Kluwer Copyright Blog

Given the lack of evidence on the impact of reversion and contract adjustment rights, will the UK prioritise the adoption of voluntary measures?

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Recently, the EU Parliament adopted a resolution calling for new rules to ensure a fair and sustainable music streaming sector for creators. This shows how music creators' demands for fair remuneration are far from resolved, despite the EU's efforts to empower them through the adoption of Articles 18 to 22 of the Copyright in the Digital Single Market Directive (CDSMD), which included not only the principle of appropriate and proportionate remuneration, but also a right of revocation and contract adjustment mechanisms.

In 2022, in the UK Parliament, the Digital, Culture, Media and Sport Select Committee, in its final report on the Economics of Music Streaming, made a number of recommendations, including speedy adoption of reversion and contract adjustment rights so that UK artists do not fall behind their European counterparts. However, the UK government's response was that further research was needed to verify the impact of these rights. This response, together with the government's open preference for industry-led packages, led to the failure of MP Kevin Brennan's Bill, which sought to implement some of the Committee's recommendations, to progress through Parliament. As analysed in this blog, the research commissioned by the UK IPO highlights the general lack of empirical research and available evidence on the impact of reversion and contract adjustment rights. This raises the question of whether the UK will decide to go its own way, ruling out legislation in favour of industry-led initiatives.

Can assumptions be enough to convince the UK government to legislate on reversion and contract adjustment?

In February 2023, the UK IPO published research and analysis on "The Economics of Streaming: Rights Reversion and Contract Adjustments", written by Dr Richard Osborne and Dr Hyojung Sun. The research addresses three initial questions:

- *what similar measures exist in other countries and what has been their impact?*
- *based on the available evidence, what are the likely benefits and costs to music creators and performers of implementing a reversion and a right to contract adjustment in the UK?*
- *based on the available evidence, what are the likely benefits and costs to the wider music industry of introducing such rights in the UK?*

Throughout the report, the researchers point to the difficulties of conducting empirical research and providing evidence on the benefits and costs of implementing these rights in an industry where non-disclosure agreements dominate and access to data is scarce. The IPO later added another question to its project outline: *Should change take place at a legislative level or is it possible for the recording industry to implement a voluntary code of practice?*

The report, which focuses on the US and Europe, provides a detailed account of the existing reversion rights and contract adjustment mechanisms. It also outlines the potential impact of these measures on the wider music industry. Stakeholder views, based on interviews, enrich this analysis. As expected, while creators (featured and non-featured artists, composers, lyricists) are mostly in favour of the implementation of these measures, especially to increase their bargaining power, rightsholders (labels and publishers) oppose their implementation, arguing that this asymmetry in contractual negotiations does not really exist.

There is a general view that contractual terms have improved and diversified with streaming. Voluntary initiatives by music companies to renegotiate royalty agreements with legacy creators have also improved their situation, although complaints about low remuneration, lack of transparency and asymmetry in bargaining power remain.

Reversion rights

Depending on how they are implemented, reversion rights allow authors and performers to terminate their contracts after a certain period of time or to reclaim their rights if they are not being exploited. The report highlights that reversion rights are found in the legislation of more than 55% of UN member states. In the EU alone, there are more than 150 provisions on reversion rights in the national legislation. However, there are many ways in which these rights can be adopted, and their impact depends on that. The most common models are ‘use it or lose it’ and ‘time-based’ rights. Most laws, e.g., the CDSMD (art. 22), adopt the former, meaning that creators should be able to terminate their contracts and recover their rights if rightsholders are not using their work or are using it insufficiently. However, the study suggests that a time-based ‘right of revocation’ for authors and performers, similar to that in the US, could be more beneficial to creators. They would be able to request the reversion of their rights, for example, 20 years after the transfer of the licence, regardless of whether their works are being commercially exploited or not.

Other legal aspects, such as whether termination is automatic or subject to formalities, and whether it applies retroactively or only to new contracts, also need to be considered. The US law imposes many formalities for creators to exercise their rights. Research shows that only 1.6% of registered works have been subject to termination requests in the US, with most claims coming from

musicians and songwriters. This indicates that the introduction of many formalities has a negative impact on the exercise of these rights, limiting or making it more burdensome. The same goes for making these rights waivable and non-retroactive.

Despite the lack of research and data available, the report suggests a potential increase in royalty rates for featured artists if they can recover their rights. If implemented in the UK, it estimates that around 14% to 20% of streaming activity involving recording rights would be affected if reversion rights were automatically triggered after 35 or 25 years respectively. However, there is not enough evidence to conclude what difference the adoption of these rights has made to contractual terms, or even whether it has been good or bad for creators financially in the countries where this right has been introduced.

