed upon with producers (Art.46.4);
 - In practice, this means that only music composers benefit from remuneration for communication to the public.²⁶⁹
- **All film authors** (e.g., directors, writers and music composers) are granted a general unwaivable right to obtain **equitable remuneration** ("*equo compenso*") **for each separate act of exploitation of their works to be paid by those making an economic use** according to Art.46bis(2).

These equitable remunerations are not deemed to be independent rights but rather contractual. They are based on the transfer of exploitation rights to producers (Art.46-bis(1)). It is a transfer that will always take place since (Art.45) the producer obtains all exploitation rights by means of *cessio legis*. No contrary agreement is possible. The fact that the payment is done directly by licensees via SIAE rather than by producers does not alter the contractual nature of remuneration, established as a statutory guarantee of payment in favour of authors.

Art. 46-bis

1. Subject to the provisions of Article 46, **in the case of the transfer of the broadcasting right to the producer, the authors of cinematographic and assimilated works have a right to an equitable remuneration to be paid by the operator for each use of the works by means of the communication to the public via air, cable and satellite.**
2. For **each use of cinematographic and assimilated works** other than that provided for in paragraph 1 and in Article 18-bis, paragraph 5, the authors of the works shall be entitled to **an equitable remuneration to be paid by those exercising the exploitation rights for each economic use.**
3. For each use of cinematographic and assimilated works originally expressed in foreign languages, an equitable remuneration is also granted to the authors of the translation or adaptation of the dialogues into Italian.
4. The remunerations provided for in paragraphs 1, 2 and 3 **cannot be waived** and, in the absence of an agreement between categories of interested parties as set out in the first paragraph of Article 16 of the Regulation, it shall be determined in accordance with the procedure of Article 4 of Legislative Decree of July 20, 1945, no. 440.

²⁶⁷ The same applies to audiovisual performers (Law 633/41 article 84(3)). See AEPO-ARTIS, *Study: Performers' Rights...* p.42.

²⁶⁸ According to art.46(3), the music composer is entitled to a separate remuneration for the communication to the public, including box office share and public performance without an entrance fee, negotiated and managed by SIAE.
See https://www.siae.it/sites/default/files/12_13_spettacoli_cinematografici_2017_%281%29.pdf

²⁶⁹ See <https://www.siae.it/it/utilizzatori/cinema-e-opere-audiovisive/proiezioni-cinematografiche/proiezioni-cinematografiche>

Art.46bis was enacted in 1997 after complaints that only producers and broadcasters were benefiting from the exploitation of audiovisual works beyond initial theatrical exhibitions. The open character of this provision for each other separate act of exploitation is precisely meant to accommodate remuneration for any future audiovisual exploitation activities. Currently enforced remunerations under Art.46bis include broadcasting and making available online. These equitable remunerations are to be **paid directly by operators** of the exploitation activity, not by producers, and managed by SIAE on the basis of voluntary mandates from authors. Although Italian law does not formally require mandatory **collective management** for these remunerations, in practice they are only being managed on a collective basis for several reasons. These reasons include SIAE being the only CMO in Italy, the remuneration is unwaivable and secured by statute and ultimately because fee negotiation can only be done collectively by CMOs. Art.46bis(4) refers to “categories of interested parties as set out in the first paragraph of Article 16 of the Regulation.”²⁷⁰

The current SIAE license for “multimedia service provider” covers musical and audiovisual works, reproduction rights and making available online (e.g., streaming, downloading and simulcasting) under separate fees for each.²⁷¹

SPETTACOLI CINEMATOGRAFICI ANNO 2017

Per gli spettacoli cinematografici il compenso per diritto d'autore de corrispondere si differenzia a seconda se si tratti di:

- Spettacoli gratuiti
- Spettacoli non gratuiti

Spettacoli gratuiti

È previsto il pagamento di importo fisso, variabile in base alla capienza della sala:

- Sale cinematografiche di capienza fino a 100 posti: €23,45
- Sale cinematografiche di capienza superior a 100 posti: €35,22

Spettacoli non gratuiti

Il compenso del diritto d'autore è calcolato applicando la percentuale del 2% su:

- 100% dell'importo derivante dalla vendita dei biglietti al netto dell'IVA
- ammontare figurativo dei biglietti omaggio rilasciati in eccedenza alla quota esentata per legge dall'applicazione dell'IVA (5% in riferimento ad ogni ordine di posto)
- importo dei diritti di prevendita eccedenti il 15% del costo del biglietto o, nel caso di prevendita di abbonamenti, sui diritti eccedenti il 10% del costo dell'abbonamento.

²⁷⁰ In theory, once the fee has been negotiated and agreed by SIAE with users, authors might choose to manage its collection individually from the several licensed users. This will rarely be the case.

²⁷¹ For more details, see SIAE's License for Multimedia Service Provider:
https://www.siae.it/sites/default/files/12_50_Multimedialita_Modello_MSP_1_17.pdf

(iii) Spain

Authors of audiovisual works enjoy several **unwaivable rights to obtain equitable remuneration for several acts of exploitation** directly paid by licensees and regardless of their agreements with producers. These remuneration rights include theatrical exhibition (i.e., box office) as well as exhibition without an entrance fee, broadcast and communication to the public (including online interactive making available online) and rental (ex EU *acquis*).²⁷² Mechanisms for securing these remunerations for audiovisual authors are neither new nor original.

Specifically under Art.90 TRLPI, **co-authors of an audiovisual work** are entitled to three instances of remuneration for exploitation of their works:

- “An unwaivable right to obtain an equitable remuneration” in exchange for the transfer of the exclusive right of **rental** to producers -a transfer that is presumed *iuris tantum* (unless otherwise agreed) within audiovisual production contracts (Art.90.2 TRLPI).²⁷³ This “right of equitable remuneration” is “unwaivable”, subject to mandatory collective management. Inalienable is not mentioned. The author of a pre-existing work used in the audiovisual work is also entitled to this remuneration for rental, despite having been denied the condition of co-author (Art.87 TRLPI). Fees are set by relevant CMOs.
- **A share in box office** revenues generated by the public performance of the audiovisual work in exchange for entrance fees (Art.90.3 TRLPI). It is “unwaivable and inalienable”, subject to mandatory collective management. The author of pre-existing work, used in the audiovisual work, is also entitled to this box-office share, despite having been denied the condition of co-author (Art.87 TRLPI).
- A remuneration for the **communication to the public of an audiovisual work without an entrance fee**,²⁷⁴ including the interactive **making available online** (Art.90.4 TRLPI). This provision includes two separate remunerations. Fees will be set by CMOs. Both remunerations are unwaivable and inalienable, subject to mandatory collective management.

The remuneration right for authors was meant to mirror the one proposed for performers of phonograms and audiovisual recordings. This is why the “less detailed” language in Art.90.4 TRLPI cannot be properly understood without reading Art.108.3 TRLPI, which is more complete. Accordingly, despite being silent about it, the remunerations in Art.90.4 TRLPI are formally granted “in exchange for the transfer to the producer of the exclusive right” respectively of communication to the public and interactive making available online. Remuneration must be “equitable”.

²⁷² Additionally, audiovisual authors can enjoy compensation for limitations on private copying (Art.25 TRLPI) and public lending (Art.37.2 TRLPI).

²⁷³ This combination results from the Rental and Lending Directive. The presumption of transfer of rental right is allowed under Art.3.5. Unwaivable right to equitable remuneration is mandatory upon its transfer under Art.5.1.

²⁷⁴ This includes showing a video in a train or bus as well as showing a film in a place open to the public, for example.

Art.90.4 (authors) and Art.108.3 (performers)

The reference to “making available online” was only introduced in art.90.4 by Act 23/2006, which implemented the InfoSoc Directive. Until then, art.90.4 TRLPI only granted authors a remuneration for “communication to the public without an entrance fee”. Performers CMOs AIE and AISGE successfully lobbied the Spanish government to obtain a remuneration right in exchange for transferring the exclusive right of making available right to phonogram and audiovisual recording producers following the scheme of rental right remuneration in EU *acquis* (see above).

The initial bill introduced by the government in Parliament (August 2005) proposed Art.108.3 (performers), but included no revision of Art.90.4 (audiovisual authors). SGAE lobbied Parliament to introduce an amendment for audiovisual authors (Nov.2005). Initially, the amendment granted audiovisual authors remuneration in exchange for “any form of communication to the public that had been duly licensed,”²⁷⁵ justifying it “so as to equal the rights granted to authors to the rights granted to performers under Art.108.” The proposal was accepted and subsequently fine-tuned between the Congress and the Senate until its final language in Art.90.4 TRLPI listed only two forms: “communication to the public without an entrance fee” and “making available online”.

The scope of making available online remains a matter for debate, notably whether it covers any act of online exploitation or only those acts that allow for some “interaction” by the user. CJEU seems to uphold a restrictive interpretation of “making available online” to only cover interactive online transmissions.²⁷⁶

Other **striking differences** among the three remuneration layers granted to audiovisual authors in Art.90 TRLPI deserve further examination:

- Remuneration for rental (Art.90.2) and box office share (Art.90.3) are granted to audiovisual authors as well as to authors of **pre-existing works** used in films. This includes authors of novels adapted for films as well as authors of musical works synchronised as the movie soundtrack. Remunerations for making available online and for communication without an entrance fee (Art.90.4) only formally benefit audiovisual co-authors. Despite this, SGAE makes no distinction and grants all remuneration rights to pre-existing authors too for the sake of consistency.
- Art.90.3 TRLPI expressly states that amounts paid as box office share to authors by exhibitors may be **deducted from license fees** owed to licensors. Nothing is said regarding other remunerations (e.g., rental, communication to the public without an entrance fee and making available online). This opens the debate as to whether all remunerations paid directly to authors may be deducted from licensing fees owed to producers or if this applies only to box office share.
- **Box office remuneration** in Art.90.3 is expressly granted “In any case and regardless of what has been agreed by in the contract”. This may give rise to a debate as to whether this remuneration accrues not only in exchange for the transfer of exclusive right (as residual), but also **on top of exclusive rights**, so that authors in regards to box office are entitled to a remuneration right and an exclusive right regardless of whether the later has been reserved by authors or transferred.

²⁷⁵ The proposed Art.90.4 TRLPI was: “La comunicación pública, debidamente autorizada de una obra audiovisual por cualquier procedimiento, dará derecho a los autores a percibir la remuneración que proceda, de acuerdo con las tarifas generales establecidas por la Entidad de Gestión correspondiente.”

²⁷⁶ See CJEU, *C-More Entertainment v. Linus Sandberg* (C-279/13) ##25-27: “it is apparent from Article 3(2) of that directive that, in order to be classified as an act of ‘making available to the public’ within the meaning of that article, an act must meet, cumulatively, both conditions set out in that provision, namely that members of the public may access the protected work from a place and at a time individually chosen by them... ‘making available to the public’, for the purposes of Article 3 of the directive, is intended to refer to ‘interactive on-demand transmissions’... [instead] that is not the case of transmissions broadcast live on internet, such as those at issue in the main proceedings.”

