Kluwer Copyright Blog

The New Copyright Directive: Fair remuneration in exploitation contracts of authors and performers – Part II, Articles 20-23

Ananay Aguilar (University of Cambridge) · Thursday, August 1st, 2019

In Part I of this two-part post on Chapter 3 of the new Copyright Directive, I argued that Articles 18-23 were well-intentioned. It is now up to Member States to send clear signals of support to their creative community by not rendering these provisions ineffective. In addition, while there is ample opportunity to harmonise creator-protective provisions upwards, in the longer term attention needs to be given to not inadvertently reducing protection in the few Member States that already have stronger provisions relating, for example, to equitable remuneration, contract duration, termination, and reversion (see also this study).

Article 20 (previously 15)

Contract adjustment mechanism (also called remuneration adjustment mechanism)

Article 20(1) offers authors and performers (henceforth creators) a contract adjustment mechanism when 'the remuneration originally agreed turns out to be disproportionately low compared to all the subsequent relevant revenues derived from the exploitation of the works or performances'. The article has been compared with 'bestseller clauses' existing elsewhere, most notably and with greater effect in Germany and the Netherlands (and in a more limited guise in Denmark, France and Poland: for an analytical overview see here).

The harmonisation of the bestseller provision at European level is a positive development that acknowledges that success should trigger improved financial conditions for everyone involved in the creative value chain, not simply those with the highest bargaining power. That said, it is a

corrective measure that is activated upon success, so its effect on the larger creative ecosystem is limited.

The phrase above, for instance, has been said to introduce 'quite some uncertainty', which is further heightened by the listing of conditions in Recital 78. These include the significance of contribution, which may be justified in some cases but invites aesthetic value judgements that are not always easy to unpick (as I have argued here and here); the specificities and remuneration practices in the different content sectors; and whether the contract is based on a collective bargaining agreement.

Further, and as this study argues, the qualifying phrase 'in the event that the economic value of the rights turns out to be significantly higher **than initially estimated**' contrasts with similar clauses in Germany and the Netherlands, where the market success of the work need not have been unforeseen in order for the claim to exist. This suggests that Article 20 does not address contracts that were unfair from the outset, resulting from the fundamental imbalance in bargaining power between individual creators and their often-powerful contractual counterparts.

Recital 78 also limits the rights to be renegotiated to the 'rights harmonized at Union level', which might affect contracts in relation to adaptation. On a positive note, Recital 78 also acknowledges the reputational damage that a claim for a contractual adjustment would bring to a creator. It thus suggests that representative bodies not only 'provide assistance', but also protect a creator's 'identity'. As Benoît Machuel, General Secretary of FIM, pointed out in interview with me, this is well-meant, and likely to be put into practice in cases where systematic miscalculations have taken place. However, it is difficult to envisage how the identity can be protected in cases where the facts surrounding a particular individual are at stake.

Article 21 (previously 16)

Alternative dispute resolution procedure

Article 21 provides for the creation of a voluntary, alternative dispute resolution procedure for disputes related to obligations arising from Articles 19 and 20. Such a procedure is generally preferred over litigation. It is now for Member States to decide who will preside over and cover the costs of such a procedure.

Although such procedures have been set up in the past, most notably by collective representatives such as unions and trade associations, they have very much depended on the goodwill of the parties and have not had the legitimacy to be implemented at industry-wide level. For instance, in the UK, the Publishers' Association used to offer an 'informal dispute settlement service' but it is not clear when it was last used. Well-established legal mechanisms designed to ease the process of going through regular courts also exist with varying levels of success. The UK Copyright Tribunal is known to offer a costly and time-intensive service (see commentary here and here). More successful has been the small claims track of the UK IP Enterprise Court, although this is limited to claims of under GBP 10,000.

Article 22 (previously 16a)

Right of revocation

The principle outlined in Article 22(1) is a positive one that recognises the risk that creators face

when signing an exclusivity contract for the full term, which is then not duly exploited. A typical scenario would be one in which after a period of success, interest in a song declines and the rightsholder therefore stops investing in its promotion and distribution. Article 22 offers the creator of that song the right to revoke the contract so that they can promote and distribute the song themselves or in contract with another interested party.

The right, akin to a 'use it or lose it' clause that was introduced at a later stage in the reform process by the Council, has been generally welcomed by the creative community. However, as with the other articles in this chapter, Member States need to be careful not to render the principle ineffective.

Some of the most problematic conditions are contained in Article 22(2b) and Article 22(5). Article 22(2) suggests that Member States may make specific provisions relating to Paragraph 1, taking into account (a) the specificities of the sector and of the types of subject matter, and (b) the relative importance of individual contributions (i.e. significance of contribution as above) and the interests arising from those individual contributions.

The three following (unnumbered) paragraphs thus refer to situations regarding contracts in which a plurality of creators is involved. First, Member States may exclude subject matter if it is usually created by a plurality of contributors. Considering that the large majority of songs are created by a plurality of contributors, this represents a huge limitation for creators in the context of the music industry, but a win for the major record labels who are happy with the status quo. Second, Member States may set a timeframe within which the revocation mechanism may apply, and third, they may revoke the exclusivity rather than the full licence or transfer of contract. These last two conditions of Article 22(2b) are similar to those in Article 22(3), only in the latter case these would apply to *any* situation arising from Article 22(1), not simply to contracts in which pluralities of creators are involved. It is not clear what may be gained from introducing these conditions in one situation but not the other, other than limiting to different degrees the principle of revocation.

But, in principle, setting a timeframe may not be a bad idea (as also explained in Recital 80). As Chair of the Ivors Academy and elected Director at both PRS and PPL Crispin Hunt pointed out in interview with me, setting a timeframe for the revocation right to kick in makes sense in contexts where works do not peak within a three-month timeframe, as pop songs often do. In classical music, for example, investment is recovered over a much longer timeframe, often decades, and so a revocation right without any established timeframe may be detrimental to the sector as a whole.

While setting a legitimate timeframe may be in the interest of all the parties involved, revoking only the exclusivity when the rightsholder is not exploiting the rights introduces unnecessary complexities for the creators and their other potential contractual counterparts. In the rare situations in which this could have a favourable outcome for creators, the parties could have agreed this without it being drafted into law.

Article 22(4) voids 22(1) if the lack of exploitation is due to 'circumstances that the author or the performer can reasonably be expected to remedy'. This article stresses the problem inherent in the principle of revocation. In an age in which a song streamed may count as a song distributed and, therefore, as a song exploited, creators may face a series of obstacles before they can make a strong case that their work or performance is not being adequately exploited. Article 22(4) is likely to add more obstacles for creators.

Article 22(5) allows Member States to make any contractual provision deviating from paragraph 1 enforceable only if it has been agreed through collective bargaining. This is a positive safeguard for all the parties involved, especially those with lower bargaining power, and so one that, it is hoped, Member States will choose to implement.

Article 23 (previously also 16a)

Common provisions

Article 23(1) prevents parties from overriding Articles 19-21 in contract, and so represents a key provision that ensures that the principles contained in Chapter 3 are met.

In short, as I have suggested before, Articles 18-23 are, at least in principle, supportive of creators. They acknowledge some of the most prevalent industry-wide problems stemming from the vast inequalities in bargaining power, such as transparency, fairness in contracts, consistency in exploitation, and the reputational challenges faced by creators when entering into a dispute. While some Member States have stronger creator-protective measures, it is true that the majority need to improve these. There is therefore ample opportunity for Member States to make a success of these provisions and send clear signs of support to the creative ecosystem as a whole.

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