Regulating creator's contracts under the DSM Directive. What we can learn from the Dutch.

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The DSM Directive of 17 April 2019 contains a separate Chapter 3 comprising six articles regulating contracts concluded by authors or performers with exploiters. Articles 18 to 23 not only deal with "equitable remuneration of authors and performers in exploitation contracts", as the heading of Title IV, Chapter 3 of the Directive promises, but also with transparency, dispute resolution and the right to revocation. Although some of these issues have already been addressed in Norwegian copyright law,[1] the Directive calls for legislative change in the Nordic countries on a variety of issues. While transposing the Directive's provisions, legislatures might take notice of recent experiences with author's contract law in the Netherlands.

1. Introduction

Author's contract law has long escaped the influence of European Union law.[2] This was due to the strong resistance that traditionally existed in Member States of the common law family (especially the United Kingdom) to restricting contractual freedom. It is therefore not coincidental that the DSM Directive, which was negotiated in the run-up to the Brexit, is the first EU instrument to provide for harmonizing rules in this area.[3]

In contrast to the provisions of substantive EU copyright law found in the 2001 Information Society Directive and several other EU directives, the DSM Directive's author's contract rules have no background in international copyright law. Both the Berne Convention and the WIPO Copyright Treaty are silent on the topic, except for a few complicated rules on copyright ownership of cinematographic works in the Berne Convention.[4]

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[1] As from June, 2018 Norwegian copyright law provides for a right to reasonable remuneration upon the transfer of copyright as well as a right to transparency (Arts. 69 and 70 Norwegian Copyright Act); Lov om opphavsrett til åndsverk mv. (åndsverkloven), 15 June 2018 no. 40.

[2] See P.B. Hugenholtz and L.M.C.R. Guibault, Study on the conditions applicable to contracts relating to intellectual property in the European Union, study commissioned by the European Commission, Amsterdam, May 2002.

[3] Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC.

[4] Art. 14bis(2) Berne Convention.

The EU provisions apply equally to authors and performers and are predicated on the premise that creators are generally in a weak contractual position in their dealings with professional users of their works, such as publishers, broadcasters, and film producers.[5] In this respect the EU rules are comparable to provisions commonly found in consumer law, employment law or landlord-tenant law. The DSM Directive's provisions build on a body of author's contract law that has been in place in many Member States for many years. The main source of inspiration for the EU rules appears to be the German Copyright Act that was amended in 2002 to "strengthen the position of authors and performers"[6], and which inspired similar legislation in the Netherlands and elsewhere in Europe.

First and foremost, Art. 18 DSM Directive provides for a right for authors and performers to "appropriate and proportionate remuneration". Art. 19 introduces a transparency obligation that compels exploiters to report regularly on the extent and yield of exploitation of rights granted by creators. Art. 20 requires the introduction of a "contract adjustment mechanism" in cases of disproportionally low remuneration. Art. 21 provides for an "alternative dispute resolution procedure". Finally, Art. 22 DSM Directive calls for a "right of revocation", allowing authors to recall their rights "where there is a lack of exploitation".

A striking feature of the Directive's provisions are the frequent references to the possibility of refining its rules by way of collective agreements – a clear invitation to authors' and performers' organisations to enter into negotiations with industry associations regarding remuneration and other contract law issues.[7]

Unsurprisingly, most of the rules prescribed by the Directive are mandatory for the Member States. Nevertheless, some of the directive's more detailed provisions are discretionary. For example, Member States "may decide" that Art. 19's transparency obligation does not apply "when the contribution of the author or performer is not significant having regard to the overall work or performance".[8] Of the mandatory provisions it is not immediately apparent whether they entail full or minimal harmonisation. With regard to the transparency obligation the preamble clarifies that Member States may take more far-reaching measures,[9] but given that the Union legislator has limited itself in the Directive to a small number of creator-protective measures, it is unlikely

[5] Comment of the European Copyright Society Addressing Selected Aspects of the Implementation of Articles 18 to 22 of the Directive (EU) 2019/790 on Copyright in the Digital Single Market, 8 June 2020 (further "ECS Comment"). p. 3.

[6] Bundesgesetzblatt [Federal Law Gazette], Mar. 28, 2002, Part I, at 1155, Consolidated English translation in: 33 IIC 842 et seq. (2002). See Karsten M. Gutsche, *Equitable Remuneration for Authors in Germany – How the Germany Copyright Act Secures Their Rewards*, 50 J. Copyright Soc'y U.S.A. 257 (2002–2003).