Box office share

Remuneration schemes for audiovisual authors have a long history in Spain. In 1966, Act 17/1966 of May 31 on cinematographic works distinguished between a set of exploitation rights that belonged *ab initio* (by *cessio legis*) to producers. Unwaivable rights included two moral rights of attribution and integrity,²⁷⁷ the right to exploit the contribution separately from the film provided that it was not causing prejudice to its exploitation and the right to obtain box office share. This remuneration right survived into current law as Art.90.3 TRLPI. Some authors criticised that such a remuneration right was unnecessary and unjustified once the new law obliged producers to proportionately remunerate authors (Art.46 TRLPI) and for each of the assigned exploitation rights and modalities (Art.90.1 TRLPI).²⁷⁸ Time has proven them wrong. Box office share (Art.90.3 TRLPI) along with remuneration for communication to the public without an entrance fee (Art.90.4 TRLPI) have become a statutory mechanism to enforce the producers' obligation to secure equitable remuneration for audiovisual authors in exchange for exploitation rights transferred to them, paid directly by users and licensees.

Exhibición cinematográfica

Tarifa ejemplo

EXHIBICIÓN PÚBLICA DE PELÍCULAS CINEMATográfICAS EN SALAS COMERCIALES

2% de los ingresos en taquilla, previa deducción del I.V.A.

EXHIBICIÓN GRATUITA DE PELÍCULAS CINEMATográfICAS

15,49 € por sesión

Source: SGAE, Tarifas Generales 2016 - <http://www.sgae.es/>

<http://www.sgae.es/es-ES/SitePages/corp-ventalicensiaP3.aspx?s=18>

Remunerations set for audiovisual authors in Art.90 TRLPI are managed exclusively by CMOs.²⁷⁹ Since they are subject to **mandatory collective management**, CMOs must collect them regardless of any mandates. In this sense, mandatory collective management works as if it was extended collective licensing.

CMOs will set fees,²⁸⁰ collect and redistribute to authors. Remuneration is paid directly by users and licensees. It does not interfere with licensing the exploitation of these works by producers. Since these remunerations are equitable, fees are based on gross revenues obtained by operators. Other formats may apply for non-commercial services.

Since it is remuneration in exchange for transferring exclusive rights, it will only apply if the operator has obtained the corresponding exploitation license from the producer.

²⁷⁷ The Law of Intellectual Property of 1879, that was effective at that time, did not grant any moral rights to authors. It was not until the Law of 1987, which was subsequently integrated in the current TRLPI, that moral rights were formally recognised in Spain.

²⁷⁸ J.A. Suarez Lozano (1995) *Aproximación al derecho audiovisual*, p.77.

²⁷⁹ In the original LPI'1987, remunerations in Art.90.3 (box office share) and 4 TRLPI (communication to the public without an entrance fee) were not formally subject to mandatory collective management. This requirement was introduced in 1996 when LPI'1987 was consolidated with several acts that had been implementing EC directives. Act 43/1994 had implemented remuneration for rental right and, as allowed by Art.5 Rental Directive, subject it to mandatory collective management. When consolidating this remuneration as art.90.2 TRLPI, the government expressly set mandatory collective management for all three remunerations. Some criticised that the government exceeded its parliamentary mandate to consolidate existing laws. The Supreme Court rejected this claim since the parliamentary mandate also included the ability to "regularizar, aclarar y armonizar" provisions being consolidated. See Supreme Court (sala 3) rulings of 9 and 10 February 2000 (RJ 2000/323 and RJ 2000/325).

²⁸⁰ CMOs are obliged to negotiate fees with users. Fees must be simple, clear and reasonable. Fees must take into account the economic value of the use of the work upon the licensee's activity. Fees must find the right balance between the interests of owners and users. Specific criteria to be considered are listed in Art.157.1.b) TRLPI. These include: effective use in terms of degree, intensity and relevance of the CMO's repertoire within the user's economic activity; volume of repertoire managed by the CMO; economic income obtain by the user deriving from commercial exploitation of the CMO's repertoire; economic value of the service offered by the CMO; fees set by the CMO with other users for the same acts of exploitation; fees set by equivalent CMOs in other EU member states. See Order ECD/2574/2015 of December 2, which approves the methodology to set CMO licensing fees.

Music composer: exclusive rights and remuneration rights

The remuneration rights in Arts.90 will benefit all authors of the audiovisual work: directors, writers and music composers. Producers will acquire exclusive exploitation rights in the film through the rebuttable presumption of transfer. Authors obtain remuneration rights in exchange for that transfer. However, in the case of music composers the exclusive right of communication to the public is in some cases retained by them to be entrusted to a CMO because of historical and market reasons. This expressly trumps the presumption of transfer to producers where applicable.²⁸¹ In principle, this would mean that “residual” remuneration rights for acts of communication to the public (Art.90.3 and 90.4) would not apply here since licensing will be done on the basis of the composer’s exclusive right.

These remunerations benefit Spanish and EU audiovisual authors as well as any audiovisual author regardless of nationality.²⁸² However, when the author’s country of origin does not guarantee an equivalent right to Spanish authors, the government may direct collected amounts to public interest activities. So far, the Spanish government has never made use of this provision. Yet CMOs bylaws sometimes require such reciprocity to distribute these amounts to non-EU authors.²⁸³

²⁸¹ In the SGAE model contract for music composers, they transfer rights of reproduction and distribution of the musical composition in the film in exclusivity, but retains the right of communication to the public to be entrusted to SGAE, assuring that it will not be exercised to prohibit any act of exploitation authorised by the producer. See http://www.sgae.es/recursos/doc_interactivos/guia/docs/contrato_compositor.pdf

²⁸² In Spain, copyright protection is granted to all audiovisual authors who are Spanish nationals or from another EU country (Art.163.1 TRLPI) under the principle of non-discrimination for nationality. On top of that, it would be granted to audiovisual authors who are permanent residents and to authors of works published first in Spain or in a Berne Union country (Art.163.1 TRLPI). Lastly, it could be enjoyed by any other audiovisual authors based on reciprocity (Art.163.3 TRLPI).

According to Art.163.4 TRLPI, all audiovisual authors regardless of nationality will be entitled to the right of remuneration in Art. 90.3 and .4.

²⁸³ Whether or not this is in compliance with the Berne Convention and specifically the national treatment principle, remains a matter for debate.

Equitable remuneration for making available online (SGAE)

SGAE offers a license under Art.90.4 TRLPI for the making available of movies online (Obras audiovisuales SGAE en redes digitales interactivas). Two different fees apply depending on the commercial or non-commercial nature of the service provided. For commercial sites or apps, the fee is 2.5% of gross revenues of the service along with a minimum fee per accessed work of €0.05 for movies and €0.02 for shorter audiovisual works. For non-commercial sites or apps, fees are set by scales of monthly access (e.g., €118.43 for up to 50,000 monthly accesses). Unitary fees apply for trailers and alike based on scales of monthly access (e.g. €55.61 up to 100,000 monthly accesses).

Tarifa ejemplo

WEB /APP COMERCIALES Derecho simple remuneración (art. 90.4 del TRLPI)

Tarifa General	2,5% de los ingresos totales del servicio
Tarifa mínima:	
Obras completas	0,05 € por acceso
Obras completas (<60')	0,02 € por acceso

WEB /APP NO COMERCIALES

Hasta 50.000 visionados mensuales	118,43 €/mes
Entre 50.001 y 100.000 visionados mensuales	296,09 €/mes
Más de 100.000 visionados mensuales	473,74 €/mes

TRÁILERES O FRAGMENTOS (HASTA 15'):

Hasta 100.000 visitas mensuales	55,61 €/mes
Más de 100.000 visitas mensuales	92,31 €/mes

UTILIZACIÓN DE OBRAS MUSICALES CONTENIDAS EN OBRAS AUDIOVISUALES

Tarifa General	1,875% de los ingresos totales del servicio
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Source: SGAE, Tarifas Generales 2016- <http://www.sgae.es/>
<http://www.sgae.es/es-ES/SitePages/corp-ventalicensiaP3.aspx?l=67&c=19>

The license expressly restricts its territorial scope to Spain. This may be seen as a contradiction, being for the provision of an online service, but is perfectly consistent with the scope of the remuneration right granted under Art.90.4 TRLPI. However, since SGAE manages not only its repertoire but also those of other CMOs through reciprocal representation agreements, this remuneration may benefit not only Spanish audiovisual authors but also any authors whose works are being exploited in Spain or by Spanish operators. If every national law in the EU provided for a similar right to obtain equitable remuneration for this communication to the public, SGAE and its “sister” CMOs for audiovisual authors could be reciprocally licensing and managing these remunerations for all territories. Each CMO could be managing the remuneration for the entire CMOs’ repertoire from businesses established in its territory.

DAMA offers the same remuneration license based on a general fee of 2.5% of gross revenues adjusted by the percentage of used works managed by DAMA. See DAMA Tarifas Generales 2016: http://www.damautor.es/pdf/DAMA_Tarifas.pdf

This statutory remuneration has been in place since 2006, but SGAE and DAMA have been collecting very little revenue from it. After establishing a department devoted to online licensing management, SGAE’s annual reports for 2014 and 2015²⁸⁴ showed annual income of around €500,000 for audiovisual works, mostly from Google, iTunes and Telefónica. These amount to approximately 8-10% of total online exploitation revenues. The 2016 report showed a similar amount of €595,000. Several reasons account for slow VOD market growth: VOD services are only now starting to operate in Spain, fees are still undergoing negotiations, and internal accounting places some of these licenses under the general “communication to the public”.

These remuneration rights are fully compatible with EU *acquis*. So far, EU copyright harmonisation has been done on the basis of principle of subsidiarity and as a minimum of harmonisation, except where the contrary is indicated. Accordingly, Member States are free to grant authors and performers further protection as long as it does not interfere with the functioning of the internal market, and to apply the mechanism of Art.5.3 Rental and Lending Directive *mutatis mutandis*, in relation to other exploitation rights transferred by contracts to producers.²⁸⁵

(iv) Netherlands

In the **Netherlands**, Art.45d DCA establishes a rebuttable presumption of transfer of the main exploitation rights, except adaptation, from **directors and screenwriters**²⁸⁶ to producers. In return, producers must pay equitable remuneration to authors.²⁸⁷

Since July 1st 2015, Art.45d(2), DCA introduced **unwaivable right** for directors and screenwriters as well as performers **to receive a proportional equitable remuneration from anyone who “broadcasts a film or communicates it to the public in any other manner”** except for the making available online (e.g., VOD) and theatrical exhibition (i.e., box office). The remuneration right will be **collectively managed** (Art.45d(3) CDA). It is paid by the party that makes the communication to the public based upon generated revenues. The “proportional” criterion relates to the income generated by the communication of that party.²⁸⁸

Equitable remuneration only accrues when authors and performers have assigned their exploitation rights to the film producers, hence “a residual” remuneration. On this basis, VEVAM²⁸⁹ for directors, LIRA²⁹⁰ for writers and NORMA for performers, collect remunerations directly from TV and cable operators.

