

**STUDY ON THE CONDITIONS APPLICABLE TO CONTRACTS
RELATING TO INTELLECTUAL PROPERTY
IN THE EUROPEAN UNION**

Final Report

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List of abbreviations

AA	Ars Aequi
AGBG	Gesetz über den Allgemeinen Geschäftsbedingungen
AfP	Archiv für Presserecht
ALAI	Association Littéraire et Artistique Internationale
AM	Auteurs en Media
AMI	Auteurs, Media- en Informatierecht
ARRvS	Afdeling rechtspraak Raad van State
BC	Berne Convention
BGB	Bürgerliches Gesetzbuch
BGBI	Bundesgesetzblatt
BGH	Bundesgerichtshof
BIE	Bijblad bij de Industriële Eigendom
BUMA	Vereniging Buma (previously: Het Bureau voor Musiek – auteursrecht)
BverfGE	Bundesverfassungsgerichtsentscheidungen
CDPA	Copyright, Design and Patent Act (UK)
CD-ROM	Compact Disk Read Only Memory
CPI	Code de la Propriété Intellectuelle
EEA	European Economic Association
EC	European Community
ECHR	European Convention on Human Rights
ECR	European Court Reports
EIPR	European Intellectual Property Review
FCC	French Civil Code
FuR	Film und Recht
GEMA	Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigung
GG	Grundgesetz
GRUR	Gewerblicher Rechtsschutz und Urheberrecht
GRUR Int.	Gewerblicher Rechtsschutz und Urheberrecht Internationaler Teil
Gw	Grondwet
HR	Hoge Raad
IIC	International Review of Industrial Property and Copyright Law
JCP	Juris-Classeur, Pratique
M&R	Medien und Recht (Österreich)
NBW	Nederlandse Burgerlijk Wetboek
NCCUSL	National Conference of Commissioners on Uniform State Laws
NJ	Nederlandse Jurisprudentie
NJB	Nederlandse Juristenblad
NJCM-Bulletin	Nederlands Tijdschrift voor Mensenrechten
NJV	Nederlandse Juristenvereniging

OJ	Official Journal
OLG	Oberlandsgericht
RIDA	Revue Internationale de Droit d'Auteur
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
UFITA	Archiv für Urheber-, Film-, Funk- und Theaterrecht
UK	United Kingdom
UNIDROIT	International Institute for the Unification of Private Law
UWG	Gesetz gegen den unlauteren Wettbewerb
VG Wort	Verwertungsgesellschaft Wort
WIPO	World Intellectual Property Organisation
ZUM	Zeitschrift für Urheber- und Medienrecht

Chapter 1. Introduction

The cross-border exploitation of copyrighted works or performances has increased dramatically in recent years. This development is evident in respect of such ‘borderless’ media such as broadcasting and information services provided online. However, more traditional sectors of the information and entertainment industries, such as book publishing and film production, are also undergoing a process of rapid internationalisation, particularly within the European Union. As a consequence, contractual relationships between authors or performers on the one hand, and publishers, broadcasters or producers on the other hand, are increasingly taking on an international dimension. In view of the differences that presently exist at the national level regarding the law applicable to copyright contracts, this process of internationalisation has, inevitably, prompted the question whether some form of harmonisation at the European level is called for. This is the central question of this study.

Authors and performing artists rarely are in a position to commercially produce and distribute their own works or performances. In order to bring their creations to the market, they often have no other choice but to enter into agreements with those businesses or entities that are willing and able to exploit and distribute these works and performances, such as book, sound recording and software publishers, radio and television broadcasters, film producers, record companies, museums and galleries, show business promoters, advertising agencies, et cetera. The relationships between authors or performing artists on the one hand, and publishers, broadcaster or producers on the other hand are usually governed by individual contracts, in which the transfer of rights in favour of the exploiter constitutes a key provision.

Authors and performing artists have long been recognised as the weaker party to transactions relating to the exploitation of their productions, for whom protective measures are necessary to prevent that they be unfairly or unreasonably disadvantaged. It is indeed no use granting rights to authors and performing artists if the latter are unable to draw from the exploitation of these rights all the benefits to which they are entitled under the law. In addition to the general principles of contract law, many Member States have implemented a number of specific measures designed to protect authors and performing artists in their contractual relations with publishers, broadcasters, and producers. Such measures of protection range from default rules applicable to publishing contracts, such as those codified in the early 20th century in Germany, to the imperative rules for the protection of authors and performers, found in France, Belgium and other countries of the *droit d’auteur* tradition. In addition, several Member States provide for general rules protecting authors and performers against over-broad transfers of rights. Conversely, economic and practical reasons have inspired many legislatures in the world to create rules of allocation or interpretation that concentrate the rights in works created under employment or audiovisual works in the hands of the employer or of the film producer.

The globalisation and the new methods of exploitation of protected works and performances have put the existing rules of copyright contracting¹ under a new light. For example, courts in various Member States of the European Union and even in the United States have recently ruled on the question whether contracts between authors and publishers, which were concluded in ‘analogue’ times, also cover new electronic uses, such as the right to communicate works on-line.

¹ Note that the scope of this study encompasses both copyrights (authors’ rights) and neighbouring (related) rights. In the context of this study the term ‘copyright contract’ will be used as shorthand refer to contractual relations dealing with both categories of rights.

In practice, existing disparities in the law relating to copyright contracts may lead to different outcomes depending on which national law applies to the initial allocation of rights and further transfer of rights in international copyright cases. This issue has come up, with a vengeance, during the preparatory discussions on a WIPO Treaty on Audiovisual Performances.

Because copyright contracts are primarily governed by the national laws of the Member States, existing disparities might have an adverse effect on the working of the internal market. The possibility to transfer rights according to several mechanisms, the existence in some Member States of presumptions of transfer and of waiver of rights and the varying degrees of regulation applicable to contractual practices in the field may all bear consequences for the exploitation of works and performances within the European Community. In light of this study's findings, these are all elements that the European Commission will have to consider when assessing the need to harmonise the laws of Member States on this issue. At a time when the modes of exploitation converge inside the digital environment, the legislature is asked to weigh the publishers' and producers' need for legal certainty in obtaining a broad transfer of rights against the social and economic impact that extensive transfers of rights will have on authors and performers.

First and foremost, the aim of this study is to determine whether disparities in the national law actually exist to such a degree that a harmonisation initiative would be justified. To this end, the study will examine in detail the law existing in the Member States as it relates specifically to contracts concluded between authors or performers and their counterparts. It will focus on individual contracts of exploitation and on the ensuing transfers of rights. The law governing transfers to collecting societies is outside the scope of this study, as is the law applicable to copyright contracts concluded between right holders other than authors or performers, such as book club agreements, film distribution contracts, merchandising deals, et cetera. Also, this study will not deal with the new database right or other rights of intellectual or industrial property.

This brings us to the legal terminology employed in this study. The term 'transfer' is to be understood in its broadest sense as including all possible forms of alienation of rights. The term 'assignment' is used to indicate a cession of one or more proprietary interests. The term 'license' indicates an authorisation to use one or more economic (exploitation) rights, or parts thereof. The term 'waiver' refers to the renunciation of a right, in most cases, of a moral right.

The study is divided into seven chapters, including the present introduction. Chapter 2 starts off with a survey of the main obligations of Member States under the relevant international instruments, such as the Berne and the Rome Conventions, with respect to transfers of rights. Not surprisingly, these and other international instruments have very little to offer in terms of copyright contract law. Next, we undertake a similar exercise in respect of existing Community law. Indeed, several directives in the area of copyright and neighbouring rights contain rules and references relating to contractual practices. Chapter 2 proceeds with an examination of general principles of contract law that may be relevant to contractual relationships between authors or performers and publishers or producers, respectively. Here, we concentrate on such omnipresent, often unwritten rules as the principles of good faith, of imprecision, and of fairness and equity.

Chapter 3 serves as an introduction to the analysis presented in the following chapter. In this chapter, we give a general overview of the different concepts and issues relating to the ownership and transfer of rights, as well as relating to the formation and content of copyright contract. More particularly, we try to explain the reasoning behind the imposition of certain rules, like those governing formalities, restrictions on transfers, remuneration, interpretation (scope) of contracts, effect of transfer in relation to third parties, and termination of contract. The structure of this introductory chapter also serves as skeleton for the presentation of Chapter 4.

Chapter 4 constitutes the *pièce de resistance* of the study. Here, we will present a detailed country-by-country review of specific rules relating to copyright contracts. Many of these rules are found in national laws on copyright and related rights. In some countries, special laws on (certain classes of) contracts exist. In reviewing this rather complicated body of law, we first examine the existing rules on ownership of rights. As we shall see, most Member States provide for exceptions to the basic rule that authorship implies ownership (the ‘creator doctrine’), particularly with respect to works made under employment and audiovisual works. The second part of this chapter describes the legislative and practical differences that exist between the various forms of transfer, i.e. assignment, licence, and waiver. Next, we distinguish between rules governing formalities, restrictions on transfers, remuneration, interpretation (scope) of contracts, effect of transfer in relation to third parties, and termination of contract. Because of time limits, this report does not present an in-depth country-by-country account of case law relating to copyright contracts. However, we have attempted to illustrate our description of statutory law with case law, as much as is practically possible.

Chapter 5 deals with the private international law aspects of trans-national copyright contracting. To what extent does the existing Rome Convention on the law applicable to contractual obligations apply in this context? Is there scope for introducing a special rule of private international law relating to copyright contracts?

Chapter 6 gives a summary of the main differences that exist in the legislation of the Member States regarding copyright contracts. On the basis of our findings, we then discuss the effect of these differences on the functioning of the internal market and consider whether or not there is room for harmonisation in this field at the European level. However, the limited time and means to produce this study did not allow for an assessment of the economic impact (i.e. effect on the functioning of the internal market) of disparities in national laws on copyright contracts. Our remarks on the impact of legislative differences on the Internal Market therefore remain subject to ulterior confirmation by means of an economic survey.

In Chapter 7, we draw a number of conclusions and recommendations that may be considered when assessing the need for Community action and this field.

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The principal author of the study is Dr. Lucie Guibault. Most of the research underlying Chapters 2 and 4 was undertaken by Marjanka Vermunt, who also produced the table of comparison appended to this study as Annex I. Chapter 6 was researched and drafted by Marieke Berghuis. Prof. P. Bernt Hugenholtz supervised the study, and drafted its final chapter. We wish to thank the following people for their precious contribution to this report:

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Chapter 2. General Framework Relating to Copyright Contracts

Authors and performing artists rarely are in a position to commercially produce and distribute their own works or performances. In order to bring their creations to the market, they have often no other choice but to come into contact with those businesses or entities that might be willing to exploit and distribute these works and performances, such as book, sound recording and software publishers, radio and television broadcasters, movie producers, museums and galleries, show business promoters and different public or private corporations.² The relationships between authors or performing artists on the one hand, and exploiters on the other hand are usually governed by individual contracts, in which the transfer of rights in favour of the exploiter constitutes one of the key provisions. In principle, authors and performing artists are thus free to dispose of their right as they see fit, i.e. to enter into the contracts that will lead to the best allocation of those rights and to the best use of their work. An agreement concluded in the true spirit of the principle of freedom of contract normally presupposes that it has been reached at the close of a free and voluntary negotiation process conducted in good faith between equal and perfectly informed contracting parties. As De Freitas points out however, ‘there is recognition that the 19th century views on freedom to negotiate and sanctity of contract are, certainly in today’s world, unrealistic’.³ Indeed, most of the time, copyright contracts are not concluded between equal and perfectly informed contracting parties. Severe inequalities of bargaining power, of practical experience and of technical knowledge may have an impact on the authors’ and performing artists’ capacity to express consent at the time of conclusion of the contract.⁴

In practice, exploiters have the tendency to demand broad transfers of rights from authors and performing artists, arguing that broad transfers give them the legal certainty necessary to make the required investment for the production and distribution of protected works and other subject matter. The fact is however that, in their contractual relations with exploiters, authors and performing artists regularly find themselves in a weaker bargaining position.⁵ The risk therefore exists that exploiters take unfair advantage of their stronger position. The question arises whether international copyright law and the general rules of civil law can provide some form of protection to authors and performing artists in their contractual relationships with exploiters. To this end, we examine what protection, if any, the several multinational instruments in the field of copyright and related rights offer to authors and performing artists in their contractual relationships with exploiters. In the following section, we draw a portrait of the general rules of law applicable to copyright contracts, with specific examples taken from French, German, Dutch, and United Kingdom law. To this end, we enquire whether and to what extent the general principles of law, such as the principle of good faith, of imprecision, and of fairness and equity, allow courts in different jurisdictions to interpret or revise contractual terms that might be deemed unfair to the author or the performer.

2.1 *International framework*

What are, if any, the Member States’ legal obligations in the area of copyright and related rights both under the relevant multilateral instruments and the European directives? In this section, we draw a brief overview of the relevant provisions of the Berne Convention, the Rome Convention, the Agreement on Trade Related Aspects of Intellectual Property (TRIPS Agreement), and the Proposal for a WIPO Treaty on the Protection of Audiovisual Performances. Finally, we have a short look at the few relevant provisions included in the European directives on copyright and related rights.

² Dessemontet 1998, p. 48. These various people and entities can be collectively referred to as ‘producers’.

³ De Freitas 1991, p. 257.

⁴ Hugenholtz 2000b, p. 79; Ghestin 1993, p. 117; and Hartlief 1999a, p. 33.

⁵ Hugenholtz 2000, p. 11.

2.1.1 Multilateral instruments

2.1.1.1 Berne Convention

The Berne Convention of 1886 on the protection of literary and artistic works initially contained no mention of the alienability of the author's economic rights. In fact, the importance of the exercise and protection of one's author's rights was only recognised during the Berlin revision Conference held in 1908.⁶ At that time, Contracting Parties agreed to the introduction of article 5 in the Convention, which proclaimed that both the enjoyment and the exercise of the rights granted under the Convention must not be subject to any formality, and that 'such enjoyment and such exercise are independent of the existence of protection in the country of origin of the work'. However, in application of the principle of freedom of contract, the Berne Convention did not extend beyond the regulation of questions relating to the enjoyment of author's rights. After a century of successive revisions, the final text of the Berne Convention contains only two references to the transferability of the rights granted therein. A first reference can be found in Article 6*bis* of the Convention, which was inserted during the Stockholm revision Conference of 1967. It states that 'independently of the author's economic rights, and *even after the transfer of the said rights*, the author shall have the right' to retain her moral rights' (Emphasis added).

A second reference to the transferability of economic rights and to copyright contracts can be found in Article 14*bis*(2)(b) of the Convention, concerning cinematographic works. As Ricketson explains, the exploitation of rights in cinematographic works at the international level began in the early 1950's to cause great concern to authors and film-makers. The problems stemmed from the different approaches that had been adopted in national laws. There were two extremes: the film copyright system, which was found mainly in the common law countries and which granted ownership of the rights on the film to its producer, and those systems, which accorded copyright protection to the authors or intellectual creators of the cinematographic work.⁷ This provision led to intense discussions during the Stockholm revision Conference. Finally, ownership of copyright in a cinematographic work was left for determination at the national level. Article 14*bis*(2)(b) established a compromise by providing that in the absence of any contract to the contrary, authors who have undertaken to bring contributions to the making of a cinematographic work, may not object to reproduction, distribution and other uses of the work. The application of this rule may be limited according to the provisions of Article 14*bis*(3) as far as certain key authors of the work are concerned and may be further limited by national legislation. At the national level, legislative solutions with respect to authors' rights vary from the system of so-called 'film copyright' to rebuttable or non-rebuttable presumptions of assignment of authors' right to the maker or producer of the film. The state purpose of these provisions was the production of a uniform international code to regulate the exploitation of cinematographic works so as to promote the free circulation of films. As Ricketson reports, this objective was hardly achieved, and the provisions adopted are the most obscure and least useful in the whole Convention.⁸

2.1.1.2 Rome Convention

The International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations, otherwise known as the Rome Convention of 1961, sets the minimum level of protection in the field of related rights. The Rome Convention contains three important provisions relating to the conclusion of contractual agreements between performers on the one hand

⁶ Boytha 1991, p. 209.

⁷ Ricketson 1987, p. 573.

⁸ Id., p. 582.

and producers or broadcasting organisations on the other hand. Remarkably, not only do these provisions not offer any protection to the performing artists in the conclusion of exploitation contracts, but they also have the effect of reducing the scope of the protection granted under the Convention. Article 7.1 of the Convention grants performers the possibility of preventing the following acts:

- 1) *the broadcasting and the communication to the public, without their consent, of their performance, except where the performance used in the broadcasting or the public communication is itself already a broadcast performance or is made from a fixation;*
- 2) *the fixation, without their consent, of their unfixed performance;*
- 3) *the reproduction, without their consent, of a fixation of their performance:*
 - a. *if the original fixation itself was made without their consent;*
 - b. *if the reproduction is made for purposes different from those for which the performers gave their consent;*
 - c. *if the original fixation was made in accordance with the provisions of Article 15, and the reproduction is made for purposes different from those referred to in those provisions.*

As the Guide to the Rome Convention points out, the second paragraph of Article 7 decreases the minimum protection enjoyed by performers as far as their relations with broadcasting organisations are concerned. Indeed, sub-paragraphs (1) and (2) of paragraph 7.2 allow a Contracting State to regulate certain questions in favour of broadcasting organisations once the performer has consented to have his performance broadcast. These cover re-broadcasting, fixation for broadcasting purposes and reproduction of such a fixation for broadcasting purposes. However, sub-paragraph (3) provides that the domestic law shall not operate to deprive performers of the ability to control, by contract, their relations with broadcasting organisations.

Article 12 of the Rome Convention contains the second mention made in the text of contractual agreements. This provision is seen as the most important provision in the Convention and deals with 'secondary uses' of phonograms. When a phonogram which has been published for commercial purposes is used directly for broadcasting or communication to the public, Contracting States have three possibilities. These are to assure the payment by the user of an equitable remuneration (i) to the performers or (ii) to the producer of the phonogram or (iii) to both. In any case, the payment is a single one to be shared if necessary. The last part of the provision states that 'domestic law may, in the absence of agreement between these parties, lay down the conditions as to the sharing of this remuneration'. As the Guide to the Rome Convention points out, the accent is on agreement and, in many countries, this has in fact been achieved both as to collection and distribution of the sums due for secondary uses of phonograms. In view of the sums involved, one should not underestimate the possible conflicts that may arise around the sharing of the remuneration due for secondary uses of phonograms. Finally, article 19 of the Rome Convention states that performing artists' rights cease to be applicable 'once a performer has consented to the incorporation of his performance in a visual or audio-visual fixation'. All in all, none of these provisions strengthen the position of the performing artist in his relationship with producers or broadcasting organisations.

2.1.1.3 TRIPS Agreement

The final version of the TRIPS Agreement contains no provision on the transfer or exercise of copyrights or related rights.⁹ Gervais reports that, in the course of the negotiations, a provision on

⁹ World Trade Agreement 1994 (establishing the WTO and including GATT Uruguay 1994), Marrakech, April 1994, Annex 1C.

transfer of rights had been proposed for inclusion in the section on copyright of the Draft of July 23, 1990 of the TRIPS Agreement.¹⁰ The text proposed read as follows:

Protected rights shall be freely and separately exploitable and transferable. [Assignees and exclusive licensees shall enjoy all rights of their assignors and licensors acquired through voluntary agreements, and shall be entitled to enjoy, exercise and enforce their acquired exclusive rights [in their own names]]?

Finally, no consensus was reached on the wording of this provision and it was altogether withdrawn from the final text of the Agreement. In our opinion however, such a provision would not have added much to the existing situation regarding copyright contracts.

