

# Kluwer Copyright Blog

## CDSM: French transposition Order annulled to the extent that it does not provide for ‘appropriate’ remuneration for authors

Brad Spitz (REALEX) · Monday, November 28th, 2022



The [Conseil d’Etat](#), the French administrative Supreme Court, handed down an important [ruling on 15 November 2022](#) which annuls [Order no. 2021-580 of 12 May 2021](#) (‘2021 Order’) of the French Government that implements articles 2(6) and 17 to 23 of the [EU Directive 2019/790 on copyright and related rights in the Digital Single Market](#) (‘CDSM’), to the extent that the 2021 Order does not provide that authors who assign their exclusive rights are entitled to receive ‘appropriate’ remuneration.

Some consider that the Government was influenced by the French union of book publishers [Syndicat National de l’Edition – SNE](#) when it decided to leave out the term ‘appropriate’ when transposing the principle of ‘*appropriate and proportionate remuneration*’ of articles 18 and 20 of the CDSM.

The case was filed on 12 July 2021 by two French unions in charge of defending the interests of authors ([Comité pluridisciplinaire des artistes-auteurs et des artistes-aatrices \(CAAP\)](#) and [Ligue des auteurs professionnels](#)), claiming that the Government had exceeded its powers (‘*recours pour excès de pouvoir*’), in particular for not providing that authors are entitled to ‘appropriate’ remuneration.

## The principle of appropriate and proportionate remuneration of articles 18 and 20 of the CDSM

Article 18 of the CDSM provides that where authors license or transfer their exclusive rights for the exploitation of their works, they are ‘*entitled to receive appropriate and proportionate remuneration*’.

Article 20 provides for a mechanism to adjust the financial situation if the exploitation of the work ultimately shows that the initial contract is not fair for the author. Indeed, the Member States must ensure that authors are ‘*entitled to claim additional, appropriate and fair remuneration from the party with whom they entered into a contract for the exploitation of their rights, or from the successors in title of such party, 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*’.

Remuneration of authors under French copyright law before the 2021 Order

There are two possible forms of remuneration under French copyright law: royalties based on the revenues deriving from the exploitation of the work, and, as an exception to this rule, fixed royalties in the form of a lump sum.

1) Article L131-4 paragraph 1 of the French Intellectual Property Code (‘IPC’) states the general applicable rule: the assignment by an author ‘*shall comprise a proportional participation by the author in the revenue from sale or exploitation of the work.*’

There are almost no judgments that state what percentage would be too low. In a judgment of 16 May 1969, the High Court of First Instance of Paris ruled that 2.5% is not sufficient and therefore is in breach of the law, and in a judgment of 30 November 1999, the same court ruled that a clause providing for 0% for the first 1,000 copies sold, 7% for the next 2,000 copies and 10% beyond 3,000 copies sold, was null. In France, the percentage will often be between 5% and 10%, with the main basis of calculation – the retail price – being very broad; the royalty rate and basis of calculation will of course depend on the sector (music, TV, cinema, etc.) and certain specific rules.

Interestingly, in the present case, the applicants’ lawyer pleaded before the Conseil d’Etat that ‘0.5% royalties is proportional. But can we consider that the resulting sum is appropriate in view of the work carried out?’ ([Here](#)). Indeed, proportional royalties are not necessarily appropriate ...

2) There are exceptions to that general rule: article L131-4 paragraph 2 IPC states that the author’s remuneration may be calculated as a lump sum in the following cases:

1° *There is no practical way to determine the basis for calculating the proportional remuneration;*

2° *There are no means to supervise the proportional remuneration;*

3° *The cost involved in the calculation and supervising of operations would not justify the anticipated results;*

4° *The nature or condition of exploitation makes the application of the rule of proportional*

*remuneration impossible, either because the author's contribution does not constitute one of the essential elements of the intellectual creation of the work or because the use of the work is only of an accessory nature in relation to the subject matter exploited; [...]*

If the exploitation of the work is financially more successful than envisaged, [Article L.131-5 IPC](#) allows the author to claim for the initial lump sum to be revised in the following circumstances:

*“If the exploitation right has been assigned and the author suffers a prejudice of more than seven-twelfths as a result of an unfair contract or of an insufficient estimate of the proceeds from the work, he may demand a revision of the price conditions under the contract.*

*Such demand may only be made where the work has been assigned against a lump sum remuneration.*

*The damage suffered by the author shall be assessed taking into account the overall exploitation by the assignee of the works of the author who claims to have suffered prejudice.”*

It is possible to assess the damage suffered by the author under the unfair contract by reference to the practices of the sector (Court of Appeal of Paris, 15 May 1987).

### **The implementation of the CDSM into French law**

The French implementation of articles 18 to 23 of the CDSM did not substantially change the provisions stated above:

- Article L131-4 paragraph IPC remains unchanged and still refers to a proportional participation, and not to an ‘appropriate’ participation,
- Article L131-5 IPC is now – practically unchanged – in [article L131-5-I](#).

The 2021 Order implemented article 20 of the CDSM in [article L131-5-II to IV](#), with article L131-5-II providing: ‘The author is entitled to additional remuneration when the proportional remuneration initially provided for in the exploitation contract turns out to be excessively low in relation to all the income subsequently derived from exploitation by the transferee. In order to assess the situation of the author, his contribution may be taken into account.’

### **The Conseil d’Etat’s judgment**

The Conseil d’Etat found that even though the 2021 Order provided that authors are entitled to claim revision of the initial fixed lump sum and claim additional remuneration when the proportional royalties are too low, it *‘did not provide, contrary to what is required by the directive, that the remuneration be, from the start, “appropriate”* (§14) (underlined by the author), i.e. directly in the assignment agreements entered into by the authors. The administrative court more generally found that the 2021 Order did not correctly implement the CDSM as it *‘does not provide that the authors [...] have the right to receive appropriate remuneration’* (§15). The Conseil d’Etat therefore annulled the 2021 Order to the extent that it does not provide that authors assigning their exclusive rights for the exploitation of their works have the right to receive appropriate

remuneration.

In its decision, the Conseil d'Etat does not explain how the CDSM should be implemented, but it does appear that the CDSM requires that the national law will have to provide that authors are entitled to receive appropriate and proportionate remuneration, not only under the initial licence or assignment agreement, but also in the adjustment mechanisms.

To be continued...

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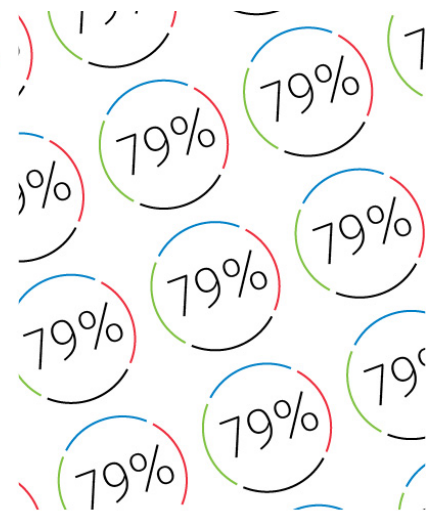
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