Despite **VOD being excluded** from the remuneration granted by statute, audiovisual authors and performers CMOs as well as VOD operators reached **an agreement** that proportional remuneration will be collectively managed on a voluntary basis.²⁹¹ However, practical implementation of this remuneration is still unsettled since no tariff agreement exists beyond an initial payment agreed upon in 2015.

²⁸⁴ Informe de Gestión SGAE - 2014:

http://www.sgae.es/recursos/asamblea-general-2015/Documentos_Asamblea_2015/Informe_gestion_WEB.pdf;

Informe de Gestión SGAE – 2015:

http://www.sgae.es/Documentos%20compartidos/Gobierno%20corporativo/Auditorias/INFORME_DE_GESTION_SGAE_2015_WEB.pdf

Notice that in these reports, the amounts collected as “VOD royalties” from audiovisual platforms are included for the time being as “broadcasting royalties.”

²⁸⁵ According to von Lewinski, “for the sake of consistency it would be appropriate to do so;” See Walter/von Lewinski (2010) *European Copyright Law*... #6.2.55

²⁸⁶ The presumption of transfer also includes the lead actor(s) in a film. Authors of the film score and the writers of texts to the film score are not subject to this presumption of transfer.

²⁸⁷ If the contribution has been done under employment, initial ownership of all rights is vested in the employer.

²⁸⁸ ALAI 2015, Report from The Netherlands p. 15:

<http://alai2015.org/en/national-reports.html>

and ALAI 2017, ALAI 2017, “Report from The Netherlands”, p. 7:

http://alai2017.org/fileadmin/user_upload/ALAI_2017/Netherlands.pdf

²⁸⁹ See: <http://www.vevam.org/>

²⁹⁰ See: <http://www.lira.nl/>

²⁹¹ See Visser, Schaap & Kreijger (July 2015) “New Copyright Contract Law”: <http://www.ipmc.nl/en/topics/new-copyright-contract-law-netherlands>

(v) Poland

In **Poland**, exploitation rights are presumed to be transferred to the audiovisual work's producer, but co-authors or any individual who makes a creative contribution,²⁹² retain **a right to equitable remuneration for a variety of acts of exploitation**: theatrical exhibition (i.e., box office), rental, TV broadcasting and mechanical reproduction for home use (e.g., DVD). Since **online uses are not specifically provided** for in Art.70.2-1,²⁹³ audiovisual authors do not receive remuneration from online audiovisual markets.

Article 70. 1.²⁹⁴ It is presumed that the producer of an audiovisual work acquires, pursuant to the contract for creation of such work or a contract for use of an existing work, exclusive economic rights for the exploitation of those works within the framework of the audiovisual work as a whole.

2. Ineffective

2-1. Co-authors of audiovisual work and artistic performers shall have the right to:

- 1) remuneration proportionate to proceeds received from screening the audiovisual work in cinemas;*
 - 2) appropriate remuneration for the rental of copies of audiovisual works and their public presentation;*
 - 3) appropriate remuneration for the broadcasting of the work on television or through other means of public presentation of works;*
 - 4) appropriate remuneration for the reproduction of the audiovisual work on a copy for individual use.*
- 3. The person using an audiovisual work shall pay remuneration referred to in paragraph 2-1 through the competent collective management organization.*
- 4. Respective remuneration for the use of a Polish audiovisual work abroad or a foreign work in the Republic of Poland may be agreed on a lump sum basis.*

Only theatrical exhibition refers to a remuneration “proportionate to proceeds,” while the rest are “appropriate” remunerations. All are enforceable against final users²⁹⁵ and subject to mandatory collective management.²⁹⁶ According to art.18.3, they “cannot be waived, transferred or assigned.

In addition, the exercise of these remunerations appears to be **difficult in practice** because of the “yet unfamiliar concept of being confronted with parallel claims on the basis of the exclusive rights held by the producer and the remuneration right exercised by the collective management societies.”²⁹⁷

²⁹² See Article 69: “Co-authors of audiovisual work shall be persons who made a creative contribution to its completion, and in particular: the director, picture operator, the author of the adaptation of a literary work, the author of musical works or musical and lyrical works created for the audiovisual work and the author of the screenplay.” See: <http://www.copyright.gov.pl/pages/main-page/law-and-ordinances.php>

²⁹³ It remains unclear whether “through other means of public presentation of works” under Art.70.2-1 paragraph 2(3) can be interpreted to cover online markets.

²⁹⁴ English translation obtained from the Polish Ministry of Culture and National Heritage. See: <http://www.copyright.gov.pl/pages/main-page/law-and-ordinances.php>.

²⁹⁵ Barta/Markiewicz refer to them as “executable creditors’ claims,” including “royalties due pursuant to any contractual transfer or license of rights under which a work has already begun to be exploited, as well as the right itself subject to the transfer or license, to the extent of the author’s consent”. *International Copyright Law and Practice* (Geller/Nimmer), Chapter 33 : Poland, #4[3][c].

²⁹⁶ These remunerations are managed mainly by ZAPA, the CMO for audiovisual authors and producers in Poland; <http://www.sfp.org.pl/> According to the information in this website “ZAPA collects the royalties on behalf of its rightsholders, but also on behalf of those who have not registered with ZAPA yet, but whose creative works are within the scope of protection exercised by ZAPA”: <http://www.zapa.org.pl/en/tantiemy>

²⁹⁷ See Walter/von Lewinski (2010) *European Copyright Law*, # Poland p.373.

(vi) Estonia

Upon transferring economic rights to producers, Estonian law grants audiovisual authors **an unwaivable right to obtain “an equitable remuneration** from the television broadcaster, commercial lessor or another person who uses the audiovisual work”. Art.14(6) of the Estonian Act provides that:

*Where an author has transferred the author’s economic rights to a producer of an audiovisual work or granted an authorization to use (including to rent) the original or a copy of an audiovisual works, or where such a transfer or authorization is presumed, the author shall retain the right to obtain an equitable remuneration from the television broadcaster, commercial lessor or another person who uses the audiovisual work. An agreement to waive the right to obtain an equitable remuneration is void.*²⁹⁸

The exercise of this right is unwaivable and subject to **mandatory collective management. Payment is done by the “person who uses the audiovisual work”**. In the law, express reference is made to TV broadcasting and rental (EU *acquis*), while EAU’s website also includes licenses and tariffs for the making available online of audiovisual works. However, the website only refers to directors, writers of script and dialogues, operators and performers as authors entitled to such remunerations; music composers are not included.

Accordingly, the Union of Audiovisual Rights of Estonia (EAAL)²⁹⁹, on behalf of audiovisual directors and writers as well as performers, manages the equitable remuneration rights for private copying, rental and lending (including digital), communication to the public by any means (e.g., radio, TV, cable and satellite) as well as the making available to the public online. Similar remunerations and licenses on behalf of music composers are managed by Eesti Autorite Ühing (EAU).³⁰⁰

(vii) Lithuania

In theory, **Lithuanian** Act grants co-authors of audiovisual works (e.g., directors, authors of screenplay and dialogue, art directors, cameramen, music composers specifically created for the audiovisual work) a remuneration “for each mode of the exploitation of the work”. It expressly refers to theatrical exhibition, broadcast, cable retransmission, rental and “including the making available to the public of the work via computer networks (over the internet).³⁰¹ In practice, audiovisual collective management in Lithuania only extends to remuneration for cable retransmission, rental and private copying.

Article 15. Economic Rights of Authors

*3.The author shall have **the right to receive a remuneration for each mode of the exploitation of the work related to author’s economic rights specified in paragraph 1 of this Article. In the case of public performance of a work, the author shall be entitled to a remuneration for both the direct (live) performance, and when the aforementioned acts are done with the help of a phonogram or audiovisual fixation, radio and television broadcasting or retransmission. In the case of broadcasting, retransmission or another communication to the public of the work, **including the making available to the public of the work via computer networks (on the Internet), the author shall be entitled to receive a remuneration for both the broadcasting, retransmission or another communication to the public of a direct (live) performance of the work, and for the use of a phonogram or audiovisual fixation. The amount of remuneration and the payment procedure thereof shall be agreed upon in the copyright agreement, as well as in the licensing agreement negotiated between users of works and the authors or associations of collective administration of copyright.*****

²⁹⁸ The Estonian provision is very precise and unique as to the means of transferring of the “economic rights” to the producer, covering both express and presumed transfers of rights, as well as “authorizations to use.”

²⁹⁹ See Eesti Audiovisuaalautorite Liiduga (EAAL): <https://kinoliit.ee/kinoliit/>

³⁰⁰ On EAU’s website, the following licenses and tariffs are offered: reproduction, rental, VOD, broadcast, cable, satellite and mechanical communication to the public, making available online, private use. <http://www.eau.org/teoste-kasutajale/audiovisuaalautorite-teosed/>

³⁰¹ See Resolution requested by LATGA-A, in support of introducing an unwaivable right of remuneration for the exploitation of audiovisual works over the internet.

Since these remunerations relate to economic exclusive rights that **can be assigned and transferred** (e.g., under a rebuttable presumption of transfer of all economic rights in favor of producer – ex Art.11.2), **audiovisual authors tend to forgoe any further remuneration** for the exploitation of their works under buy-out contracts. Art.15.3 specifically allows for this, stating: “*the amount of remuneration and the payment procedure thereof shall be agreed upon in the copyright agreement*”.

The rental remuneration is the only remuneration formally envisioned as unwaivable (see Art.11.4) following implementation of Art.5 Rental Directive. Private copying compensation is understood to be retained by authors, as it is unwaivable, following CJUE’s ruling in *Luksan*.

Mandatory collective management is envisioned for cable retransmission and private copying as well as other means of exploitation that are not relevant for audiovisual authors (e.g., reprography, public lending, broadcasting and communication to the public of phonograms).

According to Art.15, fees are to be negotiated among CMO and licensees. However, this is to be read only as a possibility. Collective management may apply to enforce these remunerations, but collective management is not mandatory. Neither Asociacija LATGA³⁰² (established in 1990) nor AVAKA³⁰³ (established in 2008) have reported any remunerations for online uses so far.

The Lithuanian scenario offers another example of how **statutory language** declaring remuneration rights for authors **does not always and easily translate into effective enforcement** when remunerations are not formally set as unwaivable and subject to mandatory collective management.

(viii) Bulgaria

In **Bulgaria**, co-authors of an audiovisual work (e.g., director, writer, cameraman, music composer, and illustrator in respect of cartoons) are entitled to “*fair compensation ... for each type of use of the film or audio-visual work;*” these compensations will be paid “by the respective users” and may be received through the producer or through CMOs. Mandatory collective management is only established for the remuneration rights for rental and public lending, as well as for cable retransmission; for the rest of **remuneration rights**,³⁰⁴ they **must be expressly reserved** in the production contracts before authors can mandate them to collective management. The website of FILMAUTOR shows licenses/tariffs for theatrical exhibition (and without an entrance fee), TV broadcast, cable, as well as making available online (including VOD).³⁰⁵

(ix) Romania

Romanian law requires **proportional remuneration for each mode of exploitation** (Art.71). However, authors may choose whether to get this remuneration **from producers or “directly from the users” via a CMO**. DACIN-SARA,³⁰⁶ the Romanian audiovisual authors’ CMO, offers licenses and tariffs for cable retransmission, communication to the public, broadcast, reproduction and private copying. It does not seem to offer licenses or tariffs for online exploitation of audiovisual works.