2.1.1.4 Proposal for a Treaty on the Protection of Audiovisual Performances

The first attempt to include audiovisual performers into an international agreement, namely the Rome Convention of 1961, resulted in a far-reaching exclusion of protection for audiovisual performers upon their mere consent to the incorporation of their performance into a visual or audiovisual fixation. The issue was raised once more, unsuccessfully, in the context of the WIPO Performers and Phonograms Treaty (WPPT) of 1996, to resurrect again in the context of the proposed WIPO Treaty on the Protection of Audiovisual Performances. But the efforts of the Diplomatic Conference held in December 2000 towards the adoption of the treaty have remained unsuccessful.¹¹ Among other objectives pursued by the Treaty was to strike a proper balance between the need for exploiters to secure the necessary business certainty for the distribution and exploitation of audiovisual fixations and the objective to strengthen the international legal framework for protection of performer's rights, while preserving the potential for bargaining. To this end, Article 12 of the Basic Proposal contained three alternative solutions on the subject of the transfer of rights of performing artists. This provision proved to be the most controversial of all issues dealt with during the Diplomatic Conference and eventually turned out to be the deal breaker. At the close of the Diplomatic Conference, the lack of consensus among the delegations on the issue of the transfers of rights ultimately led to the failure to adopt the Treaty on the Protection of Audiovisual Performances. Considering that the crucial issue regarding legal provisions on transfer has extensively been discussed during more than five years in WIPO Committees without success, the possibilities for a compromise would seem to have been exhausted for the time being.¹²

2.1.2 European Directives

Licensing contracts and contractual relations concerning copyright and related rights have not been subject to overall harmonisation within the Community.¹³ The European legislator has until now refrained from intervening on the issue of transfers of rights and of contractual agreements between authors or performing artists on the one hand and exploiters on the other hand, because contractual and civil matters have traditionally fallen under the exclusive competence of the Member States.¹⁴ Member States have so far enjoyed the freedom to adopt under their own national legal systems protective measures to the benefit of authors or performing artists regarding either the scope of transfer of rights or the formation, execution, and interpretation of contracts concluded with broadcasters, publishers and other producers.

¹⁰ Gervais 1998, p. 102.

¹¹ Heevel 2001, p. 61; and Cohen Jehoram 2001, p. 296.

¹² For a discussion on the international private law provisions of the Proposal, see section 5.4 *infra*.

¹³ Commission of the European Communities, *Communication from the Commission to the Council and the European Parliament on European Contract Law*, Brussels, 11 July 2001, COM(2001) 398 final, Annex 1, p. 38.

¹⁴ Von Lewinski 1996, p. 49.

On the other hand, rights administration or licensing in general and the issue of collective management in particular has been addressed in several Community instruments. For instance, the Directive on the legal protection of computer programs¹⁵ addresses issues of contractual relations by granting minimum rights to users. In particular, the right for any lawful user of a computer program to make a back-up copy of the program, ‘insofar as it is necessary for that use’, may not be set aside by contract (Article 5(2)). The possibility to observe, study, or test the functioning of the program (Article 5(3)) cannot be prevented by contract. Furthermore, the Computer Programs Directive provides that any contractual provisions contrary to the de-compilation exception (Article 6) are null and void. The *sui generis* right granted under the Directive on the legal protection of databases may be transferred, assigned, or granted under contractual licence (Article 7(3)).¹⁶ The Directive also contains a provision similar to that in Directive 91/250/EEC on the legal protection of computer programs (Article 8). In particular, any contractual agreement contrary to the possibility for the lawful user to extract and re-utilise insubstantial parts of the database for any purposes whatsoever, shall be null and void.

As we have established in section 2.1.4 above, article 2(2) of the EC Directive on the Public Lending and Rental Rights¹⁷ designates the principal director of a cinematographic or audiovisual work as its author or as one of its authors. Articles 2(5) and (6) grant Member States the possibility to establish a presumption of transfer of rights from the authors and performers to the producer of the audiovisual work. Article 4 of this European Directive establishes a new concept with respect to the rental of protected material, which could be qualified as a limited transferability. The article reads as follows: ‘Where an author or performer has transferred or assigned his rental right concerning a phonogram or an original or copy of a film to a phonogram or film producer, that author or performer shall retain the right to obtain an equitable remuneration for the rental. The right to obtain an equitable remuneration for rental cannot be waived by authors or performers.’ The adoption of article 4 of the Rental and Lending Rights Directive has been justified by the fact that it is usually not sufficient simply to determine who should be the initial owner of a right on a work. The legislation must in addition ensure that the first rights owner is actually able to benefit from his or her right. As Reinbothe and von Lewinski explain, the provision is designed to deal with the situation that authors and performing artists, due to their weak bargaining position in relation to producers, will often not be able to benefit adequately from their exclusive rental rights.¹⁸ Thus, even after the transfer of the exclusive right, the author or performer retains an unwaivable right to equitable remuneration.

The provisions of the Rental and Lending Rights Directive have been implemented in various ways by the Member States. Several countries have incorporated them word for word in the national legislation, establishing a presumption of transfer of rights from the authors and performers to the producer of the audiovisual work but providing authors, including the principal director, and performers with an unwaivable right to remuneration for the rental of the work.¹⁹ Other times, like under the **Swedish** Copyright and Related Rights Act or the **French** CPI, no presumption of transfer of the rental or lending rights is established, making it therefore unnecessary to provide for a corresponding right to remuneration. In other countries, like **Germany**, the law allows for a voluntary transfer of the authors’ or the performers’ rental right to the producer of an audiovisual work, in exchange for which the latter are to benefit from a remuneration right. Thus, although

¹⁵ Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs, O.J.C.E. L 122/42, 17 May 1991.

¹⁶ Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, O.J.C.E. L 077/20, 27 March 1996.

¹⁷ O.J.C.E. L 346/61, 27 November 1992.

¹⁸ Reinbothe and von Lewinski 1993, p. 65.

¹⁹ See for example: Belgian Copyright and Related Rights Act, art. 24; Danish Copyright and Related Rights Act, art. 58a and 65(5); Spanish Copyright and Related Rights Act, art. 109(2); and United Kingdom CDPA, art. 93B(1) and 191G.

there is no legal presumption of transfer of the author's rental right, article 27 of the German Act grants the authors of a cinematographic work an unwaivable right to remuneration, applicable in cases where the author has granted to the producer of an audio recording or a film the rental right (Article 17) with regard to that video or audio recording. The **Greek** provisions are to the same effect. As we have seen in section 2.1.4 above, there is no legal presumption with respect to the author's rights under **Italian** law, but there is one with respect to the performer's rights. Nevertheless, just like the performer has an unwaivable right to equitable remuneration for the rental of an audiovisual work under article 84(2) of the Act, the author is entitled to an unwaivable right to fair remuneration if he assigns his right of rental to a producer of phonograms or cinematographic or audiovisual works or of sequences of moving images. Under article 109(2) of the **Spanish** Copyright and Related Rights Act, the performer who has transferred or assigned to a producer of phonograms or audiovisual recordings his rental rights in a phonogram, or an original or copy of an audiovisual recording, retains the unwaivable right to receive equitable remuneration for the rental thereof. Such remuneration is payable by those who conduct the operations of rental to the public of phonograms or audiovisual recordings in their capacity as successors in title to the owners of the corresponding rights to authorize such rental.

The laws of two Member States would appear not to be in complete compliance with the provisions of the Rental and Lending Rights Directive. In **Austria**, the lending of a work is subject, under article 16a(2) of the Copyright Act, to the payment of an equitable remuneration to the author. In addition, where a film producer authorises the rental or lending of an audiovisual work against the payment of remuneration, article 16a(5) grants to the author of such a film an unwaivable right to an equitable part of that remuneration. Article 16a(5) adds that if another person has a right to remuneration under the law or a contract, the author has an unwaivable right to an equitable part of this remuneration. Contrary to the Rental and Lending Rights Directive, the payment of an equitable remuneration to the author of an audiovisual work only arises under article 16a(5) of the Copyright Act if the rental occurs against the payment of remuneration. Moreover, contrary to the Rental and Lending Rights Directive, the Austrian Copyright and Related Rights Act provides for no kind of right to equitable remuneration either in favour of the principal director of the audiovisual work or in favour of the performers.²⁰ In **Finland**, whereas the Copyright and Related Rights Act does establish a presumption of transfer of the performer's rental right,²¹ it is interesting to note that the provisions which grant performers and producers a right to remuneration are not applicable to a 'film or any other device on which moving images have been recorded'. The Finnish solution would therefore appear to be in contradiction with the requirements of the Rental and Lending Rights Directive.

Although the contractual practices regarding the transfer of the authors' and performers' rights to exploiters are generally not regulated at the European level, the importance of contractual agreements as a means to determine the conditions of use of protected works and performances clearly transpires from the text of some of the directives adopted in the field of copyright and related rights law. For instance, Recital 9 of the Cable and Satellite Directive²² proclaims that 'the development of the acquisition of rights on a contractual basis by authorisation is already making a vigorous contribution to the creation of the desired European audiovisual area' and that 'the continuation of such contractual agreements should be ensured and their smooth application in practice should be promoted wherever possible'. More importantly, Recital 19 of the same Directive sets out a number of principles of interpretation of international co-production agreements. According to the European lawmakers, international co-production agreements are to be interpreted in the light of the economic purpose and scope envisaged by the parties upon signature. It was also

²⁰ Walter 2001, p. 379.

²¹ Finnish Copyright and Related Rights Act, art. 45(3rd par.).

²² O.J.E.C. L 248/15, 6 October 1993.

felt at the time of the adoption of the Directive that a clear rule was necessary in cases where the international co-production agreement does not expressly regulate the division of rights in the specific case of communication to the public by satellite within the meaning of the Directive. Be that as it may, the Directive contains no particular rule of interpretation for contracts pertaining to the division of rights between co-producers. Recital 30 reaffirms the need to promote contractual arrangements regarding the authorisation of cable retransmission. The only provision included in the text of the Cable and Satellite Directive regarding contractual agreements is article 12(1), according to which Member States are required to ensure by means of civil or administrative law, as appropriate, that the parties enter and conduct negotiations regarding authorisation for cable retransmission in good faith and do not prevent or hinder negotiations without valid justification.

The new Directive on the harmonisation of certain aspects of copyright and related rights in the information society²³ contains a number of references to the conclusion of contractual arrangements as a means to determine the conditions of use of protected works and subject matter. Recital 30 of the Directive confirms that ‘the rights referred to in the Directive may be transferred, assigned or subject to the granting of contractual licences, without prejudice to the relevant national legislation on copyright and related rights’. With respect to the limitation on copyright adopted in favour of non-profit making establishments such as publicly accessible libraries and archives, Recital 40 specifies that such limitation should not cover uses made in the context of on-line delivery of protected works or other subject matter. Therefore, the conclusion of specific contracts or licences should be promoted which, without creating imbalances, favour such establishments and the disseminative purposes they serve. Recital 45 further declares that ‘the exceptions and limitations referred to in Article 5(2), (3) and (4) should not, however, prevent the definition of contractual relations designed to ensure fair compensation for the rights holders insofar as permitted by national law’.²⁴ Recital 53 and article 6(4) of the Directive both deal with the use of technological measures to ensure a secure environment for the provision of interactive on-demand services. Without going too deep into the relationship between technological measures, contractual agreements and limitations on copyright under the Directive, suffice it to say that the provisions of a contractual agreement that governs an on-line service have been given precedence over the limitations set out in the Directive.

2.2 *General principles of law*

The field of copyright and related rights law must not be considered in isolation. Admittedly, the core provisions regulating the transfer of rights from authors and performers to exploiters are to be found in the copyright and related rights acts. However, the field of copyright and related rights law is not hermetic, as show numerous references made in the copyright acts to the general principles of law. In fact, the general principles of contract law complement the rules laid down in the copyright and related rights legislation to regulate aspects of the transfer of rights and of the formation, execution, and interpretation of copyright contracts that cannot be addressed in the specific legislation on copyright and related rights.²⁵ However, like in the field of copyright law, the rules on contract law have yet to be fully harmonised at the European level. The approximation of certain specific areas of contract law has covered an increasing number of issues. The EC legislator has followed a selective approach adopting directives on specific contracts or specific marketing techniques where a particular need for harmonisation was identified. So far, the harmonisation efforts have led to the publication of the *Principles of European Contract Law Parts I and II*, which cover the core rules of contract, formation, authority of agents, validity, interpretation, contents, performance, non-performance (breach) and remedies. These Principles have been drawn up by an

²³ O.J.C.E. L 167/10, 22 June 2001.

²⁴ The last part of the Recital most probably refers to the Austrian and German ‘monist’ systems.

²⁵ Götting 1995, p. 55.

independent body of experts from each Member State of the European Union under a project supported by the European Commission and many other organisations. The Principles of European Contract Law are intended to be applied as general rules of contract law in the European Communities if the parties so choose. Before turning in chapter 4 to the study of the specific provisions contained in national copyright and related rights acts, we first examine whether the general principles of law as laid down in the Principles of European Contract Law and in national civil law would allow courts to interpret or revise contractual terms that might be deemed unfair to the author or the performer. We focus here on such principles as the principle of good faith, of imprecision, and of fairness and equity.

2.2.1 Good faith

Interestingly, article 12(1) of the Cable and Satellite Directive demands that Member States ensure ‘by means of civil or administrative law, as appropriate, that the parties enter and conduct negotiations regarding authorisation for cable retransmission in good faith and do not prevent or hinder negotiations without valid justification’. This provision directly refers to the principle of good faith as a criterion to be followed when parties negotiate licensing terms and enter into contract. In some jurisdictions, this provision has been transposed literally in the copyright act,²⁶ while in other Member States no implementation was deemed necessary because the principle of good faith is such a fundamental concept that it pervades the entire legal system. Be that as it may, it is not usual to come across direct references to the principle of good faith in the copyright acts of the Member States. Good faith is synonymous to sincerity, candour, and more globally to loyalty.²⁷ Most systems make a distinction between subjective good faith and objective good faith. Subjective good faith is usually defined as a subjective state of mind: not knowing or having to know of a certain fact or event. Objective good faith by contrast, is usually regarded as a standard of conduct of contracting parties. Objective good faith is the concept to which most statutory provisions refer either in general terms or in specific terms like *Treu und Glauben* in Germany, or *redelijkheid en billijkheid* in the Netherlands. Parties are thus free to enter into a contract and to determine its contents, subject to the requirements of good faith and fair dealing.²⁸ Moreover, each party must act in accordance with good faith and fair dealing.²⁹ Good faith and fair dealing must be observed throughout the life of the contract, beginning with its negotiation. It will apply to those contractual duties, which may continue after the main duties have been performed, such as a duty to keep trade secrets.

The principle of good faith in contractual relationships is expressly laid down in the **Belgian**, **French**, and **Luxembourg** Civil Codes, where article 1134 of the French Civil Code provides for example that ‘contracts must be performed in good faith’. A similar rule, found in article 1375 of the **Italian** Civil Code, provides that the obligor and the obligee shall behave according the rules of fairness. The **Spanish**, **Portuguese**, and **Greek** civil codes also have provisions, which oblige the parties to behave in accordance with the requirements of good faith. In the **Nordic** countries the good faith principle has been recognized by courts and legal scholars. Although it has not been expressed in general terms in the statutes, several statutory provisions presuppose its existence, like article 36 of the Uniform Nordic Contract Act which gives the courts power to set aside unfair contract clauses.³⁰ The District Court of Bruges (Belgium) referred to the principle of good faith to interpret the obligations of a sound producer that flowed from a contract with an artist.³¹ The

²⁶ See for example: Dutch Copyright Act, art. 26b.

²⁷ Hesselink 1998, p. 288; Ghestin 1993, p. 231; Smits and Wijers 1995, § 2.1; and Palandt 2000, § 242, p. 227.

²⁸ Principles of European Contract Law, art. 1:102.

²⁹ Principles of European Contract Law, art. 1:201(1).

³⁰ Lando 1996, § 3.

³¹ Rb. Brugge (1e k.), 6 December 1995, (*Megadisc v. Waut et al.*), *Ac&M* 1996/1, p. 156.

dispute concerned a clause in the contract according to which the producer undertook the obligation to make a specific number of recordings within six months from the date of termination of the contract or to pay the artist a lump sum as compensation if he was not in state of doing so. The Court struck the contractual clause down, because it contained a purely potestative condition, and pointed out that contracts must be executed in accordance with the principle of good faith. In a case against a copyright collecting society, the French *Cour de Cassation* also relied on the principle of good faith to hold that the collection of payments from foreign subsidiaries for ‘technical assistance’ and ‘editorial fess’ did not correspond to any tangible service from the publisher. Such payments had in fact no other cause than the transfer of the publishing rights and served only to reduce the author’s rights. The Court concluded that the publisher had failed to execute in good faith the obligations flowing from the publishing contract.³²

In **Germany** and the **Netherlands**, the principle of objective good faith is generally recognised as allowing courts to bring correctives to the application of other legal norms, when in certain concrete circumstances, their harshness would need to be mitigated. Traditionally, courts have used the principle of good faith as an instrument to interpret, correct, and supplement the obligations flowing from a contractual agreement. Article 242 of the German Civil Code states that ‘the obligor must perform his duty in accordance with good faith and fair dealing having regard to commercial practices’. By contrast, article 6:248 of the Dutch Civil Code provides that ‘a rule binding upon the parties as a result of the contract does not apply to the extent that, in the given circumstances, this would be unacceptable according to the criteria of reason and equity’. The principle of good faith may thus be applied to control the behaviour of the contracting parties both during the pre-contractual phase and at the time of the execution of the contractual obligations. Therefore, as for any other type of contract, parties to a contract providing for the assignment, licence, or waiver of the author’s rights have the obligation under continental European civil law to negotiate in good faith and are bound by all the consequences that equity, custom, or law give to the obligation depending on the nature of the contract.³³ The parties must execute their contractual obligations in good faith.

The requirement of good faith in contractual relationships has also been interpreted in Germany and the Netherlands as imposing a duty on each party to take one another’s interest into account.³⁴ In other words, the principle of good faith reflects the general recognition that parties have an obligation of loyalty and co-operation vis-à-vis one another whose degree may be defined by the legislator or by the courts according to the usage and good contractual practices.³⁵ In application of article 6:2 of the Dutch Civil Code, a contract term, which would normally be binding upon the parties, will not be so to the extent that, given all relevant circumstances, this would be unacceptable according to criteria of objective good faith. This provision clearly adopts the view that even express terms of contract can be set aside whenever their enforcement would be grossly unjust. The term ‘unacceptable’ indicates that such a decision should be reserved for exceptional situations.³⁶ Paragraph 242 of the German Civil Code, which lays down the principle of *Treu und Glauben*, has received a similar interpretation from German courts.³⁷ Hence, an unreasonably burdensome obligation could be declared invalid as contrary to the general principle of good faith and to the standard of good contractual practices.

³² Cass. 11 January 2000 (*Ed. Dargaud v. Uderzo and SNE*), Case No. Y 98-20-446, decision No. 64 P – non published. See Kéréver, ‘Chronique de jurisprudence’ *RIDA* 2001/187, p. 227.

³³ Gautier 1999, p. 185 referring to art. 1134 and 1135 of the French Civil Code.

³⁴ Asser-Hartkamp 1997, p. 285; Smits 1995, p. 101; and Dutch Civil Code, art. 6:2(1).

³⁵ Ghestin 1993, p. 239.

³⁶ Hartkamp 1999, p. 126.

³⁷ Fikentscher 1985, p. 139.

By contrast, the doctrine of objective good faith in contracts as an overriding principle of fair dealing never took root in **British** common law. The modern view is that, in keeping with the principles of freedom of contract and the binding force of contracts, in English contract law good faith is in principle irrelevant.³⁸ The fairness of terms in a contract becomes a relevant question when courts apply the principles of ‘construction’ (e.g. interpretation). Hence, ‘modern principles of construction require courts to have regard to the commercial background, the context of the contract and the circumstances of the parties, and to consider whether, against that background and in that context, to give the words a particular or restricted meaning would lead to an apparently unreasonable and unfair result’.³⁹ For instance, English courts have refused on a few occasions to enforce a contract assigning copyright because its provisions were unduly restrictive or because it constituted an unconscionable bargain in view of the inequality in bargaining power.⁴⁰ But this line of jurisprudence has not been widely followed so that the doctrines of unconscionability and undue influence remain an exceptional remedy.⁴¹ In principle, any covenant in restraint of trade is prima facie unenforceable at common law and is enforceable only if it is reasonable with reference to the interests of the parties concerned and of the public.⁴² The leading authority on the application of the restraint of trade doctrine to copyright agreements is now the decision of the House of Lords in *Schroeder v. Macaulay*.⁴³ In that case, the plaintiff, a young and unknown song-writer, entered into an exclusive five year agreement with the defendants. The plaintiff assigned the copyright for the whole world for every work created by him during the period of the agreement. The five years was extended to 10 years if the plaintiff’s royalties exceeded £5,000. The defendants had no obligation to exploit any of the compositions of the plaintiff. Moreover, defendants could terminate the agreement at any time on one month’s notice and could assign the benefit of it, but no such right was given to the plaintiff. The House of Lords unanimously held that the agreement imposed an unreasonable restraint on trade because the bargain made was neither fair nor reasonable.⁴⁴

2.2.2 Imprecision

According to article 5:101(1) of the Principles of European Contract Law, a contract is to be interpreted according to the common intention of the parties even if this differs from the literal meaning of the words. In Germany, article 157 of the **German** Civil Code states that contracts are to be interpreted in accordance with good faith and fair dealing having regard to commercial practices. In such a case, the courts must seek to reach a fair and reasonable outcome based on all the facts before them, taking into account the circumstances attending the formation of the contract. Although not expressly formulated in statutes, the **Dutch** and the **Nordic** rules on interpretation are equivalent to the German rules. The Civil Codes of **Belgium, France, Italy, and Spain** contain provisions on the interpretation of contracts. These provisions give the common intention of the parties the priority. However, the French Cour de Cassation has held that the wording of a clear and unambiguous contract term cannot be disregarded in favour of an interpretation that would bring about a more reasonable result. This rule on ‘*les clauses claires et précises*’ has not been found in German and Dutch law but is in accordance with **British** rules of interpretation.⁴⁵ In cases where the court is unable to establish a common intention, the contract is to be interpreted according to

³⁸ Chitty 1999, p. 13.