[7] Recital 73 (art. 18); art. 19(5) and Recital 77; art. 20(1) and Recital 78; art. 22(5).

[8] Art. 19(4).

[9] Recital 76, last sentence.

that the other rules of author's contract law in the Directive would amount to maximum harmonisation.[10]

According to Art. 23, "any contractual provision that prevents compliance with Articles 19, 20 and 21 shall be unenforceable in relation to authors and performers". Under Art. 3(4) of the Rome I Regulation on applicable law, contractual choices of law may not deviate from the binding application of Articles 19, 20 and 21, "where all other elements relevant to the situation at the time of the choice are located in one or more Member States".[11] Remarkably, Art. 23 of the DSM Directive seems to exempt Article 18, but this is probably because Art.18(2) leaves wide discretion to the Member States to "use different mechanisms" when transposing the right to fair remuneration.[12] The right of revocation of Art. 22 is also not binding. However, Member States may provide that derogating clauses are only allowed by collective agreement.[13]

The implementation deadline of the Directive expired on 7 June 2021.[14] The Directive's provisions apply to all works and other subject matter protected by national law on or after 7 June 2021, but do not prejudice "any acts concluded and rights acquired before 7 June 2021".[15] Application of the transparency provisions is subject to a transitional period of one additional year; it therefore applies, for new and existing contracts alike, from 7 June 2022.[16]

This article introduces and examines the creator's contract rules of the DSM Directive. After examining and assessing these provisions, we will look at recent experiences with the corresponding provisions in the copyright law of the Netherlands, which introduced similar law in 2015. The recent Dutch experience with author's contract law might be helpful in preventing problems with the application of the new rules in Nordic law.

2. Scope of application

According to Recital 72, "[a]uthors and performers tend to be in the weaker contractual position when they grant a licence or transfer their rights, including through their own companies, for the purposes of exploitation in return for remuneration." This is an important recital, which clarifies that the scope of application of the provisions of Chapter 3 is limited to *exploitation contracts* (i.e., "contracts for the purposes of exploitation in return for remuneration"). After all, "[t]he need for protection does not arise where the contractual coun-

[10] ECS Comment (note 5), p. 4, referring to the Commission's Impact Assessment that preceded the proposed directive.
[11] Recital 81, referring to Regulation (EC) No 593/2008 of the European Parliament and of the Council of17 June 2008 on the law applicable to contractual obligations (Rome I), Art. 3(4).
[12] European Copyright Society, Comment of the European Copyright Society Addressing Selected Aspects of the Implementation of Articles 18 to 22 of the Directive. (EU) 2019/790 on Copyright in the Digital Single Market, 8 June 2020 [hereinafter "ECS Comment"], p. 12–13.
[13] Art. 22(5).
[14] Art. 29(1).
[15] Art. 26.
[16] Art. 27.

terpart acts as an end user and does not exploit the work or performance itself, which could, for instance, be the case in some employment contracts."[17]

This does raise the question whether the Directive's provisions might apply to employed creators and performers in the first place. According to the recital, this is not the case if the employer is an "end user" who does not exploit the work or performance himself, for example, a copywriter employed by an advertising agency. By contrast, the recital does suggest that the EU provisions do apply if the employer actually exploits the created works or performances.[18] This might be the case, for example, for broadcasting employees, employed journalists or actors in (temporary) employment.[19]

The words "including through their own companies" in Recital 72, first sentence clarify that the Directive's provisions also apply to self-employed persons operating from a one-person company. Otherwise, the provisions of Chapter 3 can only be invoked by "natural persons". In other words, legal persons, such as television production companies, are ruled out from protection, even though such companies, too, occasionally find themselves in a weak bargaining position, for example vis-à-vis large media companies or platforms. Finally, Art. 23 (2) DSM Directive rules out authors of computer programs from benefiting from the Directive's creator-protective provisions.

3. Art. 18: appropriate and proportionate compensation

Art. 18(1) DSM Directive requires Member States to ensure that "where authors and performers license or transfer their exclusive rights for the exploitation of their works or other subject matter, they are entitled to receive appropriate and proportionate remuneration". This is a significant departure from the freedom of contract that leaves contract parties wide discretion to negotiate a price. Note that the right to fair remuneration of Art. 18 is contingent upon a grant of rights. Art. 18 does not establish a general obligation to fairly remunerate creative labour. Also, Art. 18 does not prevent creators from "authorising the use of their works or other subject matter for free, including through non-exclusive free licences for the benefit of any users".[20] In other words, open content licenses, such as the popular Creative Commons suite, may still be granted *pro deo*.