³⁰² See LATGA-A: <http://www.latga.lt/apie-mus.html>

³⁰³ See AVAKA: <http://www.avaka.lt/en>. See also AVAKA’s 2016 Activity Report: http://avaka.lt/sites/default/files/2016_AVAKA_veiklos_finansine_audito_ataskaita_GALUTINE.pdf

³⁰⁴ This study does not refer to remuneration or compensation resulting from limitations and exceptions, such as private copying, typically subject to mandatory collective management.

³⁰⁵ See FILMAUTOR: <http://www.filmautor.org/Polzvateli>

³⁰⁶ See DACIN-SARA: <http://dacinsara.ro/utilizatori/>

(x) Sweden

Nordic countries have a long tradition of collective management of authors' rights and related rights.

In **Sweden**, for instance, although the only statutory remuneration right for authors and performers is envisioned when the rental right has been transferred to the producer (Art.29), audiovisual authors remuneration may benefit from **several extended collective licenses** (ECL)³⁰⁷ for educational uses, private copying, broadcast retransmissions and broadcast copying.

Copyswede manages audiovisual authors and performers rights.³⁰⁸ Stim manages rights in musical works. The presumption of transfer of exclusive rights to audiovisual producers does not cover musical works (e.g., soundtracks). At the end, the music composer is the co-author that mostly benefits from secondary remunerations. For music composers, Stim offers licenses for theatrical exhibition of movies with or without an entrance fee as well as for online uses of musical works in audiovisual works.³⁰⁹ Copyswede does not do so for writers and directors.

Recent legislation introduced an extended collective license scheme for radio and television companies for programmes made available at the request of individuals via the internet, which apparently applies to audiovisual authors and performers.³¹⁰

b. Other former Soviet states

Collective management in former Soviet states is uneven. A few examples follow:

(i) Georgia

In **Georgia**, audiovisual co-authors (e.g., directors, screenplay and dialogue authors, authors of musical work specifically created for the audiovisual work) shall retain **the right to receive remuneration from users for using the audiovisual work “in any form.”**

This **unwaivable**³¹¹ remuneration right shall be exercised only through a **collective management organisation**, except when the user has directly paid remuneration to authors and/or co-authors. In this case, users must submit evidence of payment to the CMO. Licenses offered by Georgian Copyright Association (GCA) include all major acts of exploitation including streaming and downloading for internet services.³¹² It is unclear if GCA's digital license includes audiovisual works.

(ii) Armenia

In **Armenia** (Art.34.2), co-authors of an audiovisual work are the principal director, the screenplay author, composer of music specifically created for the film, the author of dialogues and the cameraman. Producers may also be co-authors if they are one of these authors at the same time. According to Art.34.3, economic rights of authors shall be transferred to producers of the audiovisual work by the contract concluded with the producer upon the audiovisual work's creation. This looks more like a *cessio legis* than a presumption, let alone rebuttable.

According to Art.34.3, “in the absence of a contract, **the authors retain the right to receive an equitable remuneration for any type of use**”. Any waiver of this equitable remuneration shall be null and void,³¹³

³⁰⁷ ECL extends the effects of an agreement entered into by a CMO (which is representative of a substantial number of authors in a specific field) and users to all authors in that same field, despite not being members of that CMO.

³⁰⁸ See Copyswede: <https://www.copyswede.se>

³⁰⁹ See Stim: <https://www.stim.se/en/get-music-license>

³¹⁰ See AEPO-ARTIS, Study: Performers' Rights... p.40. The scenario in Sweden is rather complex consisting of a combination of collective agreements between producers, CMOs –or Unions- for authors and performers, and operators (distinguishing between public broadcasters and private operators); as a result, authors and performers of audiovisual works/recordings share some revenues for the online exploitation of TV programs.

³¹¹ According to the Georgian Copyright Act, any other agreement between audiovisual work producers and authors shall be null and void.

³¹² See Georgian Copyright Association (GCA): <http://www.gca.ge>. The association was established in 1999 as a legal successor of the Georgian Authors and Performers Association (GESAP) and Georgian Authors Society (SAS).

³¹³ This seems to imply that, despite unwaivable, remuneration may be trumped by an agreement (i.e., agreeing on a different remuneration paid by the producer).

but it is **not subject to mandatory collective management**. The only remuneration rights for audiovisual authors subject to compulsory collective management are ex *EU acquis* **rental** and **cable retransmission** (Art.63.7).³¹⁴ Other remuneration rights allowed under Art.34.3 might still be collectively managed on the basis of voluntary agreements. **Difficulties in obtaining mandates and enforcement** as well as insufficient development of the online market may explain why no remuneration for online uses is currently offered by CMOs in Armenia.³¹⁵

c. Latin America

Despite most Latin American countries have detailed legislation regulating collective management, CMOs are unevenly developed. Argentina, Brazil and Mexico have a longer history of collective management and the strongest CMOs. In Chile for instance, Sociedad Chilena del Derecho de Autor (SCD) was its first CMO, created in 1992. The most common challenges faced by CMOs in Latin America are piracy and a lack of awareness by the population.³¹⁶

(i) Chile

In October 2016, Law n.20959/2016 extended to directors and screenwriters of movies, the same remuneration rights previously granted to audiovisual performers by Law 20243/2010. Both laws need to be jointly examined.

Law n.20243/2010 granted **audiovisual performing artists** (*“intérpretes y ejecutantes”*)³¹⁷ inalienable and unwaivable moral rights of attribution and integrity (Art.2) as well as **inalienable and unwaivable rights to obtain a remuneration for the following acts of exploitation** of their performances in audiovisual works and recordings (Art.3):

- a) *public communication and broadcast by TV, cable, radio and theaters, in any means, analogue or digital;*
- b) *making available on digital interactive means;*
- c) *public rental;*
- d) *direct use of the audiovisual support (or a copy of it) for exhibition in a public place with a lucrative intent, by means of any equipment;*

These remunerations³¹⁸ will be **paid by whoever executes the listed activities**. Fees will be agreed upon with CMOs, by reference to the general procedure to establish collective licensing fees in art.100 Law n.17336. The statute does not require mandatory **collective management** (“it may be managed”), but this has always been the case in practice.

These remunerations, which accrue in exchange for the transfer of rights to producers under a rebuttable presumption, are safeguarded from any transfer of rights done by the performers and do not affect other exploitation rights granted to performers by the Law on Intellectual Property. Art.66 Law n.17336 grants artists rights of fixation, reproduction, distribution, transmission and retransmission by wire or wireless means, live communication to the public.

Despite the statute referring to one remuneration, the granted remuneration right will translate into several independent remunerations, each negotiated and paid for each listed means of exploitation and for subcategories within them.³¹⁹

³¹⁴ Audiovisual performers retain an unwaivable remuneration right for rental and the right to receive an equitable remuneration for other types of uses according to Art.45(7).

³¹⁵ The ARMAUTHOR’s 2015 report shows the following categories of licensed uses on behalf of music composers: theaters, concert haalls, TV, radio, restaurant, phonogram producer, ringtones, cable and other. See ARMAUTHOR 2015 Annual Report: http://www.armauthor.am/images/site_images/_2015.pdf

³¹⁶ See Correa Pereira, “Collective Management in Latin America”, in *Collective Management of Copyright and Related Rights* (Gervais, ed.), Kluwer Law International (2006).

³¹⁷ This includes actors as well as musicians that participate in an audiovisual production.

³¹⁸ Remunerations shown by CHILEACTORES include: TV broadcast, cable retransmission, theater exhibition (2% of net box office), transport, VOD and online means of exploitation (2% of gross revenues), rental, hospitals. See: <http://www.chileactores.cl/wp-content/uploads/2015/10/Tarifas-septiembre-2014.pdf>

³¹⁹ For instance, the first listing (a) includes several different means of exploitation that will be carried out by different licensees: TV broadcasters, cable companies, theater exhibitors ...; in principle, three different “fees” should derive from the first listing.

In 2016, **Law n.20959/2016**, known as **Ricardo Larrain Law (Ley Larrain)**, in reference to the late director, granted the same remuneration rights as in Art.3 Law n. 20243/2010 to **directors and screenwriters of cinematographic works**.³²⁰ The law states that this right **cannot be waived or transferred** by contract, specifically adding that “any agreement -of any kind- so as not to exercise this right or not to join a CMO for its exercise will be null and void.”³²¹ Mandatory **collective management** is not required by statute. In principle, they will be managed on the basis of voluntary mandates by authors to the CMO. However, since these remunerations cannot be waived or transferred, there seems to be no need to carve them out from production contracts before mandating them to a CMO. The remuneration right is secured for authors by law.

In order to understand the importance of the Ricardo Larrain Law, keep in mind that in Chile:

- **Co-authors of an audiovisual work (joint-work)** are “natural persons who make its intellectual creation”. The following are deemed to be co-authors, unless proven otherwise: directors, authors of the plot, script, adaptation, dialogue and composers of the music specifically created for it, as well as authors of the underlying novel or script when the film has been based on it;³²²
- **As far as cinematographic works (e.g., films), the producer (natural or legal person) is the initial owner (by *cessio legis*)** of all exploitation rights in the audiovisual work (Art.25). This is an adjudication by law of all exploitation rights in the film, not a mere rebuttable presumption. As far as other audiovisual works, Art.29 provides for a presumption of transfer of all exploitation rights in these contributions in favour of the producer.³²³
- **Music composers are not included** in Law n. 20959/2016. This might be explained because these authors already had in place a robust system of collective licensing through the *Sociedad Chilena de Autores e Intérpretes Musicales* (SCD),³²⁴ covering all activities of communication to the public of the film: theatrical exhibition, public exhibition without an entrance fee, broadcast and transmission (cable or wireless), as well as online exploitation.³²⁵ However, composers of music specifically created for the film are deemed to be co-authors and are, in principle, affected by the *cessio legis* in favour of the producer (Art.25).³²⁶

These remuneration rights are not being formally granted as new rights, but rather as a contractual security imposed by statute.³²⁷ However, because of the transfer of all exclusive rights to the producer by virtue of the *cessio legis* in Art.25, these remuneration rights are welcomed as new economic rights accruing for directors and writers of films.

Law 20.243/2010 (audiovisual performers) expressly stated that remuneration right was not to be deemed included or affected by any transfer of rights done before its enactment. Accordingly, the same applies to the remuneration right set in favour of authors by Ricardo Larrain Law.

³²⁰ Ricardo Larrain Law only applies to films, not the rest of audiovisual works.

³²¹ Law n.20959/2016 contains an express reference to the remuneration for directors, screenwriters and performers of foreign audiovisual work.: Theater exhibitors will retain these amounts on their behalf. Law n.20959/2016 also amends a mistake in art.27 LPI.

³²² It remains to be seen whether all literary contributors, who are deemed to be co-authors under Art.27, will be granted remuneration rights as “screenwriters” under Art.25 (Ricardo Larrain Law).