³⁹ *Caryll International SA v. Bangladesh Sugar and Food Industries Corp.*, [1998] 1 Weekly Law Reports 461, at p. 468.

⁴⁰ *Clifford Davis Management Ltd. v. WEA Records Ltd.*, [1975] 1 Weekly Law Reports 61 (Court of Appeals); and *O’Sullivan v. Management Agency and Music Ltd.*, [1985] 3 All England Reports 351.

⁴¹ Brownsword 1998, p. 313. See: *John v. James*, [1991] *Fleet Street Reports* 397.

⁴² Chitty 1999, p. 875.

⁴³ [1974] 1 Weekly Law Reports 1308 (HL). See: Bentley 2000, p. 58 (footnotes 66 – 70); Soetenhorst 1993, p. 157; Cornish 1998, p. 230 – 233; Laddie a.o. 1991, p. 896-901; Pilny 1989, p. 140-147; Cornish 1995, p. 657-661.

⁴⁴ *Sterling and Carpenter* 1986, p. 805; and Chitty 1999, p. 877.

⁴⁵ Lando 1996, § 4.

the meaning that reasonable persons of the same kind as the parties would give to it in the same circumstances.⁴⁶ The Principles on European Contract Law list a number of factors that may be taken into consideration by courts when trying to establish the common intention of the parties or the meaning that reasonable persons might give to the contract. Among the factors mentioned are the circumstances in which the contract was concluded, including the preliminary obligations, the subsequent conduct of the parties, and the relevant commercial practices and usages.⁴⁷

However, where there is doubt about the meaning of a contract term that has not been individually negotiated, an interpretation of the term against the party who supplied it is to be preferred.⁴⁸ The *contra proferentem* rule of interpretation constitutes one instrument in the hands of judges, from both the civil and common law traditions, that is designed to elicit or ‘construct’ the meaning that a reasonable person would accord to an ambiguous contract clause.⁴⁹ This rule provides that, when the meaning of a term included in a contract is unclear, that term will generally be interpreted against the party who has stipulated it and in favour of the party who has contracted the obligation.⁵⁰ Under the *contra proferentem* rule, the risk of ambiguity in a contract clause is placed on the party who could more easily avoid it, that is, on the party who selected or drafted the clause, rather than on the party to whom it was presented. But the use of this rule of interpretation is subject to two requirements: first, it must be clear which party formulated the clause in question; and second, the clause must be ambiguous. While the drafting of terms can hardly be attributed to one particular party in the case of fully negotiated contracts, the drafting of standard terms will usually originate with the party who presents them ready-made for acceptance by the other party. The *contra proferentem* rule is thus applied with particular rigour in the context of standard form contracts. But the second requirement of the rule poses greater difficulty. In a system where private autonomy prevails, judges should in principle refrain from interpreting clauses whose meaning is clear and unambiguous. Nevertheless, in their eagerness to protect weaker parties from unfair terms, the courts have proved remarkably imaginative at discovering ‘ambiguities’ in standard form contracts.⁵¹

2.2.3 Fairness and equity

In application of the principle of freedom of contract, parties are free to conclude any agreement that they perceive to be in their best interest, as long of course as their agreement does not go against public order and good morals. Since parties are presumed not to contract against their own interests, courts have traditionally refused to leave room, in their determination of the parties' legal obligation under a contract, for any inquiry into the fairness of the exchange.⁵² The court's refusal to intervene with respect to the fairness of the agreement's terms is known as the *iustum pretium* doctrine. To suggest that contracts might be revised for the fairness of the legal obligation would constitute a serious encroachment upon the freedom of contract and would endanger the certainty of the legal system, since parties would no longer be able to rely on the given word.⁵³ Another justification given for the refusal to look at the fairness of a contractual bargain rests on the mechanism of self-correction in a free and competitive market. If goods are overpriced, other entrepreneurs will receive the signal and respond themselves to the incentive to enter the market, with the desirable result that supply increases and prices fall. If contracts were invalidated just

⁴⁶ Principles of European Contract Law, art. 5:101(3).

⁴⁷ Principles of European Contract Law, art. 5:102.

⁴⁸ Principles of European Contract Law, art. 5:103.

⁴⁹ Chitty 1999, p. 667.

⁵⁰ French Civil Code, art. 1162; BGB, § 133, 157 and AGBG, § 5; Dutch Supreme Court, decision of 1 July 1977, *NJ* 1978, p. 125 and Dutch Supreme Court, decision of 28 Sept. 1989, *NJ* 1990, p. 583; see: Hijma 1999, p. 462.

⁵¹ Kötz and Flessner 1997, p. 115.

⁵² Hartlief 1999a, p. 10; and Atiyah 1986, p. 329.

⁵³ Hartlief 1999b, p. 246.

because the price was too high, this mechanism would be disturbed and its signalling function weakened.⁵⁴ Despite a traditional reluctance to introduce the *iustum pretium* doctrine in the national legal order, courts have at times resorted to rather imaginative ways in order to intervene with respect to the general fairness of a contract. For example, a court may find that the respective manifestation of assent of the parties justifies some scrutiny under the general rules of interpretation of contracts. If circumstances are such that one of the parties was incapable at the time of the conclusion of the contract to express a clear and well-informed consent to be bound by the contract's terms. A contract may therefore be declared invalid if one of the parties does not have the legal capacity to contract, either because of immaturity or of mental incompetence.⁵⁵ Moreover, it is generally admitted that no valid consent exists where a person gives her assent only by mistake or where consent is extorted by fraud or duress (otherwise known as 'undue influence' in the United Kingdom). In such circumstances, the party's consent would be neither free nor voluntary and the contract would therefore be invalid. The disadvantageous character of a contract is insufficient in itself to justify judicial review; only when the disadvantage is marked by a lack of consent can it be disputed, not because of the disadvantage, but because of its involuntary nature.⁵⁶

In principle, the same rule would apply for the interpretation of terms included in a standard form contract. A party who accepts another party's standard terms is bound by those terms irrespective of whether or not she actually has knowledge of their content in detail or fully understands their implications. But where the circumstances indicate that one party did not, or could not, fully comprehend the meaning of the contract, arguments have been made in favour of a judicial enquiry into the fairness of terms included in a standard form contract. The use of standard form contracts has been the object of regulation and judicial review for several years in **Germany** and the **Netherlands**. In fact, the German *Gesetz über den Allgemeinen Geschäftsbedingungen* (AGBG) was the source of inspiration for the provisions on standard form contracts that were introduced in section 6.5.3 of the Dutch Civil Code in 1987.⁵⁷ Consequently, both acts show definite similarities. They both apply to stipulations that are drafted by one party to be included in standard form contracts and used with another party, to the exception of terms that pertain to the main subject matter of the contract.⁵⁸ The 'main subject matter' of a contract must be assessed according to objective criteria: parties have in principle no authority to qualify the terms of their contract as 'essential', so as to withdraw them from the judicial review provided under articles 6:233 and following of the Dutch Civil Code. Under the German AGBG, this principle is expressed in an opposite way: instead of excluding terms that pertain to the main subject matter of the contract, the fair and reasonable test is said to apply only to those terms included in general conditions, which modify or complete the rules of law. Under both acts, a stipulation included in general conditions may be declared invalid, if it is unreasonably onerous to the other party or if it is 'surprising', i.e., if it is so unusual that the other party does not have to take it into account.⁵⁹ Furthermore, both acts contain two lists, a 'black list' of terms that are always invalid because they are considered to be unreasonably onerous to the other party and a 'grey list' of terms that, unless proven otherwise, are presumed to be unreasonably onerous.⁶⁰ The terms enumerated in these lists are meant to apply only in consumer relations, while the open norms set out in § 9 of the AGBG and article 6:233 of the Dutch Civil Code may also be invoked under certain conditions in relations between professionals.⁶¹ However, the provisions set

⁵⁴ Kötz and Flessner 1997, p. 135.

⁵⁵ French Civil Code, art. 1124; Dutch Civil Code, art. 3:34; and German Civil Code, art. 104 and f.

⁵⁶ Lucas and Lucas 2001, p. 394; and Hartlief 1999a, p. 10.

⁵⁷ Act of 18 June 1987, Official Gazette of the Netherlands No. 327.

⁵⁸ AGBG, § 8; NBW, art. 6:231(a).

⁵⁹ AGBG, § 9; NBW, art. 6:233(a).

⁶⁰ NBW, art. 6:236 and 237; AGBG, §§ 10 and 11.

⁶¹ Smits and Mijers 1995, p. 54.

out in the AGBG or in section 6.5.3 of the Dutch Civil Code do not apply to individuals bound either by an employment contract or by a collective bargaining agreement.⁶²

In the field of copyright, agreements passed between exploiters, whether publishers, or sound or film producers on the one hand and authors and performing artists on the other hand often take the form of standard form contracts. The question therefore arises whether a transfer of rights and other exploitation contract effectuated through a standard form contract could be invalidated on the basis of its unfairness or unreasonable character towards the author or the performing artist. In order to apply the provisions of the AGBG and of section 6.5.3 of the Dutch Civil Code to copyright contracts, one must first determine whether the author or artist is bound by an employment contract,⁶³ whether the disputed clause touches on the main obligations of the contract and whether that obligation is unreasonably onerous to the other party. Whether an assignment of right is to be considered as pertaining to the main subject matter of the contract is open for discussion. In our opinion, the assignment of rights will in most cases be regarded as pertaining to the main subject matter of the contract, since it sets out the *quid pro quo* of the contract: on the one side, the remuneration to be paid by the exploiter, and on the other, the extent of the transfer of rights granted by the author or the performing artist. Besides a clause that effectuates the transfer of rights however, copyright contracts contain a number of clauses that will generally not be considered essential to the performance of the contract. This might be the case for clauses that relate to the length of the contract or to the territory covered by the transfer that will be amenable to judicial review under the regulations on standard form contracts. In any case, the fairness of a term is assessed by referring, at the moment of the conclusion of the contract, to all the circumstances that surround its conclusion, to the mutually apparent interests of the parties, to the common usage of the trade, as well as to all other clauses of the contract.⁶⁴

The provisions of the AGBG have been invoked on at least two occasions to control the adequacy of the author's obligations flowing from a standard form copyright contract.⁶⁵ However, the Federal Supreme Court has taken a particularly restrictive approach in the application of the provisions of the AGBG to the cases before it.⁶⁶ In the '*Honorarbedingungen: Sendevertrag*' case, which involved a broadcasting organisation's use of standard form tariffs with freelance authors and other workers, the Court declared that there exists limits to the abstract control of the general conditions of the broadcasting organisation. The Court insisted that there should reign an almost unlimited freedom of contract. In the opinion of the Court, only a few general principles of law also applied to the field of copyright contract law.⁶⁷ However, the Court did invalidate a clause, on the basis of article 9(2) of the AGBG, which granted the broadcasting organisation the power to conclude a licensing contract in the name of the contracting partner – i.e. the author or performing artist – with a yet to be determined exploiter. In the '*Synchronisationsprecher*' case, the Federal Supreme Court considered that a clause in a film synchronisation contract, according to which the author transferred not only the synchronisation right but also the sound recording right, was not surprising in the sense of article 3 of the AGBG. Of course, if the criterion followed to assess whether a clause is surprising or not is the frequency with which it appears in similar contracts then, such a clause is indeed not surprising since such broad transfers of rights are a common feature in copyright contracts. Generally speaking, however, it has been argued that the restrictive approach taken by the Federal Supreme Court is to be attributed to the fact that a transfer of rights in a copyright contract is considered to

⁶² AGBG, § 23; NBW, art. 6:245. The reason given for this is that employment contracts and collective bargaining contracts are already the object of extensive regulation.

⁶³ Kuck 2000, p. 286.

⁶⁴ BGB, § 157 and AGBG, § 24a(3); NBW, art. 3:12, 6:233a).

⁶⁵ Götting 1995, p. 56.

⁶⁶ BGH GRUR 1984, 45, p. 47 '*Honorarbedingungen Sendevertrag*'; BGH GRUR 1984, 119, 120 '*Synchronisationsprecher*'.

⁶⁷ BGH GRUR 1984, 45, p. 48 '*Honorarbedingungen Sendevertrag*'.

pertain to the main subject matter of the contract and is therefore excluded from judicial review.⁶⁸ On the other hand, a full transfer of rights by means of a clause in a standard form contract has been regarded at least on one occasion as contrary to articles 3 and 9 of the AGBG and article 29 of the Copyright Act, according to which authors' rights are inalienable.⁶⁹

More recently, the Court of Appeal of Düsseldorf ruled that a clause in a standard form agreement used by a broadcasting organisation with independent film producers was invalid under article 9(1) of the AGBG, on the ground that it unreasonably prejudiced the producer.⁷⁰ In this case, the Court of Appeal held that a clause in the standard form contract concerning the transfer of the right to broadcast a work on television did not infer the transfer of the right to exploit that work on video. The obligation put by the broadcasting organisation on the film producer to refrain from exploiting his work on video on the basis of a transfer of the right to broadcast is disproportionate. Moreover, such an interpretation of the clause would be contrary to the 'purpose-of-transfer' rule. The Federal Supreme Court confirmed the applicability of the rules of the AGBG to the standard form contract used by the collecting society GEMA for the admission of music composers and lyricists as members of the society.⁷¹ In this case, the dispute revolved around the clause of the contract pertaining to the distribution of royalties among the members of the society. The Court ruled that a clause which provides for a transfer of rights of certain members in favour of the society but which precludes them from receiving royalties on the basis that they can only create a work with the help of another person causes an unreasonable prejudice to these members, contrary to article 9 of the AGBG.

In contrast with Germany and the Netherlands, the regulation of standard form contracts is, in many jurisdictions, relatively succinct, thereby granting authors and performers little protection against the use of abusive clauses. In **France**, the regulation of standard form contracts was confined for a long time to the general principles of law and to the provisions of the Act No. 78-23 of January 10, 1978 concerning the protection of consumers against abusive clauses. The protection afforded under the Act of 1978 still applies to contracts concluded between a professional and a consumer or a non-professional. However, it is in fact of a very narrow scope, for courts will generally refrain from invalidating abusive clauses that have not been declared so by decree of the *Conseil d'État* or by non-binding recommendation of the *Commission des clauses abusives*. Only one decree has ever been adopted pursuant to the Act.⁷² A clause in a contract between a professional and a non-professional or a consumer is considered abusive in the three following circumstances: 1) if it has the object or the effect of binding the other party to terms that did not appear in the contract; 2) if it has the object or the effect of suppressing or limiting the other party's right to damages in case of failure by the professional to perform any of her obligations; and 3) if it has the object or the effect of reserving to the professional the right to unilaterally modify the characteristics of the good to deliver or of the service to render.⁷³

In the **United Kingdom**, unfair contractual terms have been subject to judicial review since the adoption of the Unfair Contract Terms Act (UCTA) of 1977.⁷⁴ This Act subjects the use of certain clauses in both consumer and commercial contracts to considerable restrictions. The provisions of the UCTA essentially aim to control such clauses as exclusions or restrictions of liability, exclusions or restrictions of rights and remedies in respect of the liability, exclusions or restrictions of rules of evidence or procedure, and unreasonable indemnity clauses. But while the Act also imposes a

⁶⁸ Kuck 2000, p. 288.

⁶⁹ OLG Frankfurt am Main, 8 December 1983 (*AGBG – Übertragung von Nutzungsrechten*), GRUR 1984/07, pp. 515-516.

⁷⁰ OLG Düsseldorf, 23 October 2001 (*Videorechte an Fernsehproduktionen*), ZUM 2002/3, p. 221.

⁷¹ BGH, 13 December 2001 (*Klausurerfordernis*), I ZR 41/99.

⁷² French Decree No. 78-464 of March 24 1978, O.J. April 1st, 1978.

⁷³ Sinay-Cytermann 1996, p. 249.

⁷⁴ Unfair Contract Terms Act 1977, 26 October 1977, c. 50.

requirement of reasonableness concerning these specific clauses, it fails to provide a system of control on the basis of fairness general to all or most other types of contract terms.⁷⁵ More importantly, all contracts relating to the creation or the transfer of a right or interest in any copyright have been expressly excluded from the scope of application of certain sections of the Act.⁷⁶

Modelled after the Dutch and German laws, the European Directive on unfair terms in consumer contracts was adopted in 1993.⁷⁷ Contrary to the Dutch or German provisions however, the scope of application of the Directive is exclusively limited to transactions involving consumers, that is, ‘any natural person who, in contracts covered by this Directive, is acting for purposes which are outside his trade, business or profession’.⁷⁸ Article 3 of the Directive generally prohibits the use in non-negotiated contracts of terms, which contrary to the requirement of good faith, cause a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer. For more certainty, the Directive contains an indicative and non-exhaustive ‘grey list’ of clauses, which may be regarded as unfair. Inspired by the requirement of good faith, the unfairness of contractual terms is to be assessed according to the nature of the goods or services for which the contract was concluded, to all the circumstances attending the conclusion of the contract, as well as to all the other terms of the contract. However, no judicial review is permitted under the Directive for terms that deal with the definition of the main subject matter of the contract or with the adequacy of the price and remuneration in relation to the goods or services supplied, insofar as these terms are in plain intelligible language. The Directive establishes therefore a minimum level of protection for consumers confronted with standard form contracts.

The application to copyright contracts of the provisions of the European Directive on unfair contract terms is in most cases uncertain at best. The fact that the provisions of the Directive only apply to ‘consumer’ contracts, that is, to contracts concluded by a ‘natural person who (...), is acting for purposes which are outside his trade, business or profession,’ constitutes a first hurdle for authors and performing artists. Indeed, it could be argued that an author or a performing artist dealing with a producer in view of the exploitation of his work or other subject matter are in fact acting for purposes that are *within* his trade, business, or profession, thereby excluding the application of the Directive. But the question is open to debate since, to our knowledge, no national court has yet pronounced itself on whether authors and performing artists can be considered ‘consumers’ in the sense of the Directive. The second hurdle to overcome relates to the fact that, under the Directive, a clause in a standard form contract is only open to judicial review if it does not pertain to the ‘main subject matter of a contract’. Assuming that the standard contract presented by the exploiter is concluded with a consumer and that the term under review does not touch on the essence of the performance, would a term be regarded as unfair under the Directive? Let us recall that a term is generally considered unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.

The list presented in annex to the Directive is meant to give an indication of what clauses may be regarded as abusive or unfair. Among the clauses enumerated in the list that could apply in the context of an overbroad transfer of rights, is the one that has the effect of ‘irrevocably binding the consumer to terms with which he had no real opportunity of becoming acquainted before the conclusion of the contract’. This type of clause relates more to the formation of the contract and to the accuracy of the consumer's assent to the obligations contained therein, than to the fairness of the contractual obligations themselves. Other clauses that may be considered unfair under the Directive

⁷⁵ Chitty 1999, p. 735.

⁷⁶ Unfair Contract Terms Act 1977, 26 October 1977, c. 50, Schedule 1, sec. 1(c).

⁷⁷ Directive on Unfair Terms in Consumer Contracts, 93/13/EEC, of 5 April 1993, O.J. L 95/29.

