

Kluwer Copyright Blog

The long and bumpy road to copyright for the digital market – implementation of the CDSM in Poland – II: Right to Remuneration

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This series of posts presents the implementation of [the CDSM Directive](#) in Poland and discusses some of the controversies linked to the new provisions in Polish law. The [first post](#) gave an overview of the implementation, including the new provisions on TDM and the implementation of Article 17 of the CDSM. This second post discusses the right to remuneration under Article 18. An upcoming third post will cover Article 15 on the rights of press publishers.



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The implementation of Article 18 CDSM – ensuring appropriate and proportionate remuneration

The CDSM Directive also addressed the matters of copyright contract law and transfers of rights, primarily in the context of ensuring appropriate remuneration. This area was subject to an evolving discussion in Poland. The debate focused, among other things, on whether Article 18 should result in amendments to chapter 5 of [the Polish Copyright and Related Rights Act](#) on the transfer of rights, and/or if new “additional remuneration” due to authors and performers should be provided. The implementing law brought amendments in those two areas: in the chapter dedicated to contracts, and in new provisions on the additional (residual) remuneration.

1. Amendments in the chapter on the transfer of rights

According to Article 43 (1) of the Copyright and Related Rights Act, unless stated otherwise in the contract, the rightholder is entitled to remuneration. Section 2 of Article 43 was amended in the course of the implementation, and it now states that the remuneration must be fair and appropriate to the scope of the rights transferred, the character and scope of the use of a work, and the extent of the profits obtained from the use of a work. Section 3 of Article 43 establishes a presumption that remuneration proportionate to the revenue satisfies this requirement.

Amendments to the so-called “bestseller clause” were also introduced. The provision according to which the author may claim higher remuneration in court in the case of gross disproportion between the remuneration agreed in the contract and the profits from the exploitation of a work were subject to debate, particularly after a lawsuit concerning “The Witcher” novel and the videogame developed based on this [discussed in English [here](#) and in Polish [here](#)]. As a result of the amendments, the author may claim higher remuneration in court if the remuneration is inadequately low. This provision gave rise to new claims in courts, with the example of the bestseller Polish novel: “[Peasants. The Story of our Grandmothers](#)” . The discussion at the moment concerns mostly the publishing sector.

2. Additional remuneration

As for the issue of additional (residual) remuneration, the initial proposal in 2022 was to extend the scope of Article 70 (2¹), which grants additional remuneration to co-authors of an audiovisual work and performing artists to cover online uses, particularly making available on audiovisual on-demand platforms. Article 70(1) provides a presumption that the producer of an audiovisual work acquires, based on the contracts on the creation of an audiovisual work or contracts on its use, exclusive economic rights to exploit the audiovisual work as a whole. Separate from the remuneration set by contract, section 2¹ provides for “additional remuneration” due from the “user” of an audiovisual work, for example for screening the work in the movies. The provision on additional remuneration was introduced in 2007 and was subject to amendments in the course of the implementation of the CDSM Directive.

The new draft proposal submitted for public consultation in February 2024 did not provide for any new “additional remuneration”. It should be noted that Article 70(2¹) was subject to criticism and controversy and it was pointed out that implementation of the CDSM Directive would be the time to re-think the framework for such remuneration. This includes three major questions: which categories of rightholders should be entitled to residual remuneration, for which acts of exploitation should the remuneration be granted, and should the remuneration be collected by CMOs. The discussion started from Article 70 (2¹), and concerned granting additional remuneration only for audiovisual works, in relation to making the work available to the public on demand and the rebroadcasting of an audiovisual work. There were claims that music streaming platforms should also pay such remuneration to authors and performers of [musical works](#), followed by suggestions from the [literary association](#) and from translators that the authors of literary works distributed as audiobooks should be included, and not only the narrators/performers of these works.

Ultimately, the provisions adopted in the Copyright and Related Rights Act include:

1. Article 21⁴ introducing a new right to appropriate remuneration for the making available on demand of literary, journalistic (press), scientific, musical works or musical works with lyrics, and derivative works (including translations).
2. An amended Article 18 (3) providing that the right to remuneration from article 21⁴, Article 70 ust. 2¹ and Article 86¹ cannot be waived, transferred or made subject to execution.
3. Article 70(2¹) points 5 and 6, granting a right to adequate remuneration managed by CMOs to authors and performers of audiovisual works, for making available in such a way that the public can access the work at the time and place individually chosen by them and for rebroadcasting of an audiovisual work.
4. Article 86¹ introducing a right to adequate remuneration for performers of the works listed in Article 21⁴.

In Poland, the discussion continues on how these provisions will be applied in practice. A lot of attention will now be paid to the preliminary ruling requested by the [Belgian Constitutional Court](#) on remuneration rights.

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