³²³ According to Art.31, co-authors of these contributions can separately exploit them unless they assigned the rights on an exclusive basis for the audiovisual production.

³²⁴ See SCD fees: http://scd.cl/tarifas/0510/TARIFAS_GENERALES_SCD.pdf

A comparison between SCD licenses or fees and the Ricardo Larrain Law would suggest that the only difference relates to the rental remuneration right, granted to directors and screenwriters, which does not seem to be covered yet under an SCD license.

³²⁵ Synchronisation of musical works not created for the film in audiovisual productions are managed on an individual basis.

³²⁶ In other words, the music composer needs to carve out the exclusive right of communication to the public to entrust it to a CMO.

³²⁷ Law 20.243/2010 (audiovisual performers) refers to such transfer (“even after the transfer of his exclusive rights”). Some commentators point out that the authors’ remunerations will be deducted by licensees from the amounts agreed with and paid to producers as set in licensing agreement. See ABC Guionistas: “La remuneración de los autores audiovisuales”, Editorial 15/11/2016, Boletín n.286/2016 <http://www.abccguionistas.com/boletin/boletin20161115online.html>

No collective licensing for these remunerations rights has been implemented yet.

LEY NÚM. 20.959/2016 EXTIENDE LA APLICACIÓN DE LA LEY N° 20.243, QUE ESTABLECE NORMAS SOBRE LOS DERECHOS MORALES Y PATRIMONIALES DE LOS INTÉRPRETES DE LAS EJECUCIONES ARTÍSTICAS FIJADAS EN FORMATO AUDIOVISUAL

"Artículo 1.- Los directores y guionistas de las obras audiovisuales gozarán también del derecho irrenunciable e intransferible a percibir la remuneración establecida en el artículo 3 de la ley N° 20.243, con las limitaciones y excepciones contenidas en el Título III de la ley N° 17.336, cuando sean procedentes.

Para los efectos de esta ley, y por aplicación de la disposición antes citada, debe entenderse que este derecho no admite renuncia o cesión, en cualesquiera actos o contratos que el director o guionista celebre, sea para el uso de sus obras o para la transferencia de sus derechos patrimoniales. Asimismo, la obligación de no ejercer el derecho o de no integrarse a una entidad de gestión colectiva para su ejercicio, establecida o pactada en cualquier forma, se tendrá por no escrita y será nula para todos los efectos legales.

El cobro de la remuneración podrá efectuarse a través de la entidad de gestión colectiva que los represente y su monto será establecido de acuerdo a lo dispuesto en el artículo 100 de la citada ley N° 17.336.

Artículo 2.- En el caso de la comunicación al público de las obras cinematográficas extranjeras que se realice en las salas de cine, a que se refiere el literal a) del artículo 3 de la ley N° 20.243, el pago de la remuneración que corresponde realizar, respectivamente, a directores y guionistas, y a los artistas intérpretes y ejecutantes, se realizará conforme a lo dispuesto en el inciso segundo del artículo 29 de la ley N° 17.336, actuando el exhibidor como retenedor.

Artículo 3.- Sustitúyese en el artículo 27, inciso primero, de la ley N° 17.336, el término "legalidad" por las palabras "la calidad".

Artículo transitorio.- Los artículos 1 y 2 empezarán a regir seis meses después de la fecha de publicación de esta ley."

LEY NÚM. 20.243/2010 ESTABLECE NORMAS SOBRE LOS DERECHOS MORALES Y PATRIMONIALES DE LOS INTÉRPRETES DE LAS EJECUCIONES ARTÍSTICAS FIJADAS EN FORMATO AUDIOVISUAL

Artículo 1°.- Los derechos de propiedad intelectual de los artistas, intérpretes y ejecutantes de obras o fijaciones audiovisuales, se regirán por las disposiciones especiales de esta ley y, en lo no previsto en ella, por la ley N° 17.336, en cuanto sea aplicable.

Artículo 2°.- Con independencia a sus derechos patrimoniales, e incluso después de la transferencia de éstos o de su extinción, el artista, intérprete y ejecutante gozará, de por vida, del derecho a reivindicar la asociación de su nombre sobre sus interpretaciones o ejecuciones; y de oponerse a toda deformación, mutilación u otro atentado sobre su actuación o interpretación, que lesione o perjudique su prestigio o reputación. El ejercicio de estos derechos es transmisible a los herederos del artista intérprete y ejecutante, que tengan el carácter de legitimarios, de acuerdo a los órdenes abintestato establecidos en la ley. Estos derechos son inalienables, siendo nulo cualquier pacto en contrario.

Artículo 3°.- El artista intérprete y ejecutante de una obra audiovisual, incluso después de la cesión de sus derechos patrimoniales, tendrá el derecho irrenunciable e intransferible de percibir una remuneración por cualquiera de los siguientes actos que se realicen respecto de soportes audiovisuales de cualquier naturaleza, en que se encuentran fijadas o representadas sus interpretaciones o ejecuciones audiovisuales: a) La comunicación pública y radiodifusión que realicen los canales de televisión, canales de cable, organismos de radiodifusión y salas de cine, mediante cualquier tipo de emisión, análogo o digital; b) La puesta a disposición por medios digitales interactivos; c) El arrendamiento al público, y d) La utilización directa de un videograma o cualquier otro soporte audiovisual o una reproducción del mismo, con fines de lucro, para su difusión en un recinto o lugar accesible al público mediante cualquier instrumento idóneo. La remuneración a que se refiere este artículo no se entenderá comprendida en las cesiones de derechos que el artista hubiere efectuado con anterioridad a esta ley y no afecta los demás derechos que a los artistas intérpretes de obras audiovisuales les reconoce la ley N° 17.336, sobre Propiedad Intelectual.

Artículo 4°.- El pago de la remuneración será exigible de quien lleve a efecto alguna de las acciones a que se refiere el artículo precedente. El cobro de la remuneración podrá efectuarse a través de la entidad de gestión colectiva que los represente, y su monto será establecido de acuerdo a lo dispuesto en el artículo 100 de la ley N° 17.336.

(ii) Colombia

The **Pepe Sanchez Law** (Ley Pepe Sanchez)³²⁸ is a similar law enacted in Colombia, granting authors of cinematographic works an **unwaivable right to receive equitable remuneration for any “acts of communication to the public including** the making available and the commercial public rental” (Art.98).

*Art.98: The economic rights in the cinematographic work will belong, unless otherwise agreed, to the producer. 1°. Regardless of the presumption of transfer of rights of the authors designated in art.95, they will retain in any case the right to receive an equitable remuneration for the acts of communication to the public including the making available and the commercial public rental of the audiovisual work; the remuneration will be directly paid by whoever carries on the communication to the public.*³²⁹

The right to receive remuneration is independent from (“regardless of”) the transfer of exploitation rights to the producer (a transfer that may result from the rebuttable presumption set in Art.98 or from a contractual assignment). At the same time, it derives from it (“authors...will retain in any case”). Unlike in Chile, the remuneration right is granted to all co-authors of a film as listed in Art.95: directors, authors of the scenario or script, composers of the music, and the illustrators in the case of an animated film.

Remuneration will be **paid directly by the person who carries out the acts of exploitation**. Like in Chile, nothing is said regarding mandatory collective management but, once again, since remunerations cannot be affected by production contracts, there is no need to carve them out in order to mandate management to a CMO.³³⁰

Pepe Sanchez Law (May 2017)

Artículo 98. Los derechos patrimoniales sobre la obra cinematográfica se reconocerán, salvo estipulación en contrario a favor del productor.

1°. No obstante la presunción de cesión de los derechos de los autores establecidos en el artículo 95 de la presente ley, conservarán en todo caso el derecho a recibir una remuneración equitativa por los actos de comunicación pública incluida la puesta a disposición y el alquiler comercial al público que se hagan de la obra audiovisual, remuneración que será **pagada directamente por quien realice la comunicación pública**.

La remuneración a que se refiere este artículo, no se entenderá comprendida en las cesiones de derechos que el autor hubiere efectuado con anterioridad a esta ley y no afecta los demás derechos que a los autores de obras cinematográficas les reconoce la Ley 23 de 1982 y demás normas que la modifican o adicionan, así como sus decretos reglamentarios.

En ejercicio de este derecho, los autores definidos en el artículo 95 de la presente ley, no podrán prohibir, alterar o suspender la producción o la normal explotación comercial de la obra cinematográfica por parte del productor.

2°. No se considerará comunicación pública, para los efectos del ejercicio de este derecho, la que se realice con fines estrictamente educativos, dentro del recinto o instalaciones de los institutos de educación, siempre que no se cobre suma alguna por el derecho de entrada. Asimismo, el pago o reconocimiento de este derecho de remuneración no le es aplicable a aquellos establecimientos abiertos al público que utilicen la obra audiovisual para el entretenimiento de sus trabajadores, o cuya finalidad de comunicación de la obra audiovisual no sea la de entretener con ella al público consumidor con ánimo de lucro o de ventas.

³²⁸ See Ley 1835/2017, de 9 Junio 2017; published in Gaceta 523/17.

³²⁹ A couple of curiosities: on the one hand, the undistinctive reference to “audiovisual works” and “cinematographic works;” on the other, the rental right being envisioned as an act of communication to the public (see the economic rights granted in Art.76).

³³⁰ See Sociedad Colombiana de Directores Audiovisuales (DASC) <http://directorescolombia.com.co/> and Red Colombiana de Escritores Audiovisuales (REDES): <http://www.redescritorescolombia.org/es/>

(iii) Mexico

In **Mexico**, the producer owns all exclusive rights in the audiovisual work (the same result as applies to audiovisual works made under employment, but co-authors (e.g., directors, writers, music composers, photographers, animators) have **an unwaivable remuneration right for the performance or communication to the public “by any means”** (Art.26bis). This right may be assigned to a CMO on a voluntary basis. The law does not subject it to mandatory collective management. According to the law, remuneration will be **paid by licensees** once the fees have been agreed upon between them and the CMO. When this remuneration right was introduced, users claimed that it amounted to a double payment (an exclusive right licensed by producers and remuneration right licensed by CMOs), but the Supreme Court denied such claim in 2007 arguing that remuneration rights only accrue when authors have assigned their exclusive rights to producers. Despite the statutory remuneration right, CMO websites do not show any information of remuneration secured for audiovisual authors.³³¹

(iv) Argentina

Although **no specific remuneration rights are formally granted by the statute in Argentina**, audiovisual works authors are remunerated on the basis of voluntary collective management that has developed and consolidated over time. Producers are presumed to be co-owners³³² and co-authors at the same time, along with screenwriters, directors and music composers.³³³ The website of Directores Argentinos Cinematograficos (DAC)³³⁴ shows licensing for theatrical exhibition, cable and TV broadcast and communication in public places. Argentores (writers)³³⁵ has been developing licenses for digital platforms, such as Netflix, Google and YouTube.

³³¹ See: <http://www.directoresmexico.org/>

³³² Failing an agreement to the contrary, producers may exploit the film even without consent of other co-authors. Music composers and writers may exploit their contributions separately.

³³³ Co-authorship of directors was only introduced in 2003. Before that, directors were deemed to be performers.