⁷⁸ Id., art. 2(b).

are ones that make the provision of services by the exploiter subject to a condition whose realisation depends on his own will alone; that give the exploiter the right to determine whether the goods or services supplied are in conformity with the contract; or that give him the exclusive right to interpret any term of the contract. This would be the case for example, if the publisher reserved the sole right under the publishing contract to assess the manuscript, before publication, to see if it corresponds to ‘public demand or good taste’ and to decide thereafter not to publish it.⁷⁹ Any clause that would have the object of authorising the exploiter to dissolve the contract on a discretionary basis without giving the same option to the ‘consumer’ would also be deemed unfair under the Directive. Likewise, a clause enabling the exploiter to alter unilaterally without a valid reason any characteristics of the product or service to be provided would be regarded as unfair. Another type of clause, which is presumed unfair under the Directive, is the one that obliges the ‘consumer’ to fulfil all his obligations where the exploiter does not perform his.

Also modelled after the German and Dutch provisions, article 4:110(1) of the Principles of European Contract Law states that ‘a party may avoid a term which has not been individually negotiated if, contrary to the requirements of good faith and fair dealing, it causes a significant imbalance in the parties’ rights and obligations arising under the contract to the detriment of that party, taking into account the nature of the performance to be rendered under the contract, all the other terms of the contract and the circumstances at the time the contract was concluded’. Like in German and Dutch law, the rule laid down in the Principles does not apply to ‘a term which defines the main subject matter of the contract, provided the term is in plain and intelligible language; or to the adequacy in value of one party’s obligations compared to the value of the obligations of the other party’.⁸⁰ However, contrary to German and Dutch law, the Principles do not expressly exclude individuals bound either by an employment contract or by a collective bargaining agreement. In addition, contrary to the Directive on unfair contract terms, the Principles of European Contract Law do not restrict the application of this principle only to ‘consumers’. The Principles of European Contract Law would therefore seem to offer the courts greater leeway to review the terms of a standard form contract, to the extent of course that the parties have agreed to incorporate them into their contract or that their contract is governed by them. It remains to be seen what attitude the national courts will adopt when applying the Principles for the interpretation of clauses in standard copyright contracts.

Incidentally, it is interesting to mention the existence of article 29 of the **Finnish** Copyright and Related Rights Act, which states that ‘the provisions of the Contracts Act shall apply to the amendment of an unfair clause in an agreement on the transfer of copyright’. A similar provision has been incorporated in article 36 of the Swedish Act on Contracts and other Legal Transactions in the Field of Property Rights, which allows for the modification or nullification of unreasonable contract terms.⁸¹ This last provision replaced the former article 29 of the Swedish Copyright and Related Rights Act. The **Danish** Act on Contracts provides the same rule.

2.3 Conclusion

All in all however, a review of the international instruments reveals that the main treaties and directives in the field of copyright and related rights offer little or no protection to authors and performing artists regarding the conclusion of exploitation contracts, nor do they contain any rule regarding the formation, execution, and interpretation of exploitation contracts. They merely imply, without more, that the economic rights of authors and performing artists may be freely transferred

⁷⁹ Lucas and Lucas 2001, p. 408; and Kuck 2000, p. 287.

⁸⁰ Principles of European Contract Law, art. 4:110(2).

⁸¹ Levin and Kur 1995, p. 744, 745; Karnell 2000, p. 28, 29; Nyh 1998, p. 299, 301; and Strömholm 1968, p. 17.

to third parties. In some cases, these instruments have even the effect of operating a presumption of transfer of rights to the benefit of certain categories of exploiters.

Moreover, while the general rules of civil law can, in certain circumstances, be of some use to soften the harshness of restrictive agreements, these rules are generally not sufficient to protect the interests of authors and performing artists in their contractual relations with exploiters. It is therefore not surprising to note that a number of national legislators have filled the gaps left by private law with the adoption of measures to protect authors and performing artists in their contractual relations concerning the exploitation of their works and other subject matter.

Chapter 3. Introductory Remarks to the Analysis of Copyright Provisions

Authors and performing artists have long been recognised as the weaker party to transactions relating to the exploitation of their works or other subject matter, for whom protective measures are necessary to prevent that they be unfairly or unreasonably disadvantaged.⁸² It is indeed no use granting rights to authors and performing artists if the latter are unable to draw from the exploitation of these rights all the benefits to which they would be entitled. In addition to the general principles of contract law, several Member States have implemented a number of specific measures designed to protect authors and performing artists in their contractual relations with exploiters. Although the basic principle of freedom of contract persists, the law establishes a number of mandatory rules, which condition the exercise of this freedom to requirements of form and content. Many of the principles laid down in the copyright acts are thus familiar concepts of civil law that have been tailored to fit the copyright scheme and to meet the specific situation of authors and performing artists. This chapter serves as an introduction to the analysis presented in the following chapter. In this chapter, we give a general overview of the different concepts and issues relating to the ownership and transfer of rights, as well as relating to the formation and content of copyright contract. More particularly, we try to explain the reasoning behind the imposition of certain rules, like those governing formalities, restrictions on transfers, remuneration, interpretation (scope) of contracts, effect of transfer in relation to third parties, and termination of contract. Note that the structure of this chapter also serves as a skeleton for the presentation of the country-by-country analysis in Chapter 4.

The first section of this analysis gives a brief overview of how the law allocates the initial ownership of rights on different subject matter. To this end, we discuss the allocation of ownership under the traditional creator doctrine, as well as the attribution of ownership of works created under employment, works created on commission, and audiovisual works. The second section of this chapter examines the most common forms of transfer of rights that are authorised under the legislation of the Member States, and more particularly the assignment, the licence and the waiver of right.⁸³ The third section of this chapter concerns the requirements of form set by law either for the validity or the evidence of a contract concluded with an author or an artist. The fourth section deals with the crucial issue of the scope of transfer of rights allowed under the copyright and related rights act. Most laws require indeed that transfers of rights be limited in time and place and that they clearly enumerate the rights covered by the contract. Moreover, transfers of rights with respect to future forms of exploitation and future works are in most countries strictly regulated. The fifth section studies the mechanisms set in the law for the determination of the remuneration due to authors and performing artists for the exploitation of their work or other subject matter. In certain cases, the law prescribes that the remuneration must be proportional or equitable, or that it may take the form of a lump sum. Some acts also contain a provision according to which, in case of the unexpected commercial success of the work, the author may request the renegotiation of the contract if the remuneration initially paid appears disproportionate. The sixth section examines the principles of interpretation of contracts that are specifically laid down in the copyright legislation of the Member States. Next, we consider the effect of a transfer of right in relation to third parties. Does the transferee obtain under the law the right to further transfer the acquired right to another party? Does the transferee have standing to sue a third party for infringement? Is the transferee entitled to pledge, secure, or seize the acquired right? Finally, we examine the circumstances under which the parties to a copyright contract are allowed to terminate the contract. The termination of the contract may occur automatically after expiration of a certain period of time, or it may be granted

⁸² Hugenholtz 2000, p. 11.

⁸³ For the comparative analysis of the provisions on transfers of copyrights and related rights in the legislation of the Member States, see chapter 4 of this study.

in case of non-use of the rights by the transferee. We also examine whether the copyright legislation regulates the consequences for the rights transferred of the bankruptcy of the exploiter.

3.1 *Ownership of rights*

No author or performing artist can transfer more rights than he or she actually owns in respect of a particular subject matter. The issue of the transfer of rights cannot, therefore, be analysed without first examining the legislative provisions dealing with the initial allocation of ownership of rights on protected subject matter. The rules regarding the ownership of rights in fact vary from one Member State to the next, depending essentially on the country's conception of the foundation and objectives of the copyright regime. On the one hand are the Anglo-Saxon countries, like Great Britain and Ireland, where copyright protection is said to follow utilitarian objectives. There, the initial ownership of rights may be conferred, depending on the circumstances, either on the natural person who created the work or on the legal person who invested in its production, like an employer or a film producer. On the other hand are most countries of continental Europe, where copyright protection is based on natural rights principles. In these countries, only the natural person who created the work can be considered the author, on whom the initial ownership of the copyright is generally conferred following a principle known as the 'creator doctrine'. However, this rule has suffered a number of exceptions over the years.⁸⁴ Like in Great Britain and Ireland, legal entities may in certain situations be conferred initial ownership or may even be presumed to be the author of a work, as is often the case regarding particular categories of works like audiovisual works, collective works, computer programs and databases.⁸⁵

3.1.1 Creator doctrine

Virtually all copyright acts in force in the Member States provide that, in principle, the initial owner of copyright in a work is the natural person who created it. This rule of initial ownership by the physical person of the author is known as the 'creator doctrine'. It originates from the belief that the process of creating literary, artistic, or musical works brings into play only the intellectual faculties and personal qualities of the writer, sculptor, or composer and that such works are purely the expression of their author's own thought and genius. Over the years, this vision of creativity has lost some of its forcefulness as a result of the inclusion of the authors' rights in the realm of economics and competition. In Anglo-Saxon countries, the principle can easily be set-aside in circumstances where a work is created in course of employment or according to the instructions of an exploiter. By contrast, the creator doctrine plays in most continental European countries a fundamental role in the allocation of ownership of rights on a work. Certain differences do exist on this point among countries of continental Europe, where some countries apply the creator doctrine more strictly than others. For example, under the copyright acts of a few Member States, someone other than the natural person who created the work can be presumed the author of the work and the owner of the rights therein only in one instance: in the case of anonymous or pseudonymous works.

With respect to the performance of a performing artist, it appears from the explanatory memorandum accompanying the Rental and Lending Rights Directive,⁸⁶ that the European legislator considers that, in view of the nature of the subject matter, it must necessarily be *ab initio* a physical person who executes the artistic performance that is the object of the protection.⁸⁷ This interpretation corresponds also with the definition of 'performer' included in the Rome Convention

⁸⁴ See: Seignette 1994, p. 1; Strowel 1993, p. 323.

⁸⁵ Katzenberger 1996, p. 43.

⁸⁶ Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property, O.J.C.E. L 346/61, 27 November 1992.

⁸⁷ Brison 2001, p. 245.

of 1961, which includes actors, singers, musicians, dancers, and other persons who act, sing, deliver, declaim, play in, or otherwise perform literary or artistic works. Nevertheless, most – if not all – the laws of the Member States regarding neighbouring rights are silent on the question of the initial ownership of the related rights.

3.1.2 Works created under employment

Copyright law establishes a presumption of ownership in favour a natural or legal person other than the natural person who created the work in the case of anonymous, pseudonymous, collective, or derivative works. However, the presence of multiple or unidentifiable authors is not the only instance where a legal entity may be recognised as the first owner of the rights on a work. It may also be the case for works created under employment. The basis for the attribution of the initial ownership of rights to the employer is that since the latter assumes the major financial, organisational, and associative risks involved in the creation and publication of the work, he should have full control, including with respect to third parties, over the exploitation of that work.⁸⁸ In these circumstances, the author receives compensation for his intellectual creation not in the form of an exclusive economic right on the work – which is presumed transferred to the employer, but in the form of a salary or any other form of agreed remuneration. This departure from the creator doctrine is not uniformly accepted in the national legislation of the Member States. While the ownership of rights by a legal entity may correspond to the utilitarian objectives of certain European copyright systems, it may collide with the natural rights principles at the basis of a number of continental European authors' rights regimes. Many continental European legislators are thus very reluctant to grant to the employer or a legal entity the initial ownership on a work created in the course of an author's employment.

Nevertheless, there seems to be a growing tendency at the European level to recognise, either statutorily or judicially, the existence of a presumption of ownership in favour of the employer, when a work is created by an employee in the execution of his duties or following the instructions given by the employer. This movement may partly be the result of the European Union's harmonisation efforts in the area of copyright law. Pursuant to article 2 of the Computer Programs Directive, the author of a computer program is deemed to be the natural person or group of natural persons who has created the program or, where the legislation of the Member State permits, the legal person designated as the rights holder by that legislation. Where collective works are recognized by the legislation of a Member State, the person considered by the legislation of the Member State to have created the work is deemed to be its author. Moreover, under paragraph 2(3) of the Directive, the employer is considered the first owner of all economic rights on a work created by an employee in the execution of his duties or following the instructions given by the employer, unless otherwise provided by contract.⁸⁹ The same provision was included in the first draft of the EC Directive on the legal protection of databases. However, it was withdrawn from the final version of the Directive.⁹⁰ Recital 29 only states that ‘nothing prevents Member States from stipulating in their legislation that where a database is created by an employee in the execution of his duties or following the instructions given by his employer, the employer exclusively shall be entitled to exercise all economic rights in the database so created, unless otherwise provided by contract’.⁹¹ Consequently, national legislation deals with the question of the employer's ownership of rights in either one of two ways: either the copyright act contains a general and express presumption of

⁸⁸ Seignette 1994, p. 115.

⁸⁹ Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs, Official Journal L 122 , 17/05/1991 p. 42- 46, art. 2(3). See: Katzenberger 1996, p. 44.

⁹⁰ Gaster 1999, p. 79.

⁹¹ Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, Official Journal L 077, 27/03/1996 p. 20- 28, Recital 29.

ownership in favour of the employer, which is sometimes accompanied by special rules; or, the act only regulates the ownership of specific categories of works created under employment, such as computer programs and databases. In the latter case however, courts have in certain circumstances read in the employment contract an implicit transfer of rights.

Given the strength of the creator doctrine in a number of countries of the European Union, legislators have often limited themselves to the implementation of the mandatory provision of the Computer Programs Directive, which allocates to the employer the initial ownership of rights on the computer programs created by employees in the execution of their duties or following the instructions given by their employer.⁹² Some legislators have found ways to implement this mandatory provision in a way that does not contradict the creator doctrine. Other legislators have also extended the rule of initial ownership of the employer to the case of databases created under employment and to certain other specific categories of works created under employment. Nevertheless, in the absence of a general presumption of ownership of rights in favour of the employer, the basic rule is that no transfer of rights occurs. In some of the Member States however, the courts have read in the employment contract an implicit transfer of rights in favour of the employer. Even in countries where the creator doctrine is strictly applied, courts have accepted the employer has at least the right to exercise certain powers over the work created under his employment but only to the extent necessary for the exercise of his customary business activities. As we shall see in the following chapter, some courts have accepted the idea that an employer may, within his field of activities, use the works that have been created as a result of duties under the employment contract, but only for purposes that could be foreseen at the time the work was created.⁹³

3.1.3 Works created on commission

In principle, the legislator must in the attribution of ownership on works created on commission take into account the same opposing interests as for works created under employment. One might argue that since the commissioner of a work assumes the major financial, organisational, and associative risks involved in the creation and publication of the work, he should have full control, including with respect to third parties, over the exploitation of that work.⁹⁴ Others might argue that, contrary to an employer-employee relationship, the commissioner-creator relationship endures only until delivery of the commissioned work and does not entail the existence of a position of dependence on the part of the creator *vis-à-vis* the commissioner. Therefore, the creator doctrine should apply. In fact, the copyright acts of most European Member States are essentially silent on the issue of the ownership of works created on commission. In the absence of any legislative provision on the subject, courts generally conclude that the owner of the rights in a work created on commission is the physical person who created it. In several Member States, courts have accepted the argument that, despite the silence of the law, the commissioner should be able to use the works within the limits of the object and purpose of the contract. Where the legislation expressly addresses the issue, the law has most often confirmed the application of the creator doctrine.

3.1.4 Audiovisual works

Audiovisual or cinematographic works, which include cinema films, films made for broadcasting organisations and any other film work such as videos, present a particular challenge to the creator doctrine. The reason is that such works come into being thanks to the input of an important

⁹² Karnell 2000, p. 24, 25; and Schönning 2000, p. 33.

⁹³ In various sectors standards have developed. See: Muldin 1997, p. 169; Karnell 2000, p. 25.

⁹⁴ Seignette 1994, p. 115.

number of contributors. These contributors may be roughly classified as investors, producers, co-authors, performers, and technicians. Among the possible co-authors of an audiovisual work are the authors of the scenario, dialog and adaptation, the composer and, the author of a pre-existing work, if any.⁹⁵ The ownership of rights on audiovisual works therefore raises combined issues of multiple authorships and of creation under employment and/or commission. Legislators have had to grapple in the past with the difficult question of reconciling the creator doctrine, where every co-author should be recognised as such under the law and thereby obtain an exclusive right on his or her creative contribution, with the need to ensure economic efficiency, where the exploitation rights would more efficiently be held by the producer. Apart from considerations of economic efficiency, the question of who is granted the status of author of an audiovisual work is also of considerable importance for the determination of the term of protection. Although this section focuses on the problem posed by audiovisual works, the creator doctrine in fact faces similar problems with respect to the initial ownership of rights on sound recordings.

The only category of works for which the rules of initial ownership have been harmonised at the European level is that of audiovisual works. This occurred with the adoption of the Rental and Lending Rights Directive,⁹⁶ where the adoption of a single rule of ownership with respect to audiovisual works proved to be one of the most controversial issues of the entire Directive.⁹⁷ Essentially, article 2(2) of the Directive provides that the principal director of a cinematographic or audiovisual work is to be considered as its author or as one of its authors. Apart from the principal director, Member States are free to designate other contributors as the work's co-authors. In other words, contributors to a film, such as the screenplay writer, the cameraman, the editor, or the producer, may be considered as its co-authors under national legislation. This rule of authorship has in fact been reiterated in two subsequent directives.⁹⁸ The implementation of the Rental and Lending Rights Directive into national law meant that at least three Member States had to amend their copyright acts, which until then had provided that the producer was the only person to be considered as the author of an audiovisual work.⁹⁹

However, the Rental and Lending Rights Directive further grants Member States the possibility to establish a presumption of ownership in favour of the producer of the audiovisual work.¹⁰⁰

‘5. Without prejudice to paragraph 7, when a contract concerning film production is concluded, individually or collectively, by performers with a film producer, the performer covered by this contract shall be presumed, subject to contractual clauses to the contrary, to have transferred his rental right, subject to Article 4.

6. Member States may provide for a similar presumption as set out in paragraph 5 with respect to authors.

7. Member States may provide that the signing of a contract concluded between a performer and a film producer concerning the production of a film has the effect of authorizing rental, provided that such contract

⁹⁵ Kernochan 1995, p. 271.

⁹⁶ Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property, Official Journal L 346, 27/11/1992 p. 61 – 66, art. 2(2).

⁹⁷ Reinbothe and von Lewinski 1993, p. 47.

⁹⁸ Council Directive 93/83/EEC of 27 September 1993 on the co-ordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission, Official journal NO. L 248, 06/10/1993, p. 15-21, art. 1(5); and Council Directive 93/98/EEC of 29 October 1993 harmonizing the term of protection of copyright and certain related rights, Official journal NO. L 290, 24/11/1993, p. 9-13, art. 2(1).

⁹⁹ United Kingdom, Ireland, and ...

¹⁰⁰ Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property, O.J.C.E. L 346/61, 27 November 1992. Recital 19 states: ‘Whereas the provisions of Chapter II do not prevent Member States from extending the presumption set out in Article 2 (5) to the exclusive rights included in that chapter; whereas furthermore the provisions of Chapter II do not prevent Member States from providing for a rebuttable presumption of the authorization of exploitation in respect of the exclusive rights of performers provided for in those articles, in so far as such presumption is compatible with the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (hereinafter referred to as the Rome Convention)’.

provides for an equitable remuneration within the meaning of Article 4. Member States may also provide that this paragraph shall apply mutatis mutandis to the rights included in Chapter II.

These paragraphs deal with the presumption of transfer of the rental right in a comprehensive and exhaustive way. As Reinbothe and von Lewinski report, the provisions concern not only the presumptions that must be provided, but also those that may be provided. Outside the areas expressly mentioned by the Directive, and beyond the specified conditions, no presumption of transfer of the performer's or author's exclusive rental right may be provided. With respect to the performer's rights, article 2(5) applies equally to performers acting under an employment, service, or similar contract, but only insofar as the parties have not agreed to the contrary. This presumption of transfer is thus rebuttable and may affect not only the performer's rental and lending rights but also any other exclusive rights of performers provided for in the Directive, in so far as such presumption is compatible with the Rome Convention.¹⁰¹ While the presumption of transfer of the performer's rights operates as soon as the requirements and conditions of article 2(5) of the Directive are met, Member states are free to establish the presumption of transfer of the author's rights under article 2(6). The presumption of transfer is thus rebuttable and may affect not only the author's rental and lending rights but also any other exclusive rights depending on the implementing legislation.¹⁰² As a result, the copyright acts of – almost – all Member States designate at least the principal director of the audiovisual work as one of the authors of the work. Several legislators have taken advantage of the possibility to designate other co-authors of an audiovisual work, including in certain cases the film producer. Most copyright acts also provide for a rebuttable presumption of transfer of rights in favour of the producer, not only from the performers but also from the several co-authors of the audiovisual work. However, the rights of certain co-authors of the audiovisual work have been expressly excluded from the presumption of transfer.