The notion of "appropriate and proportionate" remuneration evokes a standard that is both qualitative and quantitative.[21] While "appropriate" suggests fairness, "proportionate" implies that remuneration "should be appropriate and proportionate to the actual or potential economic value of the licensed or transferred rights [...]".[22] This assessment should consider "the contribution

[17] Recital 72.
[18] See ECS Comment (note 5), p. 6–7.
[19] For other examples, see ECS Comment (note 5), p. 8.
[20] Recital 82.
[21] Rosati, Eleonora. Copyright in the Digital Single Market : Article-by-Article Commentary to the Provisions of Directive 2019/790. First edition. Oxford: Oxford University Press, 2021, p. 364.
[22] Recital 73.

of the author or performer to the whole of the work or other material and all other circumstances of the case, such as market practices or the actual exploitation of the work." Note however that current market practices are not necessarily indicative of "appropriate and fair remuneration". Since the EU rules of author's contract law are intended to correct unfair contractual practices resulting from structural weaknesses in the creator's bargaining position, prevalent market practices might very well be inherently unfair.

Although the word "proportionate" suggests that remuneration is to be proportional to revenue,[23] Recital 73 does allow *lump-sum* remuneration in certain situations: "A lump-sum payment may also constitute proportionate remuneration, but should not be the rule. Member States should be free to define, taking into account the specificities of each sector, specific cases in which a lump-sum payment may be applied."

Art. 18(2) DSM Directive gives Member States broad discretion to "use various mechanisms" to ensure that authors and performers receive appropriate and proportionate remuneration. These instruments might range from individual rights to appropriate, equitable or proportional remuneration, as currently exist in Germany, the Netherlands and France respectively, to collectively bargained agreements, such as are common in the Nordic countries. However, as the Directive admonishes in Recital 73, collective bargaining agreements are permitted only "provided that such mechanisms are in conformity with applicable Union law" – a thinly disguised reference to the general rules of competition law enshrined in Arts. 101 and 102 of the Treaty on the Functioning of the European Union (TFEU).

Other instruments to ensure fair remuneration might encompass statutory rights to remuneration or collectively managed, "residual" rights (i.e., unwaivable rights to remuneration contingent upon a transfer of rights).[24] Rights of the latter kind have recently been introduced, for example, in Belgium, to allow authors of audiovisual works to share in the proceeds of streaming platforms.[25] A draft bill proposing a similar right is under discussion in the Netherlands.[26]

4. Art. 19: transparency obligation

Art. 19 of the DSM Directive entails an obligation for licensees or transferees to provide regular information regarding the exploitation of the rights granted to them by authors or performers. According to its first paragraph, this transparency obligation implies "that authors and performers shall receive, on a regular basis, at least once a year, and taking into account the specificities of each sector, up-to-date, relevant and complete information concerning the

[23] ECS Comment, p. 14.
[24] ECS Comment (note 5), p. 16. See generally Thomas Riis, "Remuneration Rights in EU Copyright Law" (2020) 51(4) IIC 446–467.
[25] Act of 19 June 2022 implementing Directive (EU) 2019/790 art 62, Belgisch Staatsblad/Moniteur Belge 1 August 2022, no. 189.
[26] See https://www.internetconsultatie.nl/auteurscontractenrecht/details.

exploitation of their works and performances from the parties to whom they have transferred or licensed their rights or from their successors in title, in particular as regards the modes of exploitation, all income generated and the remuneration due." Here, according to the preamble, "the specificities of the different content sectors should be taken into account". The modalities of such sector-specific transparency obligations may be determined by way of collective bargaining agreements.[27]

The introduction of the transparency obligation fulfils a long-cherished wish of authors and performers. As Recital 74 explains, "[a]uthors and performers need information to assess the economic value of rights of theirs that are harmonised under Union law. This is especially the case where natural persons grant a licence or a transfer of rights for the purposes of exploitation in return for remuneration." Through mandatory disclosure of the scope and proceeds of exploitation, the right to fair remuneration can be much better substantiated. Transparency also facilitates invoking the revocation right, as a lack of exploitation can be more easily demonstrated.