³³⁴ See Directores Argentinos Cinematográficos (DAC), the CMO for audiovisual directors: <http://www.dac.org.ar/>

³³⁵ Management of remuneration rights for writers is done by ARGENTORES, Sociedad General de Autores de la Argentina: <http://www.argentores.org.ar/>

d. Asia

With a few exceptions, such as **Japan**,³³⁶ the legal, economic and market conditions in most Asian countries do not facilitate collective negotiation or collective rights management for audiovisual authors or for authors in general.³³⁷ Collective management arrived late in Asian countries. The first Asian CMO was created in Japan in 1939. In India, IPRS was created in 1969. Until the last decades of the 20th century, collective management in some countries only existed on paper, being far from fully operational. In countries where CMOs exist and are operational (e.g., Japan, Singapore, Malaysia, India, China and Thailand), their work focuses on licensing musical works, sound recordings and literary works (reprography and private copying).

(i) India

As in other common law countries, authorship and initial copyright ownership in audiovisual works belong to producers in **India**. Since 2012, authors of literary and musical works used in films are entitled to a **unwaivable right** to receive royalties **shared on an equal basis with producers** for the use of the audiovisual work **“in any form” other than for communication to the public in theaters** (Sec.18).

“Provided also that no such assignment shall be applied to any medium or mode of exploitation of the work which did not exist or was not in commercial use at the time when the assignment was made, unless the assignment specifically referred to such medium or mode of exploitation of the work”

*“Provided also that the author of the literary or musical work included in a cinematograph film shall not assign or waive **the right to receive royalties to be shared on an equal basis with the assignee of copyright for the utilization of such work in any form other than for the communication to the public of the work along with the cinematograph film in a cinema hall** except to the legal heirs of the authors or to a copyright society for collection and distribution and any agreement to contrary shall be void”*

Despite nothing being said regarding the management of this right, IPRS collects payments for all kind of uses, analogue and digital, currently existing for audiovisual works, each subject to a different fee.³³⁸

The validity of this remuneration right under Sec.18 has been challenged on constitutional grounds by audiovisual producers.

(ii) China

In **China**, co-authors are entitled to receive **remuneration in accordance with contract terms** concluded between co-authors and producers (Art.15). Nothing is mentioned regarding the unwaivable or inalienable nature of this remuneration. The China Audio-Video Copyright Association (CAVCA)³³⁹ manages authors' rights and related rights of audiovisual works and recordings, collecting fees for uses such as TV broadcast, communication in public places (including karaoke), and rental. According to its website, CAVCA also collects and distributes royalties for making available online as well as under statutory licenses with the authorisation of the National Copyright Administration of China.

³³⁶ See K. Okumura, “Collective Management in Japan”, in *Collective Management of Copyright and Related Rights* (Gervais, ed.), Kluwer Law International (2006).

³³⁷ See A.T. Tiang, “Collective Management in Asia”, in *Collective Management of Copyright and Related Rights* (Gervais, ed.), Kluwer Law International (2006).

³³⁸ See IPRS, Tarif CF: <http://www.iprs.org/cms/tariffs/CF.pdf> The 2012 Amendment granted this remuneration right for performers of audiovisual works. Performers of phonograms and audiovisual recordings remuneration is managed by ISRA: http://isracopyright.com/tariff_scheme.php

³³⁹ CAVCA: <http://cavca.org/enindex.php>

e. Africa and Arabian countries

Be it with *copyright* or *droit d'auteur* traditions, the reality in Africa and Arabian countries is hardly supportive of neither collective bargaining³⁴⁰ nor collective rights management in favour of audiovisual authors. Only a few national laws provide any rules regarding CMOs (e.g., Lebanon, Morocco and Tunisia). In most of them, CMOs are only developing, especially for audiovisual authors.

Audiovisual performers and music composers do receive some remuneration for the exploitation of audiovisual recordings and works. However, the rest of audiovisual authors do not. For instance in **Kenya**, no CMO represents audiovisual authors, but audiovisual performers get to share with producers a single equitable remuneration, equally split, for “broadcasting or other communication to the public” paid by users to the CMO (Sec.30A(2) KCA, as amended in 2014). In **Nigeria**, authors of audiovisual works are those who make arrangements for its making, meaning that authorship may depend on the agreement between parties. However, no statutory rules exist regarding remuneration rights of authors and no CMO exists for audiovisual authors. Nevertheless, COSON represents music composers.³⁴¹

When national laws fail to grant any remuneration rights to audiovisual authors or any authors, remuneration of authors remains a matter for contract law. In **Burkina Faso** and **Senegal**, the producer is responsible for payment of any remuneration to co-authors for each mode of exploitation. Similarly, in **South Africa**, **Kenya** and **Nigeria**, the producer owns all copyright and audiovisual creators only obtain contractual remuneration agreed with producers. Only in very rare instances, such as in **Burkina Faso** and **Senegal**, audiovisual authors may receive equitable remuneration for television broadcasting.

³⁴⁰ “In select African countries (Burkina Faso, Senegal and Kenya), *collective negotiation of rights* does not currently take place. Contracts are negotiated on an individual basis. In some cases, there are no written agreements, or agreements are not clear enough to enable full exploitation of rights, particularly in foreign countries. The scarcity of strong and representative associations or guilds of creative collaborators and financing partners does not support collective negotiation of rights in the target countries. In the absence of collectively negotiated contracts, it is important to create solid basis for *individually negotiated contracts*.” See T. Koskinen-Olsson (2014) WIPO Study on Collective Negotiation of Rights and Collective Management of Rights in the Audiovisual Sector, http://www.wipo.int/edocs/mdocs/mdocs/en/cdip_14/cdip_14_inf_2.pdf

³⁴¹ COSON: <http://www.cosonnng.com>

Annex: Analysis of the proposal

The annex will examine in detail the different elements that integrate the proposed statutory remuneration right.

a. A “residual” remuneration right in exchange for transferring exclusive rights to producers

The “right to obtain an equitable remuneration” proposed here is neither a new right, separate from exploitation rights, nor a limitation or non-voluntary license by which the statute authorises specific exploitation acts.

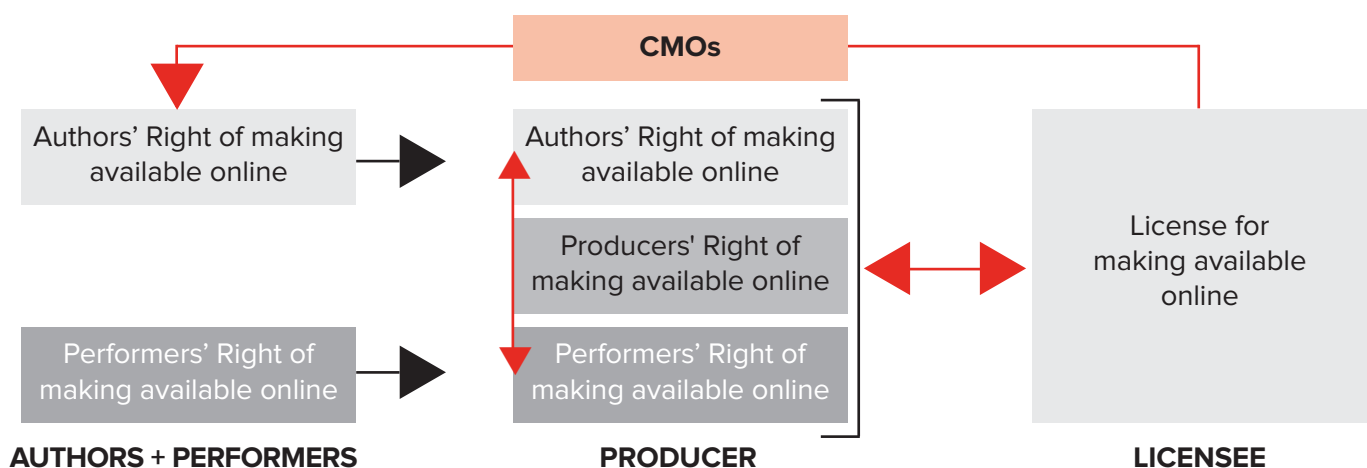
The remuneration right derives from the transfer of exploitation rights to producers and it can only be exercised once producers have licensed the exploitation of the audiovisual work. The EU legislation expressly used the term “retain” (Art.5.1 Rental and Lending Directive), which explains the nature of this remuneration right. Authors transfer their exclusive exploitation rights, but “retain” something sanctioned by law: a specific means of payment directly from the user and subject to collective management (mandatory collective management, if necessary). Hence, the name residual remuneration right.

This remuneration right is only enforceable in front of lawful users that have been licensed by producers or otherwise authorised. It is a “credit right ex lege” (i.e., a right to obtain remuneration granted by law).³⁴² and imposed ex lege on users in favour of authors. If the user has not been licensed by the producer or authorised by law, no remuneration is generated. This remuneration right is not meant to compensate for infringements.

However, this does not mean CMOs will have no standing to sue against infringements. The remuneration right is a statutory right, unwaivable and inalienable. Accordingly, CMOs could bring infringement claims against users who fail to pay for it.

As owner of all exploitation rights, the producers license exploitation. Usually, the license granted by an audiovisual producer covers three layers of exclusive rights: authors’ rights, performers’ rights and producer’s related rights in the audiovisual recording.

As an example, a license for making available online would look like this:



³⁴² See A. Delgado Porras (2007), “La categoría de los derechos de autor a una remuneración equitativa,” en *Derecho de autor y derechos afines al de autor: recopilación de artículos de Antonio Delgado Porras*, vol.2, Madrid, Instituto Autor, p.224: “la relación jurídica constituida entre el titular del derecho de remuneración equitativa y el obligado al pago de esa remuneración es una relación obligatoria”.

The sum of payments done by the licensee should remunerate, globally, for the license of exclusive rights granted by the producer. Payment done by the operator to CMOs is a partial remuneration (authors' remuneration) of that license. Whether or not amounts will be deducted from the of exclusive rights depends on market elasticity as well as the bargaining between producers and operators.³⁴³ In principle, since all the amounts will be negotiated with operators by producers and CMOs, it is only a matter of balance (see below, "equitable"). The proposed remuneration right does not intend to interfere with the licensing fee, but only to secure by law that part of this payment that will be directly received by authors.

The transfer of the exclusive right to producers that triggers the remuneration right may be done in any manner. It may be a formal transfer, such as in a contract, of exploitation rights to producers. It may be as part of the production contract. It may be within an employment contract with producers. The transfer may also operate by virtue of a legal presumption of transfer, such as under an employment relationship, failing an agreement to the contrary or under a *cessio legis* (i.e., collective works where the editor is deemed to be the author) or even under an implied transfer (if enough evidence supports its existence).

If there is no transfer of the exclusive right to the producer, then the author has no remuneration right to collect from CMOs since the author retains the full exclusive right.

b. Which acts or rights of exploitation?

Any means of exploitation covering rights of reproduction, distribution and communication to the public, including making available online, may be covered by remuneration right. Current examples of remuneration rights in national laws and international instruments cover different acts of exploitation such as theatrical exhibition (i.e., box office), communication in public places (without an entrance fee), broadcasting and cable retransmission, rental and making available online.