3.2 *Forms of transfer of rights*

The previous section shows that the natural author who creates a work is far from being always considered as the initial owner of the copyright on a work, in application of the creator doctrine. The same remark holds true for performers who make a contribution to an audiovisual work. Even when authors and performers are considered to be the first owners of the rights on the subject matter they created, they must nevertheless agree to some form of transfer of rights for the commercial exploitation of their creation. The scope of rights that are assigned, conferred, or otherwise transferred through contract by authors or performing artists to exploiters constitutes one of the key aspects of the legal relationship involved in the exploitation and distribution of works and performances. Such transfers generally pertain to the creator's economic rights: these are undeniably the most relevant rights to obtain in view of the commercial exploitation and distribution of a protected subject matter. Indeed, without some form of transfer of right or of permission to perform certain acts with respect to the protected subject matter, the exploiter would be committing an infringement of the creator's right every time that he would reproduce, communicate, display or distribute the subject matter to the public. However, the creator's exercise of certain attributes of his or her moral right may also have an impact on the exploiter's capacity to exploit the work efficiently. For example, the exercise of the creator's right of integrity may restrict the exploiter's ability to bring certain alterations to the subject matter that are considered necessary for its commercialisation. Therefore, the exploiter may require that the author or performer not only agree to a transfer of his or her economic rights, but also to a waiver of certain attributes of his or her moral rights. In addition, authors and performers are sometimes asked to waive the right to remuneration that the law grants them instead of an exclusive right on their subject matter. Before we examine which

¹⁰¹ See subsection 3.2.1.2 *infra*.

¹⁰² Reinbothe and von Lewinski 1993, p. 62.

measures have been adopted to protect authors and performing artists in their contractual relationships with exploiters, we present, in the following pages, a brief overview of the most common forms of transfer of rights and their main characteristics. More particularly, we analyse the notions of assignment, licence, and waiver of rights.

3.2.1 Assignment

An assignment of right (e.g. *'cession'*, *'overdracht'*, or *'Übertragung'*) is generally understood as the complete transfer of the rights in the protected subject matter from the initial author or performer to another party. The assignment can be either total or partial in the sense that it can be limited so as to apply to one or more, but not all, of the acts that the rights owner has the exclusive right to perform. It can also be limited so as to apply to part, but not the whole, of the period for which the copyright subsists.¹⁰³ In addition, an assignment may be limited to certain forms of exploitation of the subject matter, so that the author or performing artist may contract separately for every right that constitutes his entire privilege.¹⁰⁴ An assignment, which could be compared to a sale, confers on the assignee a *real* or *absolute* right in the copyright on the work. Consequently, once the rights are assigned to another party, the initial owner loses all claims on these rights and, therefore, may no longer perform the acts covered by the rights transferred without the assignee's consent. In most Member States, copyrights may be subject to an assignment. Although continental European author's rights systems are in principle all based on natural rights principles, the alienability of an author's economic interests essentially depends on each country's approach on this issue.

3.2.2 Licence

In all European Member States, authors and performers may grant exploiters a licence for the use of their work or other subject matter. A licence (e.g. *'concession'*, *'licentie'*, *'Einräumung von Nutzungsrechte'*) is defined as the permission to do an act, which without that permission would be an infringement of copyright or related right.¹⁰⁵ Just like an assignment of right, a licence may cover all of the acts that the rights owner has the exclusive right to perform or it may be limited only to some of them. Its application may also be limited to certain forms of exploitation, to a specific duration, or to a geographical territory. A licence may be exclusive or non-exclusive, express or implied. An implied licence will be deemed to exist for example when, 'viewing the facts objectively, the words and conduct of the alleged licensor, as made known to the alleged licensee, in fact indicated that the licensor consented to what the licensee was doing'.¹⁰⁶ A licence will be deemed exclusive if it authorises the licensee to the exclusion of all other persons, including the person granting the licence, to exercise a right, which would otherwise be exercisable exclusively by the copyright owner. Generally, the holder of an exclusive licence has the same rights against a successor in title who is bound by the licence as he has against the person granting the licence.

In practice, an exclusive licence and an assignment of rights have similar economic consequences for the author or performer and the exploiter, since the licensee – like the assignee – is empowered to exercise to the exclusion of all other persons, including the grantor of the licence, the right granted to him under the licence. To explain the difference between the licence and the assignment, an analogy is sometimes made with the difference that exists between a sale and a lease.¹⁰⁷ The essential

¹⁰³ Visser 1999, p. 117. See for example: Swedish Copyright Act, art. 27.

¹⁰⁴ See for example: French CPI, art. L. 122-7, 2nd and 3rd phrases, which state that: 'The transfer of the right of representation does not imply that of the right of reproduction. The transfer of the right of reproduction does not imply that of the right of representation'.

¹⁰⁵ Visser 1999, p. 118.

¹⁰⁶ *Redwood Music Ltd. v. Chappell and Co. Ltd.*, [1982] RPC 109, at p. 128.

¹⁰⁷ Visser 1999, p. 119.

difference between the licence and the assignment lies therefore in the fact that, contrary to the assignee, the licensee cannot be considered the owner of the right to use the protected subject matter. Another indication of the nature of the transfer is given by the consequences attached to the death of the transferee: where the licensee dies, the permission to use the subject matter may terminate, but the death of an assignee will not, in absence of specific provision, terminate the assignment.¹⁰⁸ The undeniable similarity between an exclusive licence and an assignment has led some authors to conclude that the distinction is in fact more academic than practical.¹⁰⁹ In support of their argument, Lucas and Lucas hold for example that in countries like France, where both types of transfers are admissible, the legislator has not always been consistent in its use of the terms assignment (e.g. *cession*) and licence (e.g. *concession*), which would suggest that the concepts are somewhat interchangeable. To complicate the matter, the language used by the parties in their contractual agreements relating to the use of copyrights or related rights does not always clearly indicate whether the intent is to grant a licence or an assignment of right. Hence, the courts have sometimes treated the transfer described by the parties in terms of a 'licence' as an assignment, especially in cases where the contract either expressly or by necessary implication constituted a grant exclusive of all persons including the grantor.¹¹⁰ The distinction between an assignment and a licence of rights bears particular importance in 'monist' countries like Austria and Germany. In view of the fact that the authors' rights are not assignable, authors must then be given the possibility to license their rights either on an exclusive or non-exclusive basis. In the remaining Member States, where the distinction between an assignment and a licence is less important, the national legislation contains provisions on the licensing of rights that vary from one Member State to the next and from one type of work to the other.

3.2.3 Waiver

The protection granted to authors and performers not only extends to protecting their economic interest, in the form of economic rights, but also to protecting their personal interest in the form of moral rights. Whether implicitly or expressly, moral rights are generally considered inalienable because they generally serve to protect the author's or the performer's honour and reputation. Consequently, a global waiver of an author's or the performer's moral rights is generally declared null and void.¹¹¹ However, moral rights are not absolute. They are subject to limitations in scope and conditions of good faith exercise that are designed to give weight to competing interests of transferees, other users, and the public. Thus while the global renunciation of the creator's moral rights would be deemed invalid, the Copyright and Related Rights Acts of several Member States do allow that, in certain circumstances, authors and performers waive certain attributes of their moral rights.¹¹² Indeed, it is not unusual, in practice, to come across agreements for the commercial exploitation of works or performances, in which the author or performer agrees not to object to the exploiter's performance of acts that, without such agreement, would violate his moral right. An exploiter may request that the author or the performer waives certain of the attributes of his moral rights for reasons of commercial expediency. For example, the film or record producer may wish to be able to decide when would be the most appropriate time for the release of a new film or sound recording. They may also wish to have some degree of freedom to alter a work, which forms part of a collective work, provided that such alterations are made according to fair practice. National legislation varies significantly on the question of the renunciation to some of the creator's moral rights, particularly due to the fact that the laws do not all recognise the same attributes to the authors' and performers' moral rights and do not all put the same weight on each of these attributes.

¹⁰⁸ Sterling and Carpenter 1986, p. 185.

¹⁰⁹ Lucas and Lucas 2001, p. 390; Rahmatian 1998, p. 102.

¹¹⁰ In Great Britain: *Young v. Odeon Music Pty. Ltd.*, [1978] R.P.C. 621, at p. 629; and in France, see: Boytha 1991, p. 201.

¹¹¹ Belgian Copyright Act, art. 2(2).

¹¹² Strowel 2000, p. 45, 46; Dauwe 1996, p. 241; Vanhees 1996, p. 346.

The most common attributes recognised to authors and performers under the law as part of their moral rights are the right of disclosure, the right of attribution or paternity, the right of integrity or adaptation, the right of access and the right of withdrawal.¹¹³

Sometimes, authors and performers are not only asked to waive certain attributes of their moral rights, but they are also required to forego the payments that would normally flow from the remuneration rights granted to them under the copyright act. The rights to remuneration granted to authors and performers arise either by the simple application of the law, or through the conclusion of a juridical act. An example of the first type of remuneration right is the one due to authors and performing artists for the reproduction of sound or audiovisual works for private use. To be payable, the remuneration for home copying implies no transfer of right in favour of the user. It is usually paid automatically – by simple application of the law – to a collecting society by the importers and manufacturers of recording devices outside of any contractual relationship with the author. The remuneration for the reprographic reproduction of works occurs on a similar basis. The law is generally silent regarding the possibility for an author or performing artist to waive such right. However, the question whether an author or performing artist may waive the benefit of this type of remuneration right is less pressing than in the case of a remuneration right that originates from the conclusion of a juridical act. An example of the latter type of remuneration right is the one that users of protected works or other subject matter, like broadcasting organisations, cable retransmission entities, or sound or film producers, must pay under the law upon acquiring the exclusive rights of the creators. Admittedly, such transfer of right to the producer may occur either by voluntary agreement or by legal presumption, depending on the provisions of the copyright act. The main difference between the first type of remuneration right and the latter is that the exploiter is deemed in the latter case to be the owner of the rights on the work or other subject matter, which brings as consequence that the creator is entitled to receive a remuneration.¹¹⁴

Whether the remuneration rights granted by law to compensate for the transfer of the author's or performer's exclusive right may be validly waived, essentially depends on the provisions of the copyright act. Except with respect to the authors' and performers' remuneration right for the rental of audiovisual works,¹¹⁵ the national legislation of the European Member States regarding the imperative character of the remuneration rights has not been harmonised. As a result, authors and performers may waive their remuneration right in some countries but not in others, and may waive their rights with respect to one act but not to another. In some cases, the legislator has expressly provided that the right to remuneration granted to authors and performers in compensation for the implied or voluntary transfer of their exclusive rights may not be renounced to or waived by the persons entitled to it. It would be indeed no use granting a right to remuneration to the author or the performing artist, if exploiters were able to request a contractual waiver of its application. However, most laws are silent regarding the waivable character of a remuneration right. One must therefore conclude that the remuneration due to authors, performers, and exploiters for most acts of reproduction or communication to the public may be waived.

3.3 Requirements of form

The principle of freedom of contract is generally entails the parties' freedom to choose the form of their agreement. Unless the law says otherwise, the parties to a contract are free to decide whether they wish to conclude a contract under oath, in writing, orally or even tacitly. When the law imposes the requirement that a contract be put in writing, it is generally in pursuance of three different objectives. First, it is meant to offer some reflection time to the parties who sign the contract, so

¹¹³ Salokannel, Strowel, and Derclaye 2000, p. 248.

¹¹⁴ See: Roszbach 1990.

¹¹⁵ See section 3.2.2 *infra*.

that none of them has to suffer from the disadvantageous consequences of an impulsive gesture. Second, it ensures that all relevant information pertaining to the transaction is transmitted to both parties at the time of conclusion of the contract. Third, a contract put in writing facilitates the proof of the parties' intention regarding the content of the contract. This last objective coincides in fact with the general rules of civil evidence, which often impose much stricter requirements of proof on an informed or professional party claiming the execution of an obligation, than on a non-professional or weaker party owing that obligation. In view of the persisting uncertainties regarding the content of copyright contracts and of the frequent inequalities of bargaining power that come between contracting parties, the copyright legislation of all Member States demands the existence of a written contract for the transfer of rights. This requirement sometimes serves as a condition of validity of the transfer of rights, but most often as a means to prove the transfer.¹¹⁶ In most cases, the failure to meet the requirement of form can be raised only by the party who benefits from the protection of the law, in this case by the author or the performing artist. In other words, the failure to meet this requirement is usually met with the relative nullity of the contract.¹¹⁷

3.4 *Restrictions on transfers of rights*

One of the most important measures adopted for the protection of authors and performers, aside from the provisions on the payment of remuneration, is the restriction on the scope of the transfer of rights. As Lucas and Lucas point out, the author's monopoly may be divided at will, particularly with respect to the modes of exploitation.¹¹⁸ Not only can the transfer be limited to the right of reproduction or to the right of communication to the public, or to one of their corollary like the right to make a translation or adaptation, but the parties may at their discretion also limit the scope of the transfer. A restriction of the transfer to one right, to one exploiter, to one geographical territory or to a limited duration gives the author or performing artist the possibility either to exercise these rights personally or to transfer them to other exploiters who are in a better position to further exploit the work. If the scope of an initial transfer is too broad, it not only risks depriving the creator of an eventual income in the event that the first transferee fails to exercise the rights, but it also risks depriving him of the freedom to choose another contracting partner who might make a better exercise of his rights.

Some acts require that the contract should set out explicitly, for each mode of exploitation, the author's remuneration, the geographical scope and the duration of the assignment. Only a few of the European Member States expressly regulate the transfer of rights relating to forms of exploitation that are not known or foreseeable at the time the copyright contract was concluded. Like in the case of the transfer of rights in future forms of exploitation, the national legislation of the Member States varies quite a lot with respect to the possibility to transfer rights on future works. Some countries strictly prohibit the transfer of rights in future works. Others allow such transfers to take place unconditionally, while yet other Member States put a mandatory time limit on contracts of the sort.

It is also worth pointing out that authors and performing artists that are bound by an employment contract do not always have the full benefit of these provisions. Hence, many of the rules that restrict the scope of transfers of rights, and the possibility to transfer rights for future forms of exploitation or rights on future works, either do not apply at all or apply only in part to employees. The reason for this special treatment is not only that employments contracts are regulated under labour law, but also that the employer-employee relationship generally implies the existence of an

¹¹⁶ The copyright acts of Austria, Denmark, Finland, and Sweden contain no requirement of form for the transfer of rights.

¹¹⁷ Dietz 1984, p.40; Lucas 2000, p. 59; Von Lewinsky 1995, p. 692, 716.

¹¹⁸ Lucas and Lucas 2001, p. 393.

on-going relationship during which time the employee might create a number of works that might be exploitation in a number of ways.

3.5 *Determination of remuneration*

Ensuring the author's and the performing artist's participation in the profits generated by the exploitation of their work or other subject matter certainly constitutes the primary objective of any copyright and related rights regime. However, if there is one area where the interests of authors and performing artists on the one hand, and those of exploiters on the other hand, are likely to collide, it is with respect to the payment of remuneration to creators. The hope of authors and performing artists of receiving a proportional or at least a fair remuneration for the use of their work or other subject matter regularly comes into conflict with the exploiter's intent to exploit the work or performance at the lowest cost possible. In view of the inequality of bargaining power known to exist between authors or performing artists on the one hand, and exploiters on the other hand, there is a risk that authors and performers be deprived of their fair share of the profits. The determination of the amount of remuneration to be paid to the author or performing artist is therefore one of the key issues behind the regulation of copyright contracts. The amount of remuneration to be paid to authors and performing artists was also the main focus of the recent modifications to the German Copyright Act. Admittedly, since the copyright reform of 1965, authors have had the power to ask the courts for a revision of the terms of a copyright contract if the remuneration they received proved to be grossly disproportionate in relation to the revenues made from the exploitation of the work. However, such control has been deemed insufficient for a number of reasons. First, because courts are often reluctant to find a gross disproportion between the revenues made and the remuneration paid. Second, because such revision always takes place *ex post* instead of protecting creators *ex ante* in their contractual relationships. And third, because such revision in no way ensures the payment of a fair remuneration to authors and performers who do not or cannot achieve commercial success. In the following pages, we examine the prescriptions of the law regarding the amount of remuneration due to authors and performers, with a look in the last subsection at a provision present in some of the copyright acts known as the 'best-seller clause'.

A majority of copyright acts have left the amount of remuneration to be paid to the author or performing artist to be determined by the contracting parties. In fact, only the countries most dedicated to the protection of the authors' rights provide measures in this respect, i.e. Belgium, France, Greece, Germany, Italy, Portugal, and Spain. There are numerous ways to calculate the amount of remuneration to be paid to the author or performing artist for the use of his work or other subject matter. The payment of remuneration generally takes either one of three forms: it can be proportional, equitable, or lump sum. The proportional remuneration is the mode of calculation that offers the greatest assurance of fairness to the commercially successful author or performing artist, since it is usually based on the revenues generated from the exploitation of the work or performance. However, for all the performing artists or authors who do not necessarily achieve a significant commercial success – i.e. authors of scientific works and orchestra musicians – or whose works cannot be distributed on the mass market – i.e. architectural works, or paintings – a proportional remuneration would be the guarantee of a miserable livelihood.¹¹⁹ In such circumstances, the payment of an equitable remuneration would certainly be more indicated. As a protective measure, the law may provide that the authors and performing artists will receive an equitable remuneration or it may authorise the payment of a fixed lump sum.

¹¹⁹ Lucas and Lucas 2001, p. 424.

3.5.1 Proportional remuneration

As advantageous as it may seem for authors and performing artists, the determination of a proportional remuneration often faces two rather technical difficulties: first, determining the basis on which the percentage must be calculated; and second, determining which measures of control must be used without revealing sensitive corporate information.¹²⁰ Unless the parties come to an agreement or unless the legislator clearly specifies the basis of calculation of the remuneration and puts an obligation on the exploiter to give account of the receipts generated by the exploitation of the work, the courts must deal with these delicate issues. Ideally, the proportional remuneration paid for the public performance of a work would be based on the price, exclusive of tax, paid by the public to receive communication of the work, i.e. the entry price at the theatre, the movies, and the like. The proportional remuneration paid for the publication of a book would be based on the retail price, exclusive of tax, of the book, magazine, newspaper, or other publication. Optimally, the exploiter should have the obligation to render account periodically to the author or performing artist on the receipts generated by the exploitation of the work or other subject matter.¹²¹

3.5.2 Equitable remuneration

If the definition of a basis for the payment of a proportional remuneration poses certain difficulties, the determination of what constitutes an ‘equitable’ remuneration is an even thornier question. On what basis are the contracting parties to establish what is equitable or fair, if it is not proportional to the revenues made from the exploitation of the work? Is there not a risk that the ‘fairness’ of a remuneration be determined solely by the party having the greatest bargaining power, in most cases the producer? In fact, apart from the provisions implementing article 4 of the Rental and Lending Directive, which grants authors and/or performers an unwaivable right to equitable remuneration for the rental of phonograms and films, the option of an equitable remuneration in exchange for the transfer of rights has been retained only in very limited instances. Generally, the law provides no definition of what is to be considered an equitable remuneration in the circumstances. If the contracting parties cannot agree on an equitable remuneration, such remuneration may then be fixed by a mediator or competent authority.

3.5.3 Lump sum

The rules that authorise the payment of lump sum are generally formulated as exceptions to the basic right of the author to receive a proportional remuneration, that is when such proportional remuneration is impossible to calculate or not justifiable in view of the nature of the contribution. In other words, the regulation of lump sum remuneration is usually paired in the national legislation with the regulation of proportional remuneration. On the basis of the *iustum pretium* doctrine, the courts would probably be very reluctant to review the percentage agreed to by the parties for the payment of a proportional remuneration, for fear of encroaching upon the parties’ freedom of contract and private autonomy.

3.5.4 ‘Best-seller’ clause

The copyright acts of only five of the European Member States expressly allow authors to ask for a modification of the contract, if the remuneration agreed upon is disproportionate to the income generated from the use of the work. The conditions under which this right may be invoked differ per country. Such a revision is generally permitted only if the author or performer received a lump

¹²⁰ Koumantos 1996, p. 314.

¹²¹ Bentley 2002, p. 51.

sum.