According to Recital 77, the transparency obligation extends to "all modes of exploitation and all relevant revenues worldwide". Read in conjunction with Art. 18, this allows authors and performers to be fairly remunerated for all forms of exploitation of their works or performances, including merchandising and other derivative uses.

The transparency obligation follows the rights transferred. Where rights are assigned, the obligation moves to the creator's successor in title.[28] In case of a licence, the obligation remains with the creator's contractual counterpart, but the obligation is extended to sub-licensees "in the event that their first contractual counterpart does not hold all the information that would be necessary for the purposes of paragraph 1".[29] This is important, especially in the music sector, where sub- and sub-sublicensing practices are common, leaving composers and artists with limited visibility of revenues that are generated further down the exploitation chain. In the audiovisual sector, too, the impact of these new rules will be felt, as film distributors, video platforms and even cinemas may be compelled to disclose their revenue streams to creators. To enable transparency downstream, Art. 19(2) obliges the creator's counterpart (e.g., the music publisher, label or film producer) to disclose the identity of sublicensees.

Member States may limit the transparency obligation if the administrative burden is disproportionate to the expected exploitation proceeds.[30] Art. 19 does not apply to collective rights management organisations, which have their own, more detailed transparency obligations in the Collective Rights Management Directive.[31]

[27] Recital 77.
[28] Art. 19(1).
[29] Art. 19(2).
[30] Art. 19(3) and (4).
[31] Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market, Chapter 5.

5. Art. 20: contract adjustment mechanism

Art. 20(1) DSM Directive provides for a "contract adjustment mechanism" that gives authors and performers the right 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 or performances."

Since Art. 18 as a rule requires proportionate remuneration, this mechanism will in practice be mostly invoked in cases of lump-sum payments that turn out be "disproportionately low". According to the preamble, this assessment extends to all revenues made in the entire exploitation chain: "All revenues relevant to the case in question, including, where applicable, merchandising revenues, should be taken into account for the assessment of whether the remuneration is disproportionately low."[32]

Whereas Art. 20 is clearly inspired by the *Bestseller-Paragraph* that has existed in German law for many years, the EU rule does not require that the disproportionality between creator income and revenue be unexpected or unforeseen. The provision covers any situation in which the agreed remuneration turns out to be inadequate.[33] Note however that according to the preamble, the disproportionality between the agreed remuneration and the exploitation income does need to be "clearly" demonstrated.[34]

According to Art. 20(1), a disproportionality claim can be brought not only by authors and performers, but also by their "representatives". These representatives must be "duly mandated in accordance with national law in compliance with Union law".[35] Recital 78 emphasizes that these representatives "should protect the identity of the authors and performers represented for as long as possible." This suggests that the DSM Directive permits class actions or similar dispute resolution procedures, where creators are collectively and anonymously represented. Such collective proceedings might mitigate the danger of *blacklisting*.[36]

6. Art. 21: Alternative dispute resolution procedure

Art. 21 of the DSM Directive obliges Member States to ensure that disputes concerning the transparency obligation (Art. 19) and the contract adjustment mechanism (Art. 20) "may be subject to a voluntary alternative dispute resolution procedure", which should also be available to "representative organisations of authors and performers". However, the availability of alternative dispute resolution procedure should not prevent parties from bringing an action

[32] Recital 78.
[33] ECS Comment (note 5), p. 19.
[34] Recital 78.
[35] Recital 78.
[36] See discussion in Section 8.

before an ordinary court.[37] While the obligation to provide for alternative dispute resolution is limited to Articles 19 and 20, Member States remain free to make these procedures available in cases concerning unfair remuneration or other issues of author's contract law as well. Art. 21 aims at helping authors and performers to enforce their rights without being subjected to the high cost and burden of judicial proceedings. Also, alternative dispute resolution may diminish the risk of being "blacklisted" by contractual counterparts, as a consequence of initiating a court procedure.[38]

Art. 21 qualifies the dispute procedures as "voluntary", which suggests that both creators and exploiters may elect not to go down this road in a specific case. However, as recent experience in the Netherlands demonstrates, leaving exploiters free not to participate in alternative dispute resolution seriously undermines the effectiveness of these alternatives. This raises the important question whether exploiters must cooperate when a creator initiates a dispute procedure. Whereas the words of Art. 21 leave this question unanswered, the preamble does suggest a positive answer. As Recital 79 clarifies, the main rationale of alternative dispute resolution lies in the general reluctance of authors and performers to enforce their rights against their contractual counterparts before a court. If exploiters were free not to cooperate, Art. 21 would probably remain an empty shell.

