European Copyright Contract Law: A Plea for Harmonisation

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The Proposal for a Directive on Copyright in the Digital Single Market released on 14 September 2016 deals, among other things, with copyright contract law. Chapter 3 of the Draft Directive entitled “Fair remuneration in contracts of authors and performers”, includes three provisions dealing respectively with transparency obligations (Art. 14), a contract adjustment mechanism (Art. 15), and a dispute resolution mechanism (Art. 16). These provisions, which are certainly not as controversial as the ones on the press publishers’ right or the “value gap” issue, are nonetheless noteworthy. It is indeed the first time that the issue of copyright contracts has been addressed at the European level, and this should be welcomed since there is a real need for improving the contractual position of authors and performers. This is all the more remarkable since copyright contracts have so far always been regarded as an area of law that would be left to the Member States, could not be harmonized and for which the European Union would not have any legislative competence. Thus, Arts. 14 to 16 of the Draft Directive are a first step in the right direction.

It is not, however, a great leap forward since the Draft Directive does not provide for a substantial harmonisation of copyright contract law. The European legislature could and should be more ambitious. The programmatic statement from Recital 10 of the InfoSoc Directive according to which, “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”, should not remain merely empty rhetoric.

Copyright contract law is one pillar of modern copyright law¹ and has been traditionally understood as a body of mandatory rules aiming at protecting creative

¹ A. Dietz, “Protection of creative people via copyright – the five pillars of modern continental European copyright law” (2015) *Revue Internationale du Droit d’Auteur* (RIDA) 101, at 129.

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people, i.e. authors and performers, in their relationships with publishers and producers. It is based on the assumption that authors and performers are the weaker contracting party in individual copyright contracts, similar to consumers in B2C contracts, that freedom of contract is illusory when the contracting parties have grossly disproportionate bargaining power, and that statutory provisions are thus needed to restore the balance.

Apart from a reporting obligation imposed on contractual partners of creative people (Art. 14, transparency obligations), the Draft Directive provides for a bestseller clause, i.e. a claim for an additional remuneration in case of a disproportion between the remuneration agreed upon and the subsequent income generated from the exploitation of the work or performance (Art. 15, contract adjustment mechanism). In order to improve the enforcement of both provisions, Art. 16 of the Draft Directive provides for a dispute resolution mechanism.

The proposed provisions of the Draft Directive only are *ex post* mechanisms providing for the revision of the remuneration in case of commercial success and for the reporting of the results of a past exploitation. However, it is the original contract that should in the first place *ex ante* provide for “appropriate” remuneration. According to a general principle of contract law, parties to a contract are free to negotiate the price of a good or a service. However, freedom of contract should be limited in order to compensate for the structural imbalance in bargaining power between creative people and producers. Thus, individual copyright contracts should have to stipulate, as a general rule, an appropriate remuneration for assignments of copyright or grant of licenses. Such a general fairness requirement regarding the remuneration of creative people should not, however, be limited to a mere statement of general policy without any concrete and effective enforcement mechanism. Courts should be given the power to adjust the contract in case the remuneration agreed between the contracting parties is not adequate.

The rather vague concept of “appropriate remuneration” admittedly needs to be specified. According to German copyright law for example, a remuneration is deemed appropriate if it conforms to what is regarded as customary and fair in business relations, having regard to the nature and scope of the rights granted, in particular the duration (*Dauer*), frequency (*Häufigkeit*), extent (*Ausmaß*) and moment (*Zeitpunkt*). If the rights granted are unlimited in time and scope, a lump sum payment will usually not be sufficient. The key issue here is to make sure that creative people adequately participate in the revenues generated from the exploitation of their works or performances.

The greatest challenge of drafting a piece of legislation on copyright contracts is certainly to adequately reflect the specificities of every single sector (publishing, music or audiovisual). As for employment legislation, there is a need for flexibility, which could be addressed by resorting to collective agreements that are established by representative organisations of creative people on the one hand, and producers or publishers on the other hand. The German experience shows, however, that some coercive measures are unavoidable. The mechanism of “common standards of remuneration” provided in Sec. 36 of the German Copyright Act has proven to be quite ineffective, notably due to the unwillingness of publishers and producers to negotiate such standards. There should therefore be a possibility to make

collectively negotiated remuneration agreements mandatory for all parties concerned within a specific sector.

In many areas of the media and culture industry, authors and performers are more or less forced to transfer their entire rights for the whole duration of the statutory copyright. Such a practice of “acquiring rights ahead” is detrimental to creative people as these extensive assignments or licenses often exceed the needs of the publisher or producer who does not make any use of all rights he has been granted. Some derogation to the basic principle of binding force of contractual agreements (*pacta sunt servanda*) is thus needed, enabling creative people to renegotiate or terminate such contracts under certain conditions.

Some EU Member States provide for a statutory reversion right in case the publisher or producer fails to exploit the work or performance for which he has been granted the copyright. Such a termination right, admittedly, need not be expressly stated if the publisher or producer has a contractual duty to exploit. Then failure to fulfil this obligation constitutes non-performance and gives rise to a claim for breach of contract. One means of improving the contractual position of creative people might be to provide for a general duty of the producer or publisher to exploit each right granted for each mode of exploitation. Rather than a statutory obligation, the breach of which would trigger an automatic reversion of the rights to the author or performer, it could be designed as a “use it or lose it” clause, which would have to be enforced before the court.

Apart from reversion due to insufficient exploitation, creative people could also be granted the right to terminate a copyright contract after a specific period of time. This termination right would not be subject to any condition and could be exercised without having to compensate any loss of the contracting party. The issue has been addressed by the Committee on Industry, Research and Energy of the European Parliament in its opinion on the Draft Directive on Copyright in the Digital Single Market issued on 12 July 2017. The proposition to introduce a new Art. 15a entitled “Rights reversion mechanism” should be welcomed. However, the current wording of the provision is considerably restricted since the proposed termination right would only apply “when there is a complete absence of exploitation of (the) works or performances, a persistent failure to pay the remuneration agreed or a complete lack of reporting and transparency”.² There is still room for improvement.

² European Parliament, Committee on Industry, Research and Energy (ITRE), 12.7.2017, 2016/0280 (COD), p. 33.