3.6 *Interpretation of contracts*

Under the copyright law of most European Member States, the courts give a restrictive interpretation to clauses in copyright contracts that operate the transfer of rights from an author or performing artist to a exploiter. Such a restrictive interpretation may flow from an express provision in the copyright act or it may derive from the general principles of interpretation that are applicable in civil law matters. Thus, the legislation of some Member States give the courts the express or implied instruction to interpret a grant of rights as encompassing only those rights that are required by the purpose pursued in the transfer at issue. Under the legislation of several other Member States, a written document must mention the duration, place of exercise, and the amount of remuneration for each of the rights transferred. On the basis of this provision, the courts generally consider that if the contract does not enumerate each right individually then, any right that does not appear in the list is not covered by the transfer.

3.7 *Effect of transfer in relation to third parties*

What consequence, if any, is attached to the author's transfer of rights? Can the transferee transfer in turn his right to a third party? Does he have standing to institute proceedings against a possible infringer? The answer to these questions does not depend solely on the nature of the transfer, whether assignment or licence, but depends also on the law of each Member State. Indeed, even if the assignee would, in principle, have greater rights than a licensee, national law may contain provisions for the protection of authors and artists requiring their consent for the further transfer of rights. The same holds true for the institution of proceedings against possible infringers: the national law often reserves to the sole author or performing artist the power to enforce his rights. Such measures allow authors and performers to retain some control over the exercise of the rights transferred, and in particular to make sure that their moral rights are respected.

In almost all European Member States, the transferee is entitled to transfer the rights he acquired to a third party, provided that the author has given his consent to the transfer. One exception is the transfer of rights that occurs as part of the sale of the whole or part of the exploiter's business. In this case, the prior consent of the author or performing artist is usually not required.

The question of whether the exploiter has standing to sue for copyright infringement is regulated only in a minority of Member States. In general, the assignee and the holder of the right of an exclusive exploitation right are permitted to sue in his own name for copyright infringement. By contrast, the holder of a non-exclusive license is not entitled to institute proceedings in his own name. In the absence of any legislative provision on this issue however, it is very difficult to give a definite answer to the question of whether the assignee and the licensee have standing to institute proceedings in copyright infringement cases. In these circumstances, one should look at the provisions on civil procedure of each Member State. Such an enquiry would, however, take us far beyond the scope of our study.

In the legislation of eight Member States, the copyright act contains a provision dealing specifically with the possibility for the transferee to pledge, secure, or seize the acquired rights. In some countries, such possibility is expressly forbidden, while in others such practice would be accepted.

3.8 *Termination of contract*

It is generally accepted in contract law that, unless the parties have stipulated otherwise, contracts that are concluded for a fixed period of time may only be terminated at the end of their term. However, a party is entitled to ask for the termination of the agreement if the other party has substantially violated his obligations under the contract. For instance, the majority of the copyright laws of the European Member States give the author the right to terminate the contract in the event that the exploiter does not exploit the transferred rights. The conditions under which termination may be invoked by the author vary. Only a few legislators have expressly admitted the exploiter's bankruptcy, judicial liquidation, or declaration of insolvency as a ground for the resiliation of the transfer of rights. Besides non-use of rights and bankruptcy, the copyright acts of some Member States allow the author to terminate the contract in a number of other circumstances.

Chapter 4. Country-by-Country Analysis

4.1 Austria

4.1.1 Ownership of Rights

4.1.1.1 Creator doctrine

In Austria, someone other than the natural person who created the work can be presumed the author of the work and the owner of the rights therein only in one instance: in the case of anonymous or pseudonymous works. In principle, the person whose name or generally known pseudonym or signature appears in the usual manner on copies of the work or when it is disclosed to the public, is deemed, in the absence of proof to the contrary, to be its author. However, if a work is published without any indication of the name of the author, the editor, if he is named, or otherwise the publisher, is deemed to represent the author.¹²²

4.1.1.2 Works created under employment

It is of settled jurisprudence of the Austrian Supreme Court that, in application of the creator doctrine, a legal person may never be deemed to be the initial owner of the copyright on a work.¹²³ In fact, in view of the strength of the creator doctrine, the legislator has chosen to implement paragraph 2(3) of the Computer Programs Directive in a way that does not contradict the fundamental principle according to which the author of a work is the physical person who created it. Instead of granting to the employer the initial ownership of the rights in the works made under employment, article 40b of the Austrian Copyright Act grants him an unrestricted licence to exploit the work (*unbeschränktes Werknutzungsrecht*), unless the parties have agreed otherwise.¹²⁴ There is thus no express presumption of ownership of rights in favour of the employer under Austrian copyright law, not even in the case of computer programs. The same rule applies to databases created by one or more employees in the course of duties entrusted to them or following instructions from their employer.¹²⁵ However, the Austrian courts have held that the employer may, unless otherwise agreed, exploit the rights in the works that are created in the exercise of the duties arising out of the employment contract. This implicit transfer is strictly limited to the rights in works that are created within the scope of the contract and the business.¹²⁶

4.1.1.3 Works created on commission

The Austrian Copyright and Related Rights Act contains no express provision concerning the ownership of works created on commission. In line with the creator doctrine, the Austrian Supreme Court has reaffirmed the principle that the author of the publicity slogan ‘*Auf bald – beim Wienerwald*’, even if created on commission, belonged to the person who created it and not to the commissioner

¹²² Austrian Copyright Act, art. 10(1).

¹²³ See for example: OGH, 24 November 1998, No. 4Ob292/98i; OGH, 18 February 1992, No. 4Ob127/91.

¹²⁴ Austrian Copyright Act, art. 40b which reads as follows: ‘Wird ein Computerprogramm von einem Dienstnehmer in Erfüllung seiner dienstlichen Obliegenheiten geschaffen, so steht dem Dienstgeber hieran ein unbeschränktes Werknutzungsrecht zu, wenn er mit dem Urheber nichts anderes vereinbart hat. In solchen Fällen ist der Dienstgeber auch zur Ausübung der in § 20 und § 21 Abs. 1 bezeichneten Rechte berechtigt; das Recht des Urhebers, nach § 19 die Urheberschaft für sich in Anspruch zu nehmen, bleibt unberührt.’

¹²⁵ Austrian Copyright Act, art. 40f(3).

¹²⁶ Dillenz 1999, p. 105, 106; OGH 16.6.1992, MR 1992, 244 (*Übungsprogramme*) and MR 1992, 247 (249).

of the work.¹²⁷ However, the Austrian courts have held that the commissioner of a work may, unless otherwise agreed, exploit the rights in the work created on commission. This implicit transfer is strictly limited to the rights in works that are created within the scope of the contract and the business.¹²⁸

4.1.1.4 Audiovisual works

In Austria, the exploitation rights in a professionally (“*gewerbsmäßig*”)¹²⁹ produced audiovisual work vest under article 38(1) of the Copyright Act, automatically in the producer (“*Filmbereiter*”), i.e. in the physical or legal person whose name is indicated as such in the work (article 38(3)).¹³⁰ This specific rule of ownership does not apply to pre-existing works incorporated in the work. As the Austrian Supreme Court once pointed out, the double nature of commercially produced audiovisual works, as intellectual creation and as commercial product, justifies the application of different rules and in particular that the ownership of the exploitation rights be vested in the producer who took all the financial risks necessary for the completion of the project.¹³¹ Article 69(1) of the Austrian Copyright Act provides that, where a performer has signed a contract for the production of a film or other cinematographic work, his or her authorisation is not needed for the film’s reproduction and distribution. The provisions of the Austrian Copyright Act on the authorship and ownership of audiovisual works and the equitable remuneration due to authors and performers do not appear to be in full compliance with the Rental and Lending Rights Directive, or with the Cable and Satellite Directive or the Duration of Protection Directive, for that matter. Contrary to the requirements of the Directive, the Copyright Act nowhere expressly designates the principal director as the author or as one of the co-authors of an audiovisual work. Moreover, article 38(1) does not constitute a rebuttable presumption of transfer of rights – *cessio legis*, as it is called in Austria – but establishes instead a rule of initial ownership from which contracting parties are not allowed to deviate under the law.¹³² The *cessio legis* of article 38(1) of the Act is in fact not only contrary to the requirements of the Directive, but it is also contrary to the generally accepted conception of the creator doctrine in Austria.

4.1.2 Forms of transfers of rights

4.1.2.1 Assignment

Austria differs from most countries of continental Europe in that it follows a ‘monist’ approach to author’s rights. Under this approach, the author’s economic and moral rights are considered to be so thoroughly intertwined that the economic aspect of the right cannot be dissociated from the right’s personality aspect.¹³³ Following the monist approach, copyright is a unitary right that protects the author with respect to intellectual and personal relations to his work, as well as with respect to the exploitation of his work. The Austrian Copyright and Related Rights Act allows authors to grant licences to use their works, but does not permit transfer of ownership, except by testamentary disposition.¹³⁴ The exploitation of the author’s economic interest (*Verwertungsrechte*) occurs therefore

¹²⁷ OGH, 18 February 1992, No. 4Ob127/91 (*Auf bald Wienerwald*), *GRUR Int* 11/1992, p. 838.

¹²⁸ OGH, 12 August 1996 – No. 4 Ob 2161/96 (*Buchstützen*), *GRUR Int.* 1997/12, p. 1030.

¹²⁹ Professionally means: “Works that were at least created with the intention of an exploitation within the framework of the economic market”. OGH October 18, 1994, *Me&R* 1995, p. 101, (*Oskar Werner*).

¹³⁰ OGH February 13, 2001, *Me&R* 2001/5, p. 298 (*VDFS II*).

¹³¹ OGH December 9, 1997, *Me&R* 1998, 66, (*Kunststücke*).

¹³² Walter 2001, p. 293.

¹³³ Schricker 1999, p. 553.

¹³⁴ Austrian Copyright Act, § 23 (3); German Copyright Act, § 29.

only through the grant of ‘privileges’ to use the work (*Nutzungsrechte*), which can be exclusive (*Werkenutzungsrecht*) or non-exclusive (*Werkenutzungs-bewilligung*).¹³⁵ The ownership of the authors’ economic rights may therefore not be transferred, except by way of testamentary disposition. A mention in contract to a transfer of the rights of ownership in a work by way of a security pledge has been interpreted as an unrestricted privilege to use the work.¹³⁶ Although an author may grant a global licence of all exploitation rights in a work, upon termination of the licence for any reason, all rights revert to the author. In Austria, the monist approach also applies to the performers’ rights, whereby performing artists are also precluded from assigning the right of reproduction of their performances on video- and audiocassettes.¹³⁷

4.1.2.2 Licence

According to article 24(1) of the Austrian Copyright Act, an author may grant ‘exclusive exploitation rights’ (*Werkenutzungsrecht*) or ‘non-exclusive permissions’ to exploit a work (*Werkenutzungs-bewilligung*). The ‘exclusive right’ or ‘non-exclusive permission’ granted by the author may affect one or all of the rights recognised under the Act. Pursuant to article 24(2), a non-exclusive permission granted to one party before the grant of an exclusive exploitation right to another party remains valid with respect to the holder of the exclusive exploitation right, unless agreed otherwise with the holder of the non-exclusive permission. The Act contains however a number of additional safeguards for authors who grant exclusive exploitation rights. According to article 34 and 35, the author who grants an exclusive exploitation right retains the right to include his works of literature, music, or art in a compilation of his works, after a period of twenty years have elapsed from the date of publication of the work (*Gesamtausgabe*). An author whose work is included in a periodical may still reproduce and distribute his work, unless the parties have agreed otherwise or unless it is to be inferred from the circumstances that the publisher of the periodical has acquired the exclusive right to exploit the work (article 36(1)). Where an exclusive exploitation right is implied to exist with respect to a contribution in a newspaper, such transfer expires as soon as the article is published. If the publisher or editor of a periodical accepts a work as a contribution to a compilation but without concluding an agreement regarding the delays of publication and distribution, the publisher or editor is in case of doubt under no specific obligation. In such circumstances however, the author may declare the publisher’s exploitation right extinguished, when the contribution has not appeared in the compilation within one year from its delivery. Article 74(7) of the Austrian Act specifies that the rules laid down in article 36 are deemed to apply correspondingly to photographs.

4.1.2.3 Waiver

Under Austrian copyright law, the author enjoys the right of paternity, the right of attribution and the right of integrity. Although as a rule, moral rights are in principle not transferable, article 40(1) of the Austrian Copyright Act states that the transfer of a producer’s exploitation rights on a professionally produced audiovisual work may include the acquirer’s right to designate himself as producer of the film. Moreover, in the case of computer programs, the employer is expressly entitled by law to exercise the right of attribution and the right of integrity.

¹³⁵ Strowel 1993, p. 356; and Boytha 1991, p. 201.

¹³⁶ BGH, 20 January 1994 (*Holzhandelsprogramm*) IIC 1995/05, p. 720.

¹³⁷ Austrian Copyright Act, §§ 67(2) and 74(2);

4.1.3 Requirements of form

The Austrian Copyright and Related Rights Act contains no specific provision requiring the use of an instrument in writing as a condition for validity or evidence. The provisions of the *Allgemeines bürgerliches Gesetzbuch* (AGBG) apply to copyright contracts, as to any other type of contract.¹³⁸

4.1.4 Restrictions on transfers of rights

4.1.4.1 Limits of scope, time, and place

The Austrian Copyright and Related Rights Act contains no express provision requiring that transfers of rights be limited in scope, in time, or in place. Parties are thus free to conclude any agreement in the field.¹³⁹

4.1.4.2 Future forms of exploitation

The Austrian Copyright and Related Rights Act contains no explicit rule restricting the transfer of rights in future forms of exploitation. However, the courts have held such transfers of rights in future forms of exploitation invalid on the basis of the general rules of copyright law. The Supreme Court had to consider whether a transfer of publishing rights also covered the author's 'electronic rights'.¹⁴⁰ In a publishing contract signed in 1984, the widow of an author of literary works had assigned the exclusive publishing rights in the works to a publisher. Under the contract, exclusive rights had been granted, *inter alia*, for the reproduction and commercial distribution of the work, for reproduction on microfilm, and for uses in compilations. In 1997, another publisher had used parts of the author's works in an art catalogue (on the '*Wiener Gruppe*') for the Venice Biennale art festival, to be published both in printed form, on CD-ROM, and over the Internet. The publisher, however, had failed to secure the right owner's prior permission. Before the courts, the defendant (the publisher of the art catalogue) argued that the grant of rights in the publishing contract was limited to print media, and did not extend to uses in electronic form. The Austrian Supreme Court agreed. The language in the publishing agreement suggested that the plaintiff had acquired only such rights as were necessary for exploiting the work in printed form. The Court added that, at the time of signing the contract in 1984, the use of works on the Internet and on CD-ROM was unknown media, or at least, they were such that the author could not foresee the economic impact. In sum, the Court concluded that no electronic rights had been granted to the publisher.¹⁴¹

4.1.4.3 Future works

In Austria, article 31(1) of the Copyright Act allows the grant of licenses with respect to works not yet created. The rights in such works arise at the moment the work is completed.¹⁴² However, if an author grants rights of exploitation in future works for a period of more than five years and without specifying the works licensed, this contract may be terminated on request of any party (article 31(2)). These rules also apply to the reproduction of performances on video- and audiocassettes and photographic works (article 67(2), 74(7) and 76(6)). In addition to this time limit, article 31(2) of the Austrian Copyright Act grants authors the unwaivable right to terminate a contract on future works that are not described in detail or designated only with respect to their genre, if such contract relates

¹³⁸ See AGBG, §§ 883 to 886.

¹³⁹ OGH, 18 February 1992 – No. 4 Ob 106/91 (*Videokassetten*), *GRUR Int* 1992/12, p. 932.

¹⁴⁰ OGH, 12 August 1998 (*Wiener Gruppe*), *McR* 1999, p. 275.

¹⁴¹ Hugenholtz and de Kroon 2000, p. 16.

¹⁴² OGH, 18 October 1994 (*Oskar Werner*), *McR* 1995, p. 101.

to all the works that the author might create during his lifetime or during a period exceeding five years. The contract may be terminated after a period of five years from the conclusion of the agreement. This provision also applies to the reproduction of performances on video- and audiocassettes (article 67(2)). The publisher of a periodical has acquired the exclusive right to exploit the work (article 36(1)). The moment this exclusive right ends depends on the type of periodical (article 36(2)).

4.1.5 Determination of remuneration

The Austrian Copyright and Related Rights Act contains no provision regulating the amount of remuneration to be paid to authors or performers in consideration for the exclusive or non-exclusive licence of the right to use their work or other subject matter, whether the payment of such remuneration is calculated on a proportional, equitable or lump sum basis. The parties are thus free to determine for themselves the amount and mode of calculation of the remuneration. There are however a number of provisions in the Austrian Act that grant authors and performers a right to remuneration for the unauthorised use of their works or other subject matter, such as for the reproduction of sound or audiovisual works for private use, or for the reproduction of works by libraries.¹⁴³ These different rights to remuneration are not further analysed in the context of this study, first because they do not arise as a result of the transfer of rights from the author or performer to the exploiter, and second because they do not contain any prescription regarding the mode of calculation and payment of the sums of money owed.

4.1.6 Interpretation of contracts

In Austria, according to article 33(1) of the Copyright Act, the grant of a license to use a work does not cover the making of a translation or adaptation thereof. Likewise, the grant of a reproduction or broadcasting right does not include the right to make (audio)visual recordings thereof. The provisions of article 33(1) apply correspondingly to the reproduction of performances on video- and audiocassettes and photographic works (article 67(2), 74(7), and 76(6)). In view of the wording of this provision, the Austrian courts have interpreted copyright contracts in such a way that the user, in case of doubt, only acquires such rights, as the practical purpose of the licensing contract requires.¹⁴⁴ However, in its interpretation of this rule, the Supreme Court has expressly referred to the ‘purpose-of-transfer’ rule, judging for example that:

*Auch ein Widerspruch zur Rechtsprechung, wonach das Ausmaß der Befugnisse des Werknutzungsberechtigten im Zweifel nicht weiter reicht, als es für den praktischen Zweck der ins Auge gefassten Werknutzung erforderlich ist, liegt nicht vor, und zwar auch dann nicht, wenn dem Rechtssatz auch entnommen wird, dass die Rechtseinräumung jedenfalls so weit reicht, als es der Zweck der Werknutzung erfordert. Werden nämlich – wie hier – die Werknutzungszweck eingeräumt (Katalog und Folder), dann kann es schon begrifflich zur Erfüllung dieses Zweck nicht erforderlich sein, das Werk auch für einen davon unabhängigen Zweck – Verwendung im Internet – zu nutzen.*¹⁴⁵

¹⁴³ See for example: Austrian Copyright and Related Rights Act, art. 86.

¹⁴⁴ OGH, 2 June 1981 (*Hiob*), *GRUR Int.* 1982/138; Court of Appeal Innsbruck May 25, 1998 (*Living in a world*), *McR* 1989, p. 25; Court of Appeal of Innsbruck, January 10, 1989, *McR* 1989, 210; OGH, 16 June 1992 (*Übungsprogramme*), *McR* 1992, p. 244.

¹⁴⁵ OGH, 21 March 2000 (*Für Katalog und Folder*), *GRUR Int.* 2001/2, p. 186-187. See also: OGH, 23 March 1993 (*Corporate Identity-Programm*), *GRUR Int.* 1994/08-09, p. 758.

4.1.7 Effect of transfer in relation to third parties

4.1.7.1 Right to transfer acquired rights

In Austria, the holder of an exclusive exploitation right may, with the consent of the author, *transfer* this right to a third party (article 27(2)). An author may only refuse his consent if he has important reasons to do so. The author's consent to the transfer is presumed given if the author has not responded within two months to a written request for consent from the holder of the exclusive exploitation right or the third party. After the transfer, the second transferee of an exclusive exploitation right is bound by all legal obligations flowing from the contract, including the payment of the remuneration to the author, even if the user and the third party agreed otherwise (article 27(3) and (4)). The holder of an exclusive exploitation right may, without the consent of the author, *grant non-exclusive licences*.¹⁴⁶ Consent is also not required if the transfer of the exploitation rights occurs as a result of the transfer of the business company that owns the rights (article 28(1)). Or if the author and the holder of the exclusive exploitation right have agreed so.¹⁴⁷ In case of audiovisual works, the user may transfer exploitation rights without the consent of the exploiter, unless otherwise agreed (article 40(2)). The same rule applies in the case of computer programmes (article 40c). The provisions of article 27 and 28(1) apply correspondingly to the reproduction of performances on video- and audiocassettes and to photographic works (article 67(2)).