7. Art. 22: Right of revocation

Finally, Art. 22 of the DSM Directive gives authors and performers the right to "revoke in whole or in part the licence or the transfer of rights where there is a lack of exploitation of that work or other protected subject matter". The revocation right offers a remedy against the "stockpiling" of rights by media companies that do not, or no longer, actively exploit rights granted sometimes many years ago. For this reason, provisions of this kind are sometimes called "use-it-or-lose-it" clauses; if a right holder fails to exploit the granted right, it may be revoked. Revocation rights are predicated not only on notions of fairness, but also on the economic rationale that revocation enhances a more efficient allocation of rights.

Member States may adopt sector-specific provisions, and special rules for composite works. Member States may even rule out the right of revocation altogether "if such works or other subject matter usually contain contributions of a plurality of authors or performers".[39] This might be the case, for example, for collaborative productions such as audiovisual works and video games. Member States may also provide that creators have the option of terminating the exclusivity of the transfer instead of entirely revoking it.

The right to revocation may be invoked only after a reasonable time has elapses following the conclusion of the licence or the transfer of the right. Moreover, the creator should put the creator's counterpart on notice of insuf-

[37] Recital 79.
[38] ECS Comment (note 5), p. 20.
[39] Art. 22(2).

ficient exploitation and "set an appropriate deadline by which the exploitation of the licensed or transferred rights is to take place. After the expiry of that deadline, the author or performer may choose to terminate the exclusivity of the contract instead of revoking the licence or the transfer of the rights".[40] However, if the lack of exploitation is predominantly due to circumstances that the author or the performer can reasonably be expected to remedy (for example, the author is late in submitting a revised edition), the right cannot be invoked.

The revocation right arises when there is a "lack of exploitation". Whereas Recital 80 suggests that the right kicks in only when granted rights are "not exploited at all", the dictionary meaning of "lack of" goes beyond a mere absence of something.[41] Arguably, insufficient exploitation should be enough to trigger revocation.[42]

The right of revocation is not immune to contractual derogation, but Art. 22(5) does allow Member States to make such derogation dependent on a collective bargaining agreement.

8. Experiences in the Netherlands

In 2015 a new chapter on author's contract law was introduced in Dutch law,[43] comprising equivalents of four of the five provisions now prescribed by Chapter 3 of the DSM Directive. In 2020, at the request of the Dutch government the impact and effectiveness of the 2015 provisions were assessed in a study conducted by the University for Amsterdam in collaboration with Leiden University.[44] The assessment, which was based on a review of literature, law, and jurisprudence combined with qualitative interviews with authors, performers, exploiters, other stakeholders and selected experts, provided input to the revision of the chapter on author's contract law in the context of the transposition of the Directive. The main findings of the study are summarized below.

8.1 Right to fair remuneration

Art. 25c of the Dutch Copyright Act provides for a "right to a contractually stipulated fair remuneration for the grant of exploitation rights", in line with Art. 18 of the Directive. The assessment shows that this right is still rarely put into practice. Since most authors, out of fear of loss of contracts or "blacklisting", do not dare to invoke or enforce their right to fair remuneration against exploiters, case law has scarcely developed. A notable exception is a pair of

[40] Art. 22(3).

[41] See https://dictionary.cambridge.org/dictionary/english/lack.

[42] Rosati, Eleonora. Copyright in the Digital Single Market : Article-by-Article Commentary to the Provisions of Directive 2019/790. First edition. Oxford: Oxford University Press, 2021, p. 404–405.

[43] Act of 30 June 2015, Staatsblad 2015, 257; See P.B. Hugenholtz, "Towards Author's Paradise: The New Dutch Act on Authors' Contracts," in: Karnell, G., Kur, A, P-J. Nordell, P-J. Axhamn, J., Carlsson S. (eds.), Liber Amicorum Jan Rosén (Visby 2016), p. 397–407.

