DSM SERIES – PART 4

DSM Directive and fair remuneration for authors and performers

18 June 2020

In this fourth and concluding article in our Spring/Summer 2020 series of briefings on the DSM Directive, we examine Articles 18 to 22 of the DSM Directive and the new remuneration and related rights granted to authors and performers.

Articles 18 to 22 of EU Directive 2019/790 on copyright and related rights in the Digital Single Market (the "**DSM Directive**") grant new remuneration and related rights to authors and performers. While the Copyright and Related Rights Act 2000 has a concept of "equitable remuneration" for authors and performers for specific forms of exploitation of recordings, this new remuneration right goes further and covers all forms of exploitation of relevant copyright works. These new rights did not form part of the original proposal for the DSM Directive, but were included as a result of the 'Fair Internet for Performers' campaign.

The DSM Directive recognises that authors and performers are usually in a weaker contractual position than those who typically exploit their work, and introduces a number of mechanisms to ensure they receive fair remuneration when they license or transfer their exclusive rights to a third party (e.g. a publisher, record company etc.)

NEW MECHANISMS INTRODUCED BY THE DSM DIRECTIVE

1. Appropriate and proportionate remuneration

The concept of fair remuneration is framed as that which is "***appropriate and proportionate***" to the economic value of their rights. Member States can choose to implement the fair remuneration principles laid out in the DSM Directive by relying on different or already existing mechanisms such as collective bargaining. There is no definition for ***"appropriate and proportionate"*** in the DSM Directive leaving the term open to interpretation by Member States. However, Recital 73 does provide some colour to its meaning by referring to the "***actual or potential economic value of the rights, taking into account the author or performer's contribution to the overall work and other circumstances of the case, such as market practices or the actual exploitation of the work***". It remains to be seen what mechanisms might be used to achieve this objective, e.g. how to evaluate contributions by various performers to a musical work in remuneration terms, the extent to which an initial lump sum can be made in final payment and the extent to which market practices in different sectors can influence respective negotiating positions.

2. Transparency obligations to allow assessment of economic value of work

To allow authors and performers to get an idea of what the economic value of their work is over time, Article 19 of the DSM Directive sets up a mechanism whereby authors and performers are entitled to receive "***up to date relevant and comprehensive information on exploitation of their works and performances***" at least once a year from the parties exploiting their work, so as to allow authors and performers to "***assess the economic value of the rights***" (Recital 75). This extends to any licensees and sub-licensees (albeit information from sub-licensees is not an automatic right and needs to be specifically requested by the rightholder). Article 19 does not contain an exhaustive list of information that should be provided but Recital 75 notes that the information should cover "***all modes of exploitation and on all relevant revenues worldwide with a regularity that is appropriate in the relevant sector***".

Member States have the option of placing a proportionality threshold on this transparency obligation in cases where the administrative burden would be "disproportionate" having regard to the revenues generated by the exploitation of the work or performance. Such rightholders are instead entitled to the "***types and level of information that can reasonably be expected in such cases***" which suggests that not very much will change for authors and performers whose works do not generate material amounts of revenue, in the absence perhaps of collective bargaining power. The

DSM Directive also exempts from the transparency obligations those entities and organisations that have concluded contractual arrangements pursuant to Directive 2014/26/EU (Collective Rights Management Directive) and permits the above rights to be negotiated by collective bargaining agreements.

3. Contract adjustment mechanism to ensure fair and proportionate remuneration

The aim of this newly introduced contract adjustment mechanism is essentially to assist authors and performers who may be locked into long term contracts and whose works increase in value after the contract is entered into. Armed with information obtained through the transparency obligations, authors and performers can seek "***additional, appropriate and fair remuneration***" where the original remuneration is "***disproportionately low compared to the relevant revenues derived from the subsequent exploitation***". There is no guidance on how to calculate this, but if a re-negotiation is not successful, authors and performers have an option to bring a claim with a voluntary alternative dispute resolution body to be set up in each Member State for this purpose.

This mechanism, along with the right of revocation mechanism referred to below, is quite unusual as it gives authors and performers a statutory power to amend a concluded contract which they would not usually have, save for a specific clause in the contract. The ability to contract out of such provisions is discussed below.