4.1.7.2 Standing to sue

There is no provision in the Austrian Copyright Act concerning the licensee's standing to sue for copyright infringement. However, the Austrian courts have held that only the holder of the right of an exclusive exploitation right is permitted to institute proceedings in his own name against a possible infringer, and that the author retains his right to institute independent proceedings.¹⁴⁸ The holder of the non-exclusive exploitation right is not admitted to institute copyright infringement proceedings in his own name.¹⁴⁹

4.1.7.3 Right to pledge, secure or seize acquired rights

There is no provision in the Austrian Copyright Act concerning the transferee's power to pledge, secure, or seize the acquired rights.

4.1.8 Termination of contract

4.1.8.1 Non-use of rights

Article 29(1) of the Austrian Copyright Act grants the author the right to terminate the contract in case of non-use or inadequate use of the rights transferred, inasmuch as such non-use or inadequate use causes serious injury to the author's legitimate interests. The author must grant the user, by explicit notification¹⁵⁰, a reasonable extension of time sufficient to exercise the right. An extension is not required if the exercise of rights is impossible, if the user refuses to exercise the rights, or if an extension will endanger the author's primary interests (article 29(2)). In case the user does not reject

¹⁴⁶ Only the author himself is entitled, not a legal entity. VwGH 19.4.1995, *AnnBL* 1995, 6076. Gräser a.o. 1999, p. 97.

¹⁴⁷ Gräser a.o. 1991, p. AUS 5-148.

¹⁴⁸ Supreme Court August 26, 1955, *Öbl* 1956, 20, (*Ziegel als Baustoff*). See for other case law on this topic Gräser a.o. 1991, p. AUS 5-144 (footnote 26).

¹⁴⁹ Dillenz 1999, p. 81.

¹⁵⁰ Supreme Court November 3, 1959, *ÖBl* 1960, 55, (*Edition Bristol I*).

the author's statement of termination within fourteen days after its receipt, the right reverts to the author automatically (article 29(4)).¹⁵¹ This right of termination may not be waived in advance for a period of more than three years (article 29(3)). The Austrian Supreme Court has confirmed that, under article 29 of the Copyright Act, the reversion of the author's rights for non-use by the publisher occurs automatically, even in the absence of a respite from the publisher, when the latter has not rejected the statement of termination within fourteen days after its receipt.¹⁵²

These rules also apply to the reproduction of performances on video- and audiocassettes (article 67(2)), but do not apply to exclusive exploitation rights in audiovisual works (article 40(3)) or to computer programmes (article 40c). In the cases described in article 28(2), the author is only permitted to terminate the contract if the user is under the obligation to exercise the rights granted (article 30(1)). According to article 37, if the publisher or editor of a periodical accepts a work as a contribution to a compilation but without concluding an agreement regarding the delays of publication and distribution, the publisher or editor is in case of doubt under no specific obligation. In such circumstances however, the author may declare the publisher's exploitation right extinguished, when the contribution has not appeared in the compilation within one year from its delivery. Pursuant to article 74(7), this rule also applies to photographs.

4.1.8.2 Bankruptcy of exploiter

Article 32 of the Austrian Copyright Act allows the author to terminate the contract by which exclusive exploitation rights are granted, in case of bankruptcy of the user, provided that the user has not yet started with the exploitation of the work. The user may ask the liquidator (*Konkurskommissär*) to set a limit within which the author is entitled to request the termination.

¹⁵¹ It is not necessary for the author to call the user's attention to the fact that he intends to terminate the contract (Supreme Court April 26, 1960, *ÖBl* 1961, 16, (*Quelle & Meyer*). A court decision is not required for the reversion of rights to the author (Supreme Court November 3, 1959, *ÖBl* 1960, 56, (*Edition Bristol II*)).

¹⁵² OGH, 26 January 1999 (*Sternklang*), *GRUR Int.* 1999/12, p. 1068.

4.2 *Benelux*

4.2.1 Ownership of Rights

4.2.1.1 Creator doctrine

In **Belgium**, while article 6(1) of the Belgian Copyright Act provides that the initial owner of copyright in a work is the natural person who created it, article 6(2) establishes a rebuttable presumption of ownership in favour of the person whose name appears on the work. In the past, Belgian courts have extended the benefit of this provision to legal entities.¹⁵³ With respect to anonymous or pseudonymous works, the rule established under the Belgian Copyright Act is essentially the same as the one described above: the editor is, in relation to third parties, presumed to be the author of the work.

In the **Netherlands**, article 1 of the Dutch Copyright Act provides that copyright is the exclusive right of the author of a work. As a rule, the mere authorship of a work implies initial ownership of copyright therein.¹⁵⁴ Pursuant to article 4 of the Act, authorship accrues to the person (i.e. ‘*de maker*’) who is named as author in or on the work or, in the absence of such an indication, to the person who is named as the author when the work is communicated to the public, unless there is proof to the contrary. In the absence of any clear indication to the contrary, this provision would seem to grant the authorship of a work, and thereby its ownership, to the ‘person’ whose name appears on the work whether this person is a natural or a legal person. In addition, article 8 of the Dutch Act expressly provides that when a public institution, association, foundation or company lawfully communicates a work to the public as its own, without naming any natural person as the author thereof, this entity is presumed to be the author of that work.

In **Luxembourg**, article 7 of the new Copyright Act provides that ‘the quality of author is conferred, unless proven otherwise, on the one or the ones (*à celui ou à ceux*) under whose name(s) the work is disclosed to the public. The editor of an anonymous or pseudonymous work is presumed, in relation to third parties, to be the representative of the author.’ Although the expression ‘*à celui ou à ceux*’ commonly refers to a natural person, it might also be said to refer to a legal person. This argument is reinforced by the fact that the new Luxembourg Copyright Act expressly grants the initial ownership to a legal person in the case of works created under the direction of another person, where article 6 of the Act states that ‘the economic and moral rights on works made under the direction of a physical or moral person are presumed, unless a contract stipulates otherwise, to vest in the physical or legal person under whose name the work has been disclosed’.

4.2.1.2 Works created under employment

Under the **Belgian** Copyright and Related Rights Act, the economic rights in works created by an author under an employment contract may be transferred to the employer only on condition that the transfer of such rights is explicitly agreed upon¹⁵⁵ and that the creation of the work falls within the scope of the contract.¹⁵⁶ In other words, the basic rule according to which the author of a work is

¹⁵³ Brussels January 28, 1997, *AM* 1997/3, 262; Corbet 2000 and Cass. June 12, 1998, *Ing. Cons.* 1999/100 (*Bigg’s c. Kenwood*); Strowel 2000, p. 27.

¹⁵⁴ Seignette 1994, p. 6.

¹⁵⁵ Either in the employment contract or in a separate contract. Vanhees 1996, p. 337; Wachter 1996.

¹⁵⁶ Belgian Copyright and Related Rights Act, art. 3(3)(1).

the physical person who created it also applies to works created under employment and there is no presumption of transfer of rights in favour of the employer. To adapt the creator doctrine to the needs of the employment context, some of the requirements of form normally imposed for the validity of copyright contracts have been softened with respect to the transfer of rights in works created by employees. Moreover, paragraph 3(3)(4) of the Act states that where an employee agrees to transfer the rights on future works, such transfer must be express and must foresee the employee's participation in the profits generated by the exploitation of the work. A similar rule applies to performances given within the scope of an employment contract, pursuant to paragraph 35(3)(1) of the Belgian Act. In practice, private undertakings find it burdensome to negotiate the transfer of rights for every work created in the course of each worker's employment and to comply with the formalism imposed by the Act. Furthermore, uncertainty is said to arise under this regime with respect to the ownership and the exploitation of the rights in a work created under employment after the employee has left the enterprise.¹⁵⁷ Only two exceptions to the creator doctrine have been introduced in Belgian law. The first one relates to computer programs created by an employee in the course of duties entrusted to him or following instructions from the employer, as laid down in article 3 of the Belgian Act of 30 June 1994, which implements word for word paragraph 2(3) of the Computer Programs Directive.¹⁵⁸ The other exception appears at article 20^{ter} of the Act, which establishes a presumption of ownership in favour of the employer, on databases created by one or more employees in the course of duties entrusted to them or following instructions from their employer. It is worth pointing out however that the presumption of ownership is applicable only to databases created in the non-cultural industry.

Under article 7 of the **Dutch** Copyright Act, the employer is deemed to be the author of works that are created 'in the service of another person', i.e. where there exists an employer-employee relationship characterized by authority and salary. Accordingly, for the employer to be deemed the author of the work, the employee must have received directions from the employer and must not have produced the work on his own initiative.¹⁵⁹ Nevertheless, the parties may agree otherwise. There has been an ongoing controversy in the legal literature whether, as a consequence of this rule of ownership, the 'maker' – i.e. the employer or other legal entity – only acquires the economic rights in the work, or whether he also acquires the moral rights in the work created by the employee. Spoor and Verkade observe that while the Dutch employer ownership system differs from the one in force in the neighbouring Member States, namely in France, Germany and Belgium, it has not led to any significant problem in practice. The limited application of article 7 of the Dutch Copyright Act can be explained by the fact that parties are free to agree otherwise, that the possibility exists to imply certain terms from the employment contract and that employers have followed a sound policy in this respect.¹⁶⁰ With respect to the ownership of rights in a performance given pursuant to an employment contract, the employer is entitled to exploit the rights in the performance of his employee, either if it has been agreed upon by the parties, if it results from the nature of the employment contract or usage, or if it is required by fairness and equity. In any case, the employer must pay an equitable remuneration to the performer for each form of exploitation of his rights and must respect the performer's moral rights.¹⁶¹

In **Luxembourg**, the only provision dealing with the ownership of works created under employment is the provision that implements the mandatory provision of the Computer Programs Directive, which allocates to the employer the initial ownership of rights on the computer programs

¹⁵⁷ Carneroli 2001, p. 57.

¹⁵⁸ Loi du 30 juin 1994 transposant en droit belge la directive européenne du 14 mai 1991 concernant la protection juridique des programmes d'ordinateur, *Moniteur Belge*, 27 juillet 1994.

¹⁵⁹ HR, 19 January 1951, *NJ* 1952, 37 (*In de Amsterdamse Jordaan*). Cohen Jehoram 2000, p. 33.

¹⁶⁰ Spoor and Verkade 1993, p. 34.

¹⁶¹ Dutch Related Rights Act, art. 3.

created by employees in the execution of their duties or following the instructions given by their employer.¹⁶²

4.2.1.3 Works created on commission

In **Belgium**, articles 3(3)(2) and 35(3)(2) of the Belgian Copyright Act provides that if a work or a performance is created by an author or performer on commission, the economic rights may be transferred to the person who has given the commission on condition that this is explicitly agreed upon and that the commissioner's activities are in a non-cultural field or in advertising, and the work is intended for such activity.¹⁶³ The term 'non-cultural field' encloses all enterprises except those that produce 'cultural goods' and insofar these enterprises act within the framework of a non-cultural activity.¹⁶⁴ If the commissioned work does fall under a cultural field, then the creator doctrine applies.

The **Dutch** Copyright Act would seem to be the only statute of the European Union to clearly grant the ownership of works made under the supervision of another person to the commissioner of the work. According to article 6 of the Copyright Act, if a work has been made according to the conception and under the guidance and supervision of another person, only the main author, i.e. the supervisor and not his assistants, is deemed to be the author of the work. However, this provision only concerns works that are intellectually conceived, planned, created, and arranged by one person and executed – more or less technically – by one or more assistants. Rubens and his disciples are given as typical examples of such a creative process.¹⁶⁵ In practice, this provision has had a rather limited application. For example, because not all the requirements of article 6 of the Copyright Act were met in the circumstances of the case, the Dutch Supreme Court decided to grant joint ownership of the exploitation rights in a photograph to the a freelance photographer who had created it and to the publisher who commissioned it.¹⁶⁶

The new **Luxembourg** Copyright and Related Rights Act contains no provision regulating the ownership of works created on commission. One must therefore conclude that, in such circumstances, the creator doctrine applies and that the author is the physical person who created the work.

4.2.1.4 Audiovisual works

In **Belgium**, articles 14 to 20 of the Copyright and Related Rights Act contain specific provisions regarding audiovisual works. Article 14 states that, in addition to the principal director, the natural persons who participated in the creation of an audiovisual work are deemed authors thereof. Among the possible co-authors, the provision lists the authors of the screenplay, the adaptation, the words, the graphics, the musical compositions and, the author of a pre-existing work incorporated in the audiovisual work. Pursuant to article 18 of the Act, the authors, with the exception of the music composer, are presumed to have transferred to the producer their exclusive exploitation rights, including the right to subtitle or dub the work, unless the parties have agreed otherwise. Such a transfer of rights only occurs if the author has authorised the use of his contribution.¹⁶⁷ Article 36(1) contains a similar rule relating to performers, namely that unless they have agreed otherwise,

¹⁶² Luxembourg Copyright and Related Rights Act, art. 32(2).

¹⁶³ See: Civ. Bruxelles (cess.), 20 February 1998, (*S.A. Magnésium c. A.S.B.L. Institut Belge de la Sécurité Routière*), *Ac&M* 1998/3, p. 239.

¹⁶⁴ Corbet 1997, p. 24. According to Strowel, it remains to be seen "how case law will interpret this rather vague condition"; Strowel 2000, p. 31.

¹⁶⁵ Spoor and Verkade 1993, p. 25.

¹⁶⁶ Hoge Raad 1 juni 1990, nr. 13 854 (*Kluwer Publiekstijdschriften BV v. Lamoth*), *NJ* 1991/377.

¹⁶⁷ Blomme and Hendrix 1996, p. 26.

performers are deemed to have transferred to the producer their exclusive exploitation rights in their performance, including the right to subtitle or dub the work. A Belgian Court has ruled that the presumption of transfer of rights only exists if there is a direct contractual relationship of production between the performer and the producer, which, however, does not require any written instrument.¹⁶⁸

The **Dutch** Copyright Act defines a cinematographic work as ‘a work consisting of a sequence of images, with or without sound, irrespective of the manner of fixation, if it is fixed’.¹⁶⁹ This definition covers all types of audiovisual works, including live television broadcasts.¹⁷⁰ According to article 45a(2) of the Act, the natural persons who have made a contribution of a creative nature to the making of such a work are considered to be the authors thereof. Unless the parties have agreed otherwise, the authors are presumed by statute to have transferred their main economic rights to the producer of the audiovisual work, defined as the natural or legal person responsible for the making of the work with respect to its exploitation.¹⁷¹ This presumption excludes the authors of the music and the song texts, as well the right to adapt the work, apart from subtitling and synchronization. However, the presumption of transfer of the right to communicate the works to the public does include the rental and lending rights of the audiovisual work.¹⁷² Each of the authors may, unless otherwise agreed in writing, exploit his contribution that can be separated from the audiovisual work (article 45g). Article 4 of the Dutch Related Rights Act provides that these rules also apply to the performance that is intended as a contribution to the making of an audiovisual work.

In **Luxembourg**, article 21 of the Act provides that the authors of an audiovisual work are the producer and the principal director. Following article 2(5) of the Rental and Lending Rights Directive, article 24 of the Act states that ‘in the absence of contrary stipulation, the authors and other creators of an audiovisual work are presumed to have transferred to the producer all exclusive rights of exploitation of the audiovisual work, to the exception of the creators of the musical compositions. Authors are presumed to have transferred to the producer their exclusive exploitation rights, including the right to subtitle or dub the work.’ This rule does not extend to the adaptation, the arrangement and the use of a pre-existing work, which are subject to the authorization of their author. Moreover, authors retain the exclusive right to authorize the rental and lending of their works.¹⁷³ Article 51 establishes a similar presumption of transfer of the performers’ exploitation rights to the producer of an audiovisual work. Contrary to the regime created for authors, article 52 specifies that ‘except for contrary stipulation, the performer is presumed to have transferred his rental right to the producer, provided that a contract signed between the performer and the producer foresees the payment of an equitable remuneration, as prescribed by article 64 of the Act.’

4.2.2 Forms of transfers of rights

4.2.2.1 Assignment

Belgium, the **Netherlands** and **Luxembourg** follow a ‘dualist’ approach, whereby the author’s right is considered to consist of two separate elements: the pecuniary element, or ‘economic right’, and a personality element, or the ‘moral right’. In dualist systems, economic rights can be freely

¹⁶⁸ It also decided that if the producer does not respect the obligation to pay remuneration to the performer, the contract would not be null and void. Brussels June 25, 1998, *A & M* 1999/2. For a critic of this decision, see: Corbet 2000, p. 210.

¹⁶⁹ Dutch Copyright Act, art. 45a(1).

¹⁷⁰ Cohen Jehoram 2000, p. 30, 31.

¹⁷¹ Appellate Court Den Bosch October 25, 1989, NJ 1990, 99.

¹⁷² Dutch Copyright Act, art. 12(3).

¹⁷³ Luxembourg Copyright and Related Rights Act, art. 3(4).

assigned, either *inter vivos* or *mortis causa*, while moral rights are considered to be inalienable.¹⁷⁴ The same remark also holds true with respect to the performers' rights, where the economic element of the right can be assigned, but not its moral element.

4.2.2.2 Licence

Article 3(1) of the **Belgian** Copyright Act and article 12, second sentence of the **Luxembourg** Copyright Act simply state that economic rights may be alienated or granted under simple or exclusive licence. Article 2(1) of the **Dutch** Copyright Act is to the same effect.

4.2.2.3 Waiver

The **Belgian** Copyright Act grants authors the rights of disclosure, paternity, and integrity, while performers only enjoy the rights of paternity and of integrity. Moral rights are expressly declared inalienable under Belgian law and the overall renunciation of the future exercise of the moral rights is null and void. However, a partial waiver of right is possible, under certain conditions, except for the right of integrity, which is absolute.

In the **Netherlands**, the Dutch Copyright Act recognizes in article 25(1) and (4) four types of moral rights: the right to paternity; right to object to modification of the work; the right of integrity of the work; and, the right to modify the work. Paragraph 25(3) of the Dutch Copyright Act of 1912 explicitly allows the waiver of the author's right to oppose the communication of his work without acknowledgement of his name or other indication as author, as well as his right to oppose certain alterations of the work. Paragraph 25(4) further specifies that if the author of the work has assigned his copyright, he shall continue to be entitled to make such alterations to the work as he may make in good faith in accordance with social custom. But the author may not relinquish his right to oppose any distortion, mutilation, or other impairment of the work that could be prejudicial to his name or reputation or to his dignity as such. In other words, the possibility for an author to renounce by contract to certain components of her moral right would be limited by the general principles of law.¹⁷⁵ If a waiver of right were prejudicial to the author's name, reputation, or dignity, such waiver would most likely be invalidated for running afoul of the general principles of objective good faith, and of public order and good morals.¹⁷⁶ With respect to the authors of an audiovisual work, article 45(e) provides some detailed rules on the author's right to be named. According to article 45(f), the authors of an audiovisual work are assumed to have waived their right to oppose to alterations in their contributions *vis-a-vis* the exploiter, unless otherwise agreed in writing. These articles apply likewise to the performances incorporated in the work (article 4 Dutch Copyright Act). Article 5 of the Dutch Related Rights Act recognizes to performers the right to paternity, the right to object to the modification of the performance, and the right of integrity of the performer. A performer may waive his right to paternity and his right to object to the modification of a performance, but not his right to oppose any distortion, mutilation or other impairment of the performance that could be prejudicial to his name or reputation or his dignity as a performer.

Authors have, under article 11 (first sentence) of the new **Luxembourg** Copyright Act, the inalienable rights of paternity and integrity over their work. Contrary to most other copyright acts however, article 11 (second sentence) of the new Act declares that the author may waive or transfer

¹⁷⁴ Belgian Copyright Act, art. 3.

¹⁷⁵ Spoor and Verkade 1993, p. 304.

¹⁷⁶ In France: Gautier 1999, p. 185 referring to art. 1134 and 1135 of the CC; in the Netherlands: Spoor and Verkade 1993, p. 304; and in Germany: Osenberg 1979, p. 21.

all or part of his moral rights, provided that his honour and reputation are not affected. The same rule applies to the moral rights of the performing artist.¹⁷⁷

4.2.3 Requirements of form

In **Belgium**, article 3(1)(2) of the Copyright Act provides that a written instrument is necessary to prove contract terms against the author. Consequently, the *author* can prove contract terms by all legal means, whereas the *exploiter* must rely on a written instrument or proceed under oath or by confession, never by way of witness testimony or presumptions.¹⁷⁸ Since this provision constitutes a rule of evidence rather than a condition for the validity of a transfer of rights, authors and performing artists can thus validly transfer their rights without any written instrument. If a contract fails to meet the requirement of a writing, the author is the only party authorised to ask the court to declare the contract void. Article 35(2) contains the same requirement with respect to contracts relating to performers' rights.¹⁷⁹ In the particular case of publishing contracts, the written document must also indicate the minimum number of copies that make up the first printing, unless the contract fixes a guaranteed minimum of royalties to be paid by the publisher (article 25).