In digital environments, overlapping exploitation rights may cause problems. For instance, reproduction, including temporary and transient copying, and communication to the public, including making available online, almost inevitably overlap.³⁴⁴ This overlapping may lead to unwanted scenarios, such as fragmentation of licenses and double payment to different rights holders for the same act of exploitation or payment avoidance, as an excuse not to pay corresponding fees.³⁴⁵ The exclusive rights and acts of exploitation affected by the residual remuneration right must be carefully designed in each case. Rightsholders must be clearly identified.

c. Which works?

In principle, the proposal refers to all audiovisual works and authors (e.g., films, TV series, documentaries). However, its scope may be specifically designed according to market needs and the proposal's feasibility.

³⁴³ "In select African countries (Burkina Faso, Senegal and Kenya), *collective negotiation of rights* does not currently take place. Contracts are negotiated on an individual basis. In some cases, there are no written agreements, or agreements are not clear enough to enable full exploitation of rights, particularly in foreign countries. The scarcity of strong and representative associations or guilds of creative collaborators and financing partners does not support collective negotiation of rights in the target countries. In the absence of collectively negotiated contracts, it is important to create solid basis for *individually negotiated contracts*." See T. Koskinen-Olsson (2014) WIPO Study on Collective Negotiation of Rights and Collective Management of Rights in the Audiovisual Sector, http://www.wipo.int/edocs/mdocs/mdocs/en/cdip_14/cdip_14_inf_2.pdf

³⁴⁴ This is especially so when national laws include broad definitions of exclusive rights of reproduction and making available online, such as those respectively in Art.2 and Art.3 of the InfoSoc Directive.

³⁴⁵ Any act of making available online involves several acts of reproduction. Uploading a work requires making a copy on a server. The transmission of a work requires making a myriad of temporary and transient copies through routers, and final access by the user involves making RAM and streaming copies or sometimes downloads. Some of these copies may be exempted by an exception or limitation e.g., temporary and transient copies ex Art.5.1 InfoSoc Directive) but, in any case, copies done by users should be included in the remuneration license and perhaps subject to different prices (e.g. depending on streaming or downloads?).

The WIPO Guide and Glossary ³⁴⁶ defines audiovisual works as follows:

Audiovisual work

1. A *work* consisting of “a series of fixed related images, with or without accompanying sounds, susceptible of being made visible and, where accompanied by sound, susceptible of being made audible” by means of an appropriate device. (In the preceding sentence, the text between quotation marks is from the definition of “audiovisual works” in Article 2 of the *Film Register Treaty*).
2. In general, it is also regarded to be an element of the concept of “audiovisual works” that, when the series of fixed related images are made visible by means of an appropriate device, it imparts the impression of motion.
3. “Audiovisual work” is a shorter synonym of the expression of “cinematographic works to which are assimilated works expressed by a process analogous to cinematography” appearing in the non-exhaustive list of literary and artistic works in Article 2(1) of the Berne Convention.

Audiovisual works usually encompasses all possible forms of original recorded audiovisual content from films and TV series to documentaries, cartoons and any other series of related images imparting an impression of motion with accompanying sound, if any, and regardless of the process employed. They may all ³⁴⁷ be subject to remuneration in a manner that is equitable. This means that fees will be different for different works as well as depending on the means and revenues of exploitation.

d. Which authors are entitled to it?

Authorship and initial ownership in audiovisual works is allocated differently under different national laws. Even within the EU, no uniform solutions exist to decide authorship and initial ownership in audiovisual works. This inevitably leads to addressing the issue of applicable law and choice of law criteria. Following Art.5.2 and Art.14bis Berne Convention, authors entitled to this remuneration right would be ultimately decided by the national law of the “country where protection is sought”.

Accordingly, film authors may be different under various national laws.

This means that CMOs would need to keep track of amounts collected in each country for each audiovisual work and author. It also means that decisions will need to be made regarding distributing collected remunerations. Options could be:

- Payments received from several licensed territories may be distributed according to one single authorship status. The same authors as registered in the CMO of membership will always be obtaining remunerations from different countries.
- Payments received from several licensed territories are distributed according to authorship status in each country. Different authors may obtain remuneration, depending on the country.
- Payments received from several licensed territories are distributed according to an agreement or consensus as to which authors will receive these remuneration rights. For instance, the director and writer of a film. This may be the easiest solution to implement since it would not affect current remunerations that music composers receive. However, it is also the least equitable because it might mean that music composers receive less remuneration than other co-authors in the end.

³⁴⁶ See *Guide to the Copyright and Related Rights Treaties Administered by WIPO and Glossary of Copyright and Related Rights Terms*, 2003, p.268

³⁴⁷ “... primarily films in the classic sense whether silent or “talkies”, whatever their type (documentaries, newsreels, reports or feature films made to a script), whatever their length, whatever their method of making (films on location, films made in studios, cartoons, etc.), or the technical process used (films on celluloid, video tape, etc.) whatever they are intended for (showing in cinemas or television transmission) and finally whoever is their maker (commercial production companies, television organisations or mere amateurs).” See *Guide to Berne Convention* p.15

All these options have advantages and disadvantages depending on the perspective: whether we consider minor authors, who could benefit from authorship status in some countries despite not being co-authors in their country of origin, or major authors, who may expect their status to be recognised in all countries regardless of local authorship designations.

The easiest option would apparently be to take into account the information registered at CMOs where authors have registered or mandated their rights and works then use that declaration of authorship typically following one law: of the country of production) for all remunerations accruing from different territories. Other alternatives may already be in place in reciprocal representation agreements, such as for distributing box office shares.

It may also be the case that not all authors who are entitled to the remuneration right are CMO members. This is not a major problem since CMOs already deal with distributing payments to non-members on a regular basis. Most national laws also have rules to ensure this process.³⁴⁸

Notice that different audiovisual authors may be remunerated differently depending on contractual conditions and market structures put in place to secure remuneration. In some countries, composers of music created for films may already be equitably remunerated thanks to specific contractual conditions (e.g., residuals agreed by guilds) or specific exclusive rights mandates to CMOs. As long as they are effective, these solutions should be maintained and do not interfere with the current proposal.

e. Unwaivable and inalienable

The proposed remuneration right must be unwaivable and inalienable. Both conditions are essential to ensure the remuneration's effectiveness,³⁴⁹ particularly due to the specific circumstances of audiovisual production contractual practices. Remuneration can neither be waived by authors nor transferred or assigned to producers or third parties.

This concern is precisely what motivated the ruling in the European case *Luksan*.³⁵⁰ The CJEU concluded that despite national legislators are free to establish a rebuttable presumption of transfer in favor of a producer (or an employer), this must be done in accordance to EU *acquis* that deems directors as authors (or, at least, co-authors) of audiovisual works; accordingly, any rights of remuneration granted to directors/authors (i.e. fair compensation for a limitation) will not be affected by that presumption of transfer³⁵¹ or by any other contract signed by the author, because remuneration rights are not only unwaivable, but also inalienable.

f. Collective management

The need for collective management follows naturally from the unwaivable and inalienable nature of remuneration right. To secure authors remuneration in front of producers (unwaivable and inalienable) and in front of users (collective management).

Collective management is further justified because the user or licensee obliged to make payments has no relationship with the author. The licensee obtained authorisation from the producer. The proposed remuneration right may be entrusted to CMOs on a voluntary basis or, if necessary, under mandatory collective management or ECL established by law. This decision depends on specific circumstances of each country, such as market conditions or CMO development.

³⁴⁸ See Art.7 "Rights for rightholders who are not members of the CMO", Collective Rights Management Directive 2014/26/EU.

³⁴⁹ See von Lewinski regarding Art.5 Rental and Lending Directive: "The unwaivability of the right to obtain an equitable remuneration for rental represents an essential element of [Art.5]. Without this provision, authors and performers would, in practice, run the risk of being forced by the producer to waive the right." See Walter/von Lewinski (2010) *European Copyright Law* #6.4.17.

³⁵⁰ CJEU, 9 Feb.2012, *Luksan v. Van der Let* (C-277/10). It is true that in *Luksan* (#99) the question is only answered from the point of view of the private copying exception and compensation (Art.5(2)(b) ISD). It is difficult to stay away from the strong conclusions adopted by the CJEU.

³⁵¹ In that particular case, a *cessio legis* of exploitation rights in favor of the audiovisual producer.

Mandatory collective management does not turn “residual” remuneration rights into a statutory licenses. It is a mechanism to facilitate remuneration by allowing CMOs to act ex lege instead of requiring mandates from authors. In that sense, mandatory collective management leads to similar results as extended collective licensing (ECL). On the other hand, the fact that remuneration is unwaivable and subject to mandatory collective management does not mean that authors are forced to cash it in. Authors may choose not to claim any revenues from CMOs. This does not affect either the collective management or the unwaivable nature of the remuneration right.

Mandatory collective management has positive externalities and is commonly used in national and EU legislation. Mandatory collective management has the advantage of ensuring that authors will be remunerated for the exploitation of the works regardless of any other amounts agreed upon in production contracts and irrespective of the licensing deal between producers and licensees. Remunerations subject to mandatory collective management benefit all authors and all past and future productions, regardless of their production contracts. Mandatory collective management ensures authors a better position to negotiate fees with users. In short, it complements production contracts by securing an effective equitable remuneration for authors all along the exploitation of their works.

Another advantage of mandatory collective management imposed by law is to facilitate enforcement, particularly against operators refusing to pay, arguing that all relevant rights have already been licensed by the producer.

Mandatory collective management in the EU internal market

Although collective management had been only marginally regulated in the EU *acquis*, mandatory collective management had been endorsed, and even imposed, by EU directives, and had been justified by CJEU as not contrary to EU freedoms and its internal market.

Art.5 Rental and Lending Directive clearly favours collective management, specifically mandatory collective management by referring to it twice, (Art.5.3 and .4)³⁵² and by allowing Member States to subject the remuneration right to mandatory collective management. The Satellite and Cable Directive (Art.9) imposes mandatory collective management for the statutory license on cable redistribution. The InfoSoc Directive recalls the importance of collective management (Recital 26).

Directive 2014/26/EU on collective rights management and music online has maintained and confirmed the territorial nature of CMOs and their territorial licensing, except for fostering multi-territorial licensing of music online. Directive 2014/26/EU does not prevent mandatory collective management.³⁵³

CJEU had the opportunity to justify mandatory collective management in the OSA case:³⁵⁴

“(72) legislation such as that at issue in the main proceedings – which grants a collecting society, such as OSA, a monopoly over the management of copyright in relation to a category of protected works in the territory of the Member State concerned – must be considered as suitable for protecting intellectual property rights, since it is liable to allow the effective management of those rights and an effective supervision of their respect in that territory”.

³⁵² See Walter/von Lewinski (2010 *European Copyright Law* #6.4.33

³⁵³ See 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, 16 April 2004, COM(2004)261 <http://eur-lex.europa.eu/legal-content/ES/TXT/?uri=celex:52004DC0261>

³⁵⁴ See CJEU, OSA v. Léčebné lázně Mariánské Lázně (C-351/12)

g. Cross-border

Because of the inherently cross-border nature of copyright markets, implementing the proposed remuneration right would require intensive collaboration among CMOs at an international level.