[44] Stef J. van Gompel, P. Bernt Hugenholtz, Joost P. Poort, Luna D. Schumacher and Dirk J.G. Visser, Evaluatie Wet Auteurscontractenrecht. Eindrapport (2020).

cases brought against major newspaper publisher DPG Media by two freelance journalists, which was supported by the Dutch union of journalists.[45] The cases were eventually won by the journalists, and have led to a vastly improved freelance payment scheme agreed between the union and the publishing company.[46]

The study identifies several other problems in applying the right to fair remuneration, one of which is assessing the fairness of remuneration in cases where contracts do not differentiate between the creator's creative honorarium and the payment for the grant of exploitation rights. A solution could be to require by law that parties to an exploitation contract make a transparent distinction between the two types of remuneration.

8.2 Contract adjustment

Art. 25d of the Dutch Copyright Act, which provides for a contract adjustment mechanism similar to Art. 20 of the Directive, is also rarely invoked in practice. Here too, fears of blacklisting seem to play a role. Still, the provision does seem to have a positive effect in the music sector, since existing agreements are being renegotiated more frequently. The study recommends the development at sector level of "best practices" regarding the remuneration of authors in the event of exploitation success. This could reduce the risk of blacklisting. Depending on the sector, branch organisations or funding bodies, such as the Netherlands Film Fund, may have a role to play here too, by laying down "best practices" in collective agreements or funding conditions.

8.3 Alternative dispute resolution

The dispute resolution committee set up pursuant to Art. 25g of the Dutch Copyright Act has not lived up to its promise. Due to restraint on the part of authors and exploiters, less than a handful of disputes has been submitted to the committee to date. As to the authors, this is once again due to the pervasive fear of blacklisting. On the exploiters' side, scepticism already prevailed in advance, which has been further fuelled by the negative perception of the first two rulings that the dispute resolution committee has produced. Only one trade organisation and a handful of individual exploiters have so far adhered to the committee.

In the light of these experiences and in line with the intention of Art. 21 of the DSM Directive, the study recommends making participation in the dispute resolution committee compulsory whenever a creator initiates a dispute. In addition, funding bodies in the creative sectors should include participation in the dispute resolution committee as part of their funding conditions. Also, organisations of creators should make more use of the possibility to collec-

[45] Distr.Ct. Amsterdam (ktr.) 17 May 2019 (ECLI:NL:RBAMS:2019:3565 and ECLI:NL:RBAMS:2019:3566), and 1 November 2019 (ECLI:NL:RBAMS:2019:8099 and ECLI:NL:RBAMS:2019:8119), AMI 2020-3/4, nr. 5, p. 101.

[46] See https://www.nvj.nl/nieuws/werkcode-dpg-media-massaal-goedgekeurd-leden-nvj.

tively (and thus anonymously for authors) complain about, for example, general terms and conditions or model contracts of exploiters.

8.4 Right to revocation

Art. 25e of the Dutch Copyright Act provides for a right of revocation in line with Art. 22 of the DSM Directive: "The author may dissolve the contract in whole or in part if the other party does not sufficiently exploit the copyright in the work within a reasonable period of time after the conclusion of the contract or, after initially performing acts of exploitation, no longer sufficiently exploit the copyright." This right is regularly invoked, especially in the music sector where music publishers commonly own vast catalogues of songs, many of which are no longer actively promoted and exploited.

The study identifies various practical problems, the most important of which concerns the interpretation of "sufficient exploitation". In the current digital environment, a work can be made available online – on websites or platforms – indefinitely, at zero cost. And in book publishing, the rapid rise of printing-on-demand implies that the traditional criterion of " in print" is no longer practicable. The study recommends that (permanent) findability and promotion of works via current online platforms might play a role in assessing "sufficient exploitation". This could be clarified either by law or in sector-specific agreements.

9. Conclusion

The DSM Directive has equipped creators with powerful tools in their quest for fairer exploitation contracts. However, as recent Dutch experience shows, the devil is in the details. The structural imbalance in market power between creators and professional users of content manifests itself not only in endemic unfair contractual practices, but also in a general reluctance on the part of creators to individually exercise and enforce their rights against their contractual counterparts. Except for the few "star" authors and performers that do have market power, most creators are afraid of compromising their fragile relationships with publishers, producers, broadcasters and other exploiters, or even of being "blacklisted". This calls for creator's contract law that can be anonymously and/or collectively enforced wherever possible. Fortunately, both the provisions of the DSM Directive and the tradition of Nordic law leave room for such communal approaches.