Contract adjustment rights

Contract adjustments were common in many European countries, even before their inclusion in the CDSMD. These measures allow creators to renegotiate their contracts if their royalty income becomes disproportionately low compared to the revenues derived from the exploitation of their works or the duration of the copyright transfer proves to be excessive. In the EU, they were adopted on the grounds that 'there is a natural imbalance in bargaining power in the contractual relationships', with creators usually on the weaker side.

As with reversion rights, there are different ways of adopting these adjustment mechanisms. The report suggests that adopting disproportionality as the main threshold for allowing contracts to be adjusted is broader and better than the stricter 'best seller clauses', which allow creators to renegotiate their contracts only if a work does far better than expected or, in other words, in the case of commercial success. This is because the disproportionality threshold does not require a work to be exceptionally successful for the measures to apply. Therefore, it is not necessary to prove that there are large revenues and major differences between creators' and rightsholders' earnings in order to request a revision of the terms of the contract. The report suggests that contract adjustments should be mandatory, inalienable, and unwaivable features to ensure their effectiveness. They should also apply retroactively to benefit legacy artists and be accompanied by clauses that make it easier for creators to exercise their rights, particularly transparency obligations, fair remuneration and dispute settlement mechanisms.

However, the report indicates that there is even less data available to assess the impact of contract adjustments than there is for reversion rights, so it is difficult to estimate the financial gains and costs associated with the renegotiation of contracts. There are many speculations, mostly based on legal experts' views and project interviews, that suggest that contract adjustments had limited effects in countries which have adopted them. The main impact has apparently been on contractual claims, which have been settled more often in Germany, albeit informally, and on the renegotiation of contracts, which has become more common in the Netherlands. However, in interviews for this study, labels and publishers argue that these measures are not necessary because royalties increase proportionally as songs become more popular, and that in countries with bestseller clauses, they have rarely been used.

Voluntary measures

Following this, no industry-wide policy has yet been adopted in the UK. However, record companies have taken voluntary initiatives to address creators' concerns. The study highlights the initiatives taken by the Beggars Group, Defected Records, BMG, Warner Music and Sony Music. The Beggars Group for example, has introduced a 'base streaming rate' of 25% for all artists and adopted a policy of wiping out any unrecouped advances 15 years after the release of the last record under an agreed contract. Other companies have implemented similar measures.

The impact of these initiatives is not yet clear. Data from the record industry indicates some benefits. For example, according to Sony Music, thousands of featured artists and songwriters benefited from the 'legacy unrecouped balance' programme in its first year of operation, receiving millions of dollars in new royalties.

Thus, the impact of these policies can be observed even before any legislative intervention. The mere possibility of a legislative intervention has somehow proved 'effective'. Apparently, music companies are voluntarily improving the contractual terms with creators. So, the question is whether introduction of these rights is are still necessary, at least from the government's perspective.

The UK government has already expressed its desire to address remuneration issues 'through an industry-led package of measures', which could be in the form of voluntary measures or industry codes of conduct. Authors and performers' trade bodies have supported the adoption of these initiatives, but say that they should be adopted in addition to legislation establishing reversion and contract adjustment rights.

What happens next?

The study provides interesting findings on reversion rights and contract adjustments, but it only partially answers the questions raised by the IPO. The problem is that empirical evidence is almost non-existent. Existing research mainly uses publicly available data, such as the US Copyright Office's termination notice records, and the data collected through interviews and surveys. Therefore, there is insufficient evidence to determine at least the financial benefits and costs of these rights to creators and the music industry as a whole, which is what the UK government was looking for.

Moreover, the EU Parliament's resolution on the European music streaming market shows that fair remuneration for authors and performers in music services remains a key concern even after the CDSMD, along with issues such as payola schemes, musical diversity and the transparency of AI tools. The issue is not just about the unbalanced contractual relationship between music companies and creators, but also about how digital platforms remunerate music creators, as recent discussions around Spotify's new payment policy and Universal's open letter threatening to pull its catalogue from TikTok have shown.

Some of these issues are already being addressed by the UK government. The Committee's call for greater algorithmic transparency led to the Centre for Data Ethics and Innovation's research into recommendation algorithms. However, the lack of evidence has been used as a justification for non-regulatory intervention. The Competition and Markets Authority's market study on music and streaming, including music services payment policies, found no significant concerns to justify the competition authority's intervention in the music market.

After Brexit, the UK government had already announced that it would try a different approach, with more autonomy and less state intervention compared to EU policymaking. It is not surprising that the government prefers industry-led initiatives, as it has stated that it will only regulate emerging technologies when it deems it absolutely necessary. It remains to be seen whether the government's ongoing programme of work on music streaming will end with a proposal for legislative reform that includes reversion and contract adjustment rights, or whether voluntary and industry-led initiatives, such as those recently adopted in the music industry, will be considered sufficient.

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This entry was posted on Wednesday, February 14th, 2024 at 8:11 am and is filed under Contract, Digital Single Market, United Kingdom
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