4. Alternative dispute resolution ("ADR") procedure

Member States are required under Article 21 to establish a voluntary ADR body (or instruct a body already in existence that can perform the necessary functions) to deal with disputes arising from the transparency obligations and the contract adjustment mechanism (without prejudice to the right to take court proceedings). According to Recital 79, each Member State may determine how the costs of using the ADR procedure are to be allocated.

5. Right of revocation will allow authors and performers to make the most of their work

In addition to introducing new principles on fair and proportionate remuneration, the DSM Directive introduces a revocation mechanism in Article 22 which can be used when a copyright work licenced exclusively is not being exploited by the licensee. There is no minimum threshold stated in the DSM Directive and the parameters of this right are to be set out in domestic legislation.

This can only be enforced "after a reasonable time" and the right does not apply where the reason for non-exploitation can be remedied by either the author/performer or their contractual counterpart. Article 22(2) contains a number of options which a Member State can take in account in defining the scope of this revocation right.

Once that part of the contract for an unexploited work has been revoked, authors and performers can license this work to another party to exploit, thereby creating additional income.

6. Contracting Out is 'Out'

The DSM Directive provides that any contractual provisions contracting out of the transparency obligations, contract adjustment mechanism and ADR are unenforceable. This provision does not apply to the right of revocation mechanism which means parties can agree to dis-apply it. The DSM Directive also clarifies that the fair remuneration principles outlined above do not apply to authors of computer programmes.

OBLIGATIONS ON MEMBER STATES AND IMPACT OF THE DSM DIRECTIVE

The DSM Directive lays out high level principles and leaves Member States with the difficult task of setting out the details to make these principles work. Since there are a lot of issues that Member States have to work through on implementation, this is likely to lead to discrepancies in how the DSM Directive is implemented in different Member States.

The absence of definitions in the DSM Directive for the fair remuneration provisions leaves the Member States to set their own thresholds which could lead to a significantly diverse set of rights across the EU, meaning extra complexity for licensing and contract drafting.

The DSM Directive does not address whether its application should be retrospective. However, since Article 15 of the DSM Directive dealing with press publications (see our second briefing on this topic) specifically excludes application of its provisions to publications made prior to 6 June 2019, it would seem logical to assume that the remaining provisions of the DSM Directive may have a retrospective effect and will apply to contracts already in existence. This could have serious implications and lead to uncertainty if contracts that have been concluded are now vulnerable to being re-opened and amended to the benefit of one party.

The transparency obligations will also create additional costs and an administration burden on licensees who are exploiting copyrighted works.

WHAT THIS MEANS FOR YOUR BUSINESS?

Given the breadth of discretion given to Member States with respect to the above right, it is difficult at this point to plan with any certainty in preparing for this right, as the level of discretion may mean that only those artists and performers who contributed to successful works (which exceeded their original profit expectations by a significant margin) can benefit from it. However, some level of change will be coming and therefore it makes sense, if your business is engaged in the exploitation of copyright works (e.g. publishing, recording), to consider:

- the current remuneration models for payments to authors and performers and the extent to which they can be argued to represent "***appropriate and proportionate***" remuneration. This will likely require some assessment of how a contribution to a work is valued and its impact on revenues in light of the overall work and exploitation models;
- how to address the 'value gap' for successful works which generate revenues in excess of those originally projected;
- whether any existing contracts could be subject to renegotiation on remuneration in light of market practices for remuneration for similar successful works;
- the duration of time to exploitation for works which may not be exploited for an extended period of time and what act might constitute "exploitation" to avoid the revocation right;
- the extent to which information on the exploitation of the work is digitised and readily available to facilitate the transparency rights (and the extent to which this information is held by a sub-licensee); and
- as an industry what alternative dispute resolution models can be utilised to resolve disputes.

The other articles in our series on the DSM Directive are set out below:

- Mining for exceptions in the new copyright directive
- The new press publishers' right: will Big Tech push back?
- Online content sharing – pay to play?

WEBINAR

Copyright in the Digital Single Market (DSM Directive) - This webinar was recorded on Wednesday, 17 June 2020.

Please click here to contact the events team for access to the recording.

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