As any other authors' rights, remuneration rights remain territorial and subject to national laws. Remuneration should accrue for each and every territory where the exploitation of audiovisual work takes place. Management and collections of remunerations will take place for each of the licensed countries and then distributed to authors on the basis of CMO reciprocal representation agreements. Audiovisual authors should be entitled to obtain remuneration collected by CMOs regardless of countries of origin, assuming no reciprocity requirement is established.

Even when one single license has been obtained to exploit the work in several countries (e.g., online), remuneration must be cleared and paid for each licensed territory. CMOs must collaborate and maintain proper records of membership, licenses and use of works as well as obligations in terms of collections, distributions, transparency and reporting. As an advanced version, the closest territorially CMO could act as a “one-stop shop” to aggregate several remuneration rights for different territories as needed. Collected remunerations would then be distributed to corresponding CMOs and authors.³⁵⁵ In the EU, this option might be seen as an obstacle to the freedom of providing services in the internal market or even contrary to basic competition rules. However, it only affects remuneration rights, not exclusive rights, and, accordingly, they grant no “*ius prohibendi*” that could restrict the development of the market. In fact, if granting different territorial remuneration rights could become an obstacle for the functioning of the internal market, the EU *acquis* would not have allowed Member States to decide them (i.e., Art.5 Rental & Lending Directive).

Territorial remuneration rights in the EU market

On several occasions, CJEU has accepted restrictions to the internal market as long as they are justified, accurate and restricted to its goal.³⁵⁶ Copyright protection may be one of these justified reasons. In general, see Christiansen,³⁵⁷ where CJEU accepted the existence of rental right in Denmark but not in the UK, based on contextual and teleological reasons: a specific market that brings substantial income to authors and the need to secure an equitable remuneration of authors for this new market. The same reasons can easily justify the existence and exercise of different remuneration rights under European national laws meant to secure equitable remuneration of authors for any markets of exploitation of their audiovisual works. More specifically, CJEU endorsed that an act of communication to the public may generate different remunerations in different countries without being contrary to the functioning internal market. See CJEU 9 April 1987 (C-402/85), *Basset v. SACEM*.

h. Duration

The right is granted as long as the audiovisual work is protected under national law. However, since the remuneration right relates to the transfer of the rights of exploitation of the work and is aimed at securing remuneration for its exploitation, its enforceability will be limited towards licensed users and for as long as the work is being lawfully exploited.

³⁵⁵ This is the option preferred by SAA. See SAA (2011) *Response to Green Paper on online Distribution of audiovisual works*, p.13-15: “As far as cross-border licensing of audiovisual works, SAA’s proposal is neutral. It organises audiovisual author remuneration, not licensing by producers. However, it would offer VOD platforms the possibility of concluding a single arrangement for audiovisual author remuneration of the European works of their catalogues with a one-stop shop service that would distribute money to audiovisual authors. It is also neutral regarding the territorial scope of a VOD service. It would apply both to VOD services offering audiovisual works in a single territory and those operating on a multi-territory basis.”
http://ec.europa.eu/internal_market/consultations/2011/audiovisual/registered-organisation/societe-des-auteurs-audiovisuels_fr.pdf

³⁵⁶ See CJEU, *Coditel I* (62/79), *Musik Vertrieb* (55/80 y 57/80), *Phil Collins* (C 92/92 y C 326/92).

³⁵⁷ See CJEU, *Warner Brothers, Metronome Video v Christiansen* (C-158/86).

i. Who pays?

Remunerations will be directly paid by users.³⁵⁸ It is important that the statutory provision expressly establishes so in order to facilitate enforcement. In addition to obtaining the producer's or rights holder's license, the user will need to pay the corresponding fees to the audiovisual authors' CMOs.

The proposal retains the generic reference to "users," following language used in the international instruments (see Art.12 CR, Art.15 WPPT and Art.12 BT). However, it is clearly meant to refer to those persons and operators that carry on lawful acts of exploitation and which have been directly or indirectly licensed by the rights holder.

j. Equitable remuneration

The right consists of obtaining equitable remuneration, not a compensation.

Remuneration in the EU *acquis*

Although the terms remuneration and compensation are often used interchangeably by national and international legislators, the name should matter.³⁵⁹ A compensation is directed to "compensate ... adequately" damage caused to the right holder (i.e., in the case of a limitation of an exclusive right).³⁶⁰ A remuneration is not restricted to compensate any damages.

The remuneration must be equitable. Thus, it can be calculated on the basis of revenues generated by the licensed business or through any other criteria. In this sense, equitable also requires that the contribution to the final product as well as the extent of the use made are taken into account.³⁶¹

Equitable fees will be decided in each country and for each means of exploitation. Thus, they can be adjusted to cultural and economic circumstances of each country and market.

Art.16.2 of the Collective Rights Management Directive 2014/26/EU establishes the following criteria to set the "appropriate remuneration" that authors are entitled to receive:

*...Rightholders shall receive **appropriate remuneration** for the use of their rights. Tariffs for exclusive rights and rights to remuneration shall be **reasonable in relation to, inter alia, the economic value of the use of the rights in trade, taking into account the nature and scope of the use of the work and other subject-matter, as well as in relation to the economic value of the service provided** by the collective management organization. Collective management organisations shall inform the user concerned of the criteria used for the setting of those tariffs.*

Within the EU, these criteria are important for this study since Art.16 Collective Rights Management Directive 2014/26/EU is binding for Member States and applies to any remunerations negotiated by CMOs for all categories of works and rights.³⁶²

³⁵⁸ The main operators are VOD services that make catalogues of works available to the public either to rent or own at the request of an individual, independent of the technology used (e.g., internet, cable, IPTV). See SAA (2011) *Response to Green Paper on online Distribution of audiovisual works*, p.13-15; http://ec.europa.eu/internal_market/consultations/2011/audiovisual/registered-organisation/societe-des-auteurs-audiovisuels_fr.pdf

³⁵⁹ See the express distinction between compensation and remuneration regarding limitations for private copying and public lending in Recital (13) Music Online Directive: "This Directive does not affect the possibility for Member States to determine by law, by regulation or by any other specific mechanism to that effect, rightholders' fair compensation for exceptions or limitations to the reproduction right provided for in Directive 2001/29/EC ... and rightholders' remuneration for derogations from the exclusive right in respect of public lending provided for in Directive 2006/115/EC ... applicable in their territory as well as the conditions applicable for their collection."

³⁶⁰ Recital 35 InfoSoc Directive: "fair compensation to compensate them adequately for the use made of their protected works or other subject-matter. When determining the form, detailed arrangements and possible level of such fair compensation, account should be taken of the particular circumstances of each case. When evaluating these circumstances, a valuable criterion would be the possible harm to the rightholders resulting from the act in question."

³⁶¹ See Reinbothe/von Lewinski (2015) *The WIPO Treaties on Copyright – A Commentary on the WCT, the WPPT, and the BTAP*, OUP 2nd ed., #9.12.36, referring to the equitable remuneration under Art.12 Beijing Treaty on Audiovisual Performances.

³⁶² Furthermore, the same criteria are being applied to remunerate exclusive rights as well as "rights to remuneration" across the EU. Less detailed, Recital 17 of the Satellite and Cable Directive 93/83/EC, explains that in determining the fee for the license cleared at the country of uplink, "the parties should take account of all aspects of the broadcast such as the actual audience, the potential audience and the language version".

Academic literature has also been assessing the term. For instance, analysing equitable remuneration under Art.15 WPPT, von Lewinski states:

“what is considered “just”, “fair” or “reasonable” may not only be left to the determination of the debtor of the remuneration. ... the frequency and intensity of use must be taken into account. The ‘equitable’ amount may be established according to different criteria, such as in relation to the cost of living, advertising, subscription income..., profits ...; the amounts may also be considered in relation to the amounts paid under licenses to authors of works, or to those paid to performers and phonogram producers in other countries.”³⁶³

Some of the responses offered by SAA to the Green Paper on the online distribution of audiovisual works in 2011³⁶⁴ may also provide valuable insight in explaining equitable remuneration.

Calculating remuneration

Calculating remuneration due to audiovisual authors should be based on revenues of services in relation to actual use of the works. Negotiations should be conducted with authors’ CMOs on the basis of fair criteria and clear principles for calculation, which should take into account the service’s business model (e.g., individual payment, subscription, advertising).

Many services work on a revenue sharing basis with producers or distributors who authorise them to exploit the works. It is then a matter of negotiation between authors’ organisations, producers and online services on how payments to audiovisual authors would impact existing revenue sharing models.

Introducing such payments to audiovisual authors might impact the price setting if the current beneficiaries of revenues generated by online distribution of audiovisual works do not make room for authors in existing models. However, if the increase equals the payments to audiovisual authors that were not previously assumed, with a clear indication to consumers, it can result in a positive impact on the audience. Many consumers do doubt that copyright rules benefit authors and that authors receive a fair share for the exploitation of works. This move can be an argument to attract consumers to legal platforms and divert them away from piracy.

In summary, equitable does not necessarily mean “proportional” to revenues generated by exploitation, but it can certainly be so. In fact, proportional remuneration should be the desirable outcome, as already mandated in many countries that remuneration of authors for the exploitation of their works should be proportional. Equitable will also require that remuneration is obtained for each different act and means of exploitation.

If the parties (CMO and licensed operators) fail to agree on equitable fees, the disagreement should be resolved under any general mechanisms established in each country for the negotiation of collective fees (e.g., arbitration, government agency, courts).

k. Safeguard of other remuneration regimes already in place

The proposal is broad enough to encompass different remuneration regimes already secured by other means, such as *residuals* in the United States or extended collective licensing (ECL) in Nordic countries.³⁶⁵

³⁶³ See Reinbothe/von Lewinski (2015) *The WIPO Treaties on Copyright – A Commentary on the WCT, the WPPT, and the BTAP*, OUP 2nd ed., #8.15.19-21.

³⁶⁴ See SAA (2011) Response to Green Paper on online Distribution of audiovisual works, p.13-15; http://ec.europa.eu/internal_market/consultations/2011/audiovisual/registered-organisation/societe-des-auteurs-audiovisuels_fr.pdf

³⁶⁵ See SAA (2011) *Response to Green Paper on online Distribution of audiovisual works*, p.13-15: “Such a provision would not undermine the audiovisual authors who, in countries such as the UK and the Nordic countries, exercise their exclusive rights through their guilds or extended collective agreements. In such cases, the right to equitable remuneration would not apply either because there is no transfer of right to the producer or because they already benefit from separate payments for their making available right through other collective mechanisms. These audiovisual authors would therefore be able to maintain or develop such arrangements for the remuneration of their making available right if they consider them to be more effective.”



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NOTES

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Contact

CISAC Legal & Policy Department

Office: +33 (1) 55 62 08 83

Email: legal-policy@cisac.org

www.cisac.org

Address:

CISAC, 20/26, boulevard du Parc,
92200 Neuilly-sur-Seine France

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