Under **Dutch** copyright law an assignment can only be *effectuated* by means of a deed, i.e. a written instrument intended for this purpose¹⁸⁰, signed by the author¹⁸¹ (article 2(2)). For licensing contracts, the Copyright Act imposes no formal requirement. However, article 9 (3rd sentence) of the Dutch Related Rights Act demands a written instrument for the validity of the transfer of neighbouring rights, i.e. the assignment as well as the licensing. These requirements do not state that a deed is, in any case, the only means to prove the transfer of rights.¹⁸² With respect to audiovisual works, article 45d and 45f of the Copyright Act provide that if the parties' intention is that the rights in the work remain wholly or partially with the author, this should be done in writing. Likewise, the equitable remuneration the exploiter has to pay to the authors must be agreed in writing. Article 4 of the Dutch Related Rights Act provides that these rules apply *mutatis mutandis* to the performance that is intended as a contribution to the making of an audiovisual work. Lastly, article 5(3) of the Related Rights Act states that a performer may waive some of his moral rights only in writing. With the exception of the rights referred to in article 5, paragraph 1, these are assignable wholly or in part. The delivery required by whole or partial assignment must be effectuated by means of a deed of assignment. The assignment must comprise only such rights as are recorded in the deed or only those that necessarily derive from the nature or purpose of the title.

Under article 12 of the new **Luxembourg** Copyright Act, a written instrument is necessary to prove contract terms against the author. Article 49(1) of the Act provides that the assignment or the waiver of the performing artist's right must be evidenced by a written document.

4.2.4 Restrictions on transfers of rights

4.2.4.1 Limits of scope, time, and place

In **Belgium**, article 3(1)(4) of the Copyright and Related Rights Act requires that the agreement concluded by the author and the user set out explicitly, for each mode of exploitation, the author's

¹⁷⁷ Luxembourg Copyright and Related Rights Act, art. 42 (3rd sentence).

¹⁷⁸ Vanhees 1996, p. 296. See also Frequin and Vanhees 1999, p. 104.

¹⁷⁹ However, the law does not require the writing to be executed before the performance takes place. Civ. Turnhout January 7, 1999, *AM* 1999/2, 232.

¹⁸⁰ Dutch Civil Code, art. 3:95.

¹⁸¹ Supreme Court December 9, 1927, *NJ* 1928, 331.

¹⁸² Spoor and Verkade 1993, p. 350, 351.

remuneration, the geographical scope and the duration of the assignment. What the ‘modes of exploitation’ are depends on the type of rights transferred, the technical means of exploitation, and the form in which the work is marketed.¹⁸³ Article 31(1) provides that performance contracts must be concluded for a limited duration or for a specific number of communications to the public. According to 31(2), the transfer afforded by the author with respect to live performances may not validly exceed three years. The term ‘live performances’ is very broad: it includes direct performances, such as theatrical performances and concerts. If a period of more than three years is agreed upon, the contract will not be regarded void, but the user will only acquire rights for a maximum period of three years.¹⁸⁴

Besides article 2(2) of the **Dutch** Copyright Act, which states that ‘the assignment shall comprise only such rights as are recorded in the deed or necessarily derive from the nature or purpose of the title’, the Copyright Act contains no further provision requiring that transfers of rights be limited in scope, time, or place. In practice however, the parties to a copyright contract generally regulate the scope of the transfer of rights inside their agreement.¹⁸⁵

According to articles 15 and 19 of the **Luxembourg** Copyright Act, publishing contracts and contracts for the production of live performances must provide for a time limit for the fulfillment of the exploiter’s obligations.

4.2.4.2 Future forms of exploitation

Article 3(1)(6) of the **Belgian** Copyright Act expressly declares null and void any transfer of rights in respect of future forms of exploitation, notwithstanding any provision to the contrary. The nullity, which only the author is permitted to raise, affects only the clause in question, and not the entire contract.¹⁸⁶ This rule does not apply to works created under employment or on commission. With respect to performers’ rights, similar rules are laid down in article 35(2)(4) and 35(3)(3) of the Act. With respect to works created by an author under employment, article 3(3)(4) provides, in addition, that the clause affording to the user the right to exploit a work in a future form must be explicit and the contract must lay down participation in the profits obtained from such exploitation. If these requirements are not met, the future forms of exploitation are considered not been transferred.¹⁸⁷ The Brussels Tribunal de Première Instance has decided an important case on the issue of the transfer of future rights. On 16 October 1996, the Brussels court ruled in favour of the Belgian association of professional journalists (AGJPB) and others in a test case concerning the electronic re-utilization of press articles. According to the Court, the journalists’ copyrights were infringed by the unauthorized use of their copyrighted works in the *Central Station* database, which was jointly operated by a number of Belgian newspaper publishers.¹⁸⁸

In the **Netherlands**, article 2 of the Copyright Act merely states that ‘the assignment shall comprise only such rights as are recorded in the deed or necessarily derive from the nature or purpose of the title’. Opinions are divided in legal literature whether copyright can be assigned in its entirety and therefore cover rights in future forms of exploitation. Some authors have argued that article 3:97 of the Dutch Civil Code could be interpreted as permitting the transfer of such rights.¹⁸⁹ On the other hand, article 45d of the Copyright Act provides that the producer of an audiovisual work has to pay

¹⁸³ Strowel 2000, p. 33.

¹⁸⁴ Vanhees 1996, p. 327.

¹⁸⁵ Frequin and Vanhees 1999, p. 108.

¹⁸⁶ Strowel 2000, p. 34.

¹⁸⁷ Vanhees 1996, p. 340.

¹⁸⁸ Hugenholtz and de Kroon 2000, p.

¹⁸⁹ Koelman 1998, p. 76, 78, 79.

an equitable remuneration to the authors if he ‘effects exploitation in a form that did not exist or was not reasonably foreseeable at the time referred to in article 45c or if he gives the right to effect such exploitation to a third party’. Article 4 of the Dutch Related Rights Act provides a similar rule for performers in the audiovisual work.

The question of whether a transfer of rights covered forms of exploitation still unknown at the time of conclusion of the contract did arise before a Dutch court, in a matter relating to the distribution of journal articles on the Internet. In the ‘*Volkskrant*’ case,¹⁹⁰ three freelance journalists brought a copyright infringement action against a major daily newspaper, *De Volkskrant*, for having posted a selection of articles from its printed version on its Internet web site, and produced quarterly CD-ROM compilations containing all newspaper copy in full-text - without securing the journalists’ permission. Apart from an occasional letter, no contract in writing was ever concluded between the journalists and the commissioning newspaper publisher. The plaintiffs argued that the (implied) licenses granted by the journalists included only one-time print rights, and no electronic uses were implied. The Amsterdam District Court held for the plaintiffs. According to the Court, the unauthorised republication of articles on CD-ROM and over the World Wide Web constituted restricted acts, subject to the right holders’ prior authorisation, for both the CD-ROM compilations and the web site differed substantially, qua content and lay-out, from the original printed version of the newspaper. The CD-ROM and Internet versions of *De Volkskrant* are not simply extensions or substitutes of existing archival or documentary media; they constitute independent means of reproduction and communication to the public in different media, for which additional permissions must be secured. The Court focused next on the scope of the licences granted by the journalists. Did the print licences imply a right of electronic re-use? Tacitly applying the rule of article 2 (2), the Court rejected the principal argument put forward by *De Volkskrant*, that the journalists had implicitly granted permission for electronic uses, by submitting their articles for publication in the journal. In the 1980’s, when the licences were initially granted, plaintiffs could not have foreseen their contributions would be included in a CD-ROM or web site. Interestingly, the Court found infringement not only of the authors’ pecuniary rights, but of their moral rights as well. The Court ruled that the authors’ moral right of first publication (*droit de divulgation*) effectively covers first publication in every separate (new) medium. In other words, the journalists had the moral right to decide over electronic republication, which right had been violated by the newspaper.

Pursuant to articles 13 and 49(2) of the new **Luxembourg** Copyright and Related Rights Act, an author or a performer may transfer his rights on unknown forms of exploitation, only if it is subject to the payment of a specific remuneration.

4.2.4.3 Future works

Article 3(2) of the **Belgian** Copyright Act states that the transfer of economic rights relating to future works is valid only for a limited, but undetermined, period of time and only if the types of works to which the transfer applies are specified. This rule does not apply to works created under employment or on commission. Articles 35(2)(5) and 35(3)(3) of the Belgian Copyright and Related Rights Act lay down similar rules for performers. Future works are not only understood as works that do not yet exist and for which the author does not yet know what form or content they will have, but also as works the creation of which has not yet begun but for which the author does know what form or content they will have.¹⁹¹ Future works are in fact creations upon which no copyright is yet granted.

¹⁹⁰ District Court of Amsterdam, 24 September 1997 (*De Volkskrant*), in *Informatierecht/AMI* 1997, p. 194.

¹⁹¹ Frequin and Vanhees 1999, p. 118.

In the **Netherlands**, the Copyright Act contains no relevant provision on this issue. Some commentators have argued that authors and performing artists could, on the basis of article 3:97 of the Dutch Civil Code, transfer their rights in future works or performances provided that the work is sufficiently specified with respect to the content and the type of the work or performance involved.¹⁹² In other words, a *global* transfer on *all* future works of an author would probably be held invalid for it would probably not qualify as a transfer with respect to a work the content and type of which are sufficiently ‘specified’.

The new **Luxembourg** Copyright and Related Rights Act is also silent on the possibility for authors and performing artists to transfer their rights with respect to future works. One must therefore conclude that a transfer of rights in relation to not yet created works could be possible under Luxembourg law.

4.2.5 Determination of remuneration

4.2.5.1 Proportional remuneration

Of the three countries of the Benelux, only the **Belgian** Copyright and Related Rights Act requires that authors receive a proportional remuneration for the use of their work. Article 26(2)(1) of the Act provides that a publisher should pay to the author, unless otherwise agreed, a remuneration that is proportional to the gross receipts. This provision is imperative. Pursuant to article 28 of the Act, and notwithstanding any agreement to the contrary, the publisher must communicate to the author, at least once a year, a statement of sales, revenue, and assignments for each type of exploitation. In the case of audiovisual works, articles 17, 19 and 36(3) lay down similar rules that give the authors of and the performers in the audiovisual work, and the author of pre-existing work incorporated therein, the right to proportional remuneration, unless another type of remuneration is stipulated. Thus, the authors of an audiovisual work are entitled to a separate remuneration for each mode of exploitation of the work that is proportional to the gross revenue obtained from exploitation. The exploiter has the obligation to communicate to all authors, at least once a year, a statement of revenue he has obtained for each mode of exploitation. With respect to article 36(3), the Court of Appeals of Brussels ruled that, in this case, the failure to mention the remuneration payable did not make the audiovisual production contract null and void.¹⁹³ Audiovisual works belonging to the non-cultural field or to advertising are excluded from this right to remuneration (article 19). It has been argued however that although article 3(1)(4) of the Belgian Copyright Act provides that the contract must set out the remuneration explicitly for each mode of exploitation, this rule does not prohibit the parties to agree upon a transfer with no remuneration whatsoever, on the condition that this is explicitly laid down in a written instrument.¹⁹⁴

Neither the **Dutch** or the **Luxembourg** Copyright and Related Rights Acts contain any provision, which requires that authors and performing artists receive a proportional remuneration for the use of their works or other subject matter. In the **Netherlands**, model contracts concluded between associations of authors and exploiters govern the contractual relations in several sectors of the copyright industry, and regulate the royalties to be paid to the author. In the many branches of the Dutch publishing industry, specific model contracts have been set up for example with respect to translators, photographers, book illustrators, and authors of children’s or school books.¹⁹⁵ Most of these model contracts provide that authors are to receive a proportional remuneration based on the sales price of each book. Of course, the percentage of royalties paid to authors vary from one

¹⁹² Spoor and Verkade 1993, p. 360, 361; and Koelman 1998, p. 76, 77.

¹⁹³ Brussels June 25, 1998, *A&M* 1999/2, 212.

¹⁹⁴ Vanhees 1996, p. 303.

¹⁹⁵ Frequin and Vanhees 1999, p. 112.

branch to the other and depend on various factors, such as the production costs associated with each edition (i.e. hardcover v. paperback, colour v. black and white), the number of copies printed and the like. Some model contracts also provide that the royalty rate increases with the number of copies sold. The recent agreement reached between literary publishers and authors is a good illustration of such a model contract.¹⁹⁶ The percentage of royalties for paperback editions increases from 5 to 8 percent, depending on the amount of exemplars sold. The percentage for mid-price editions, over which an agreement is reached for the first time, varies from 9 to 12,5 percent. In exchange for the higher royalty percentage, the publishers get the guarantee that they can retain the right to the full exploitation of the work for an unspecified period of time. This way, the publishers have the certainty that, in the long term, they would be able to recoup their costs. Model contracts are slowly emerging in the music industry as well, for example, between music writers and lyricists on the one hand and music publishers or recording companies on the other hand.¹⁹⁷ It is also worth reminding the reader that, under Dutch law, the employer is presumed to be the initial owner of the rights on a work created by salaried authors, like journalists. A number of trade unions regrouping salaried creators have been able to conclude collective bargaining agreements with their employers, which lay down the conditions of use of the creator's works as well as the circumstances under which the employer owes particular remuneration for uses that are not covered by the agreement.¹⁹⁸

Not all sectors of the Dutch publishing or music industry are governed by model contracts however. The remuneration of freelance journalists is one example where, so far, the representatives of the freelance journalists and of the daily press publishers have not been able to reach an agreement on a model contract. The determination of the remuneration due to freelance journalists for the re-utilisation by newspaper publishers of the journalists' works on a CD-ROM compilation or in a databank accessible via the Internet has given rise to two decisions from the District Court of Amsterdam. The first case comes in the wake of the District Court of Amsterdam's decision in *De Volkskrant's* case, where three freelance journalists had brought an action for copyright infringement against the publishers of the newspaper for having made their articles available on a CD-ROM and via the Internet without their consent.¹⁹⁹ Let us recall that the Court had ruled in favour of the plaintiffs, recognising that there had been infringement of their economic and moral rights and ordering the publisher to pay damages in an amount that the parties were instructed to negotiate among themselves. At the end of 1998, the Association for the Dutch Daily Press (*Vereniging De Nederlandse Dagbladpers*) (hereinafter 'NDP') unilaterally set up a model contract concerning the re-use of works of freelance journalists written for daily newspapers. This model contract provided for the annual payment of a compensation in the amount of 2% of the remuneration paid for the single use of the journalists' articles in the newspaper. Neither the plaintiffs nor the Dutch Association for Journalists (hereinafter 'NVJ'), to which it had been submitted, accepted this proposal for a model contract. The parties were thus unable to reach an agreement on the amount to pay in compensation for the re-use of the freelance journalists' works. Moreover, it was established that, in the months that followed the first judgement of the District Court of Amsterdam, which had held *De Volkskrant* liable for copyright infringement, the newspaper continued to make articles available on a CD-ROM and via the Internet without the journalists' consent. As a result, the latter brought another action asking the Court once again to enjoin the newspaper publisher from continuing the acts of infringement and to set the amount of remuneration owed to them.²⁰⁰

¹⁹⁶ 'Modelcontract voor auteurs vernieuwd', *NRC Handelsblad*, 21 May 2002.

¹⁹⁷ The model contract developed under the auspices of the *Professionele Auteurs Lichte Muziek*, (PALM) or the BV POP / FNV KIEM, where BV POP is the section for pop musicians of the trade union FNV KIEM (for Arts, Information and Media).

¹⁹⁸ Hugenholtz 2000, p. 25-26.

¹⁹⁹ District Court of Amsterdam, 24 September 1997 (*De Volkskrant*), in *Informatierecht/AMI* 1997, p. 194. See subsection 4.2.4.2 above.

²⁰⁰ District Court of Amsterdam, 22 December 1999 (*De Volkskrant*), LJ N-number: AA3995, No. P. 3.1769.

Regarding the compensation owed to the freelance journalists for the subsequent use of their articles, the District Court of Amsterdam agreed with the publisher that the amount should be determined in function of the remuneration paid to the journalists for the single publication of their articles in the newspaper. The Court pointed out however that the remuneration concerned in this case was to be seen as damages for the infringing use of works on a CD-ROM and via the Internet and not the remuneration owed under an agreement for the future re-utilisation of works with the authors' consent. Instead of the 2% remuneration proposed by *De Volkskrant*, the Court ordered, with respect to the use of articles on a CD-ROM, the payment of 4% of the journalists' annual remuneration for the first edition of the CD-ROM and of 2% for each subsequent edition of the same CD-ROM. With respect to the making available of articles via the Internet site of the newspaper, the Court ordered the payment of 3% of the journalists' annual remuneration for the first year where the works are put on the website, and of 1,5% for each year during which the works continue to appear on the website.

The second case also involved freelance journalists and the newspaper publishing concern *PCM Uitgevers NV* (hereinafter 'PCM'), which is the unique shareholder, manager, and publisher of four of the major daily newspapers in the Netherlands (*De Volkskrant*, *NRC Handelsblad*, *Trouw*, *Het Parool*), as well as owner of the independent company, *Media Resultant BV* (hereinafter 'Media Resultant').²⁰¹ Since July 1998, the contributions made to each individual newspaper had been regrouped in one electronic archive system containing all contributions of the newspapers' respective journalists. The administration of the Centralised Database was entrusted to Media Resultant. The company not only made the archives available to the employees of each individual newspaper, but it is also made them available to the employees of all the newspapers owned by PCM, as well as offered them to the general public on a commercial basis, for example via Lexis Nexis, the whole without prior authorisation from the freelance journalists. PCM and Media Resultant instituted proceedings before the District Court of Amsterdam, asking it to declare that the different uses of works included in the Centralised Database was lawful and did not constitute copyright infringement. The Court concluded that the use of works in the electronic archives by the employees of each individual newspaper was implicitly covered by the authorisation given for the single publication of the works in the newspaper. However, the implicit licence to use of the works included in the electronic archive did not extend to their use by the employees of all other newspapers of the PCM concern or by the general public. In the absence of explicit authorisation from the freelance journalists, such uses constituted an infringement of copyright. Therefore, PCM had to pay damages to the four freelance journalists for the continued use of their works included in the Centralised Database. Like in the previous case, the Court pointed out that the remuneration concerned in this case was to be seen as damages for the infringing use of works included in the Centralised Database and not the remuneration owed under an agreement for the future re-utilisation of works with the authors' consent. Unfortunately, the Court did not fix the amount of compensation to be paid to the freelance journalists, but ordered PCM to pay damages, as they will be assessed with respect to the infringing period on the basis of the revenues generated by the storage and exploitation of the journalists' contributions. In essence, the question of the determination of the amount of remuneration due to freelance journalists for the re-utilisation by newspaper publishers is still unresolved and left to the parties for negotiation. As it currently stands, the respective positions of freelance journalists and publishers are still deeply divided concerning the NDP's proposal for a model contract allowing for the annual payment of remuneration in the amount of 2% of the remuneration paid for the single use of the journalists' articles in the newspaper.

²⁰¹ District Court of Amsterdam, 9 August 2000 (*PCM Uitgevers*), LJN-number AA6716, No. H 99.1595.

4.2.5.2 Equitable remuneration

Neither the **Belgian** nor the **Luxembourg** Copyright and Related Rights Act contain any provision requiring the payment of an equitable remuneration to authors or performing artists. By contrast, the **Dutch** Copyright Act provides several instances where authors should be paid an equitable remuneration for the use of their work. Article 12a of the Act provides that ‘if the author assigns [his] rental right (...), in respect of a literary, scientific or artistic work fixed on a phonogram to the producer thereof, the latter is indebted an equitable remuneration to the author for the rental’. Authors are also entitled to receive an equitable remuneration in the Netherlands for the public lending of their works,²⁰² for the reproduction of parts of works made for use as illustrations for teaching purposes, for home taping activities,²⁰³ and for the reproduction of works by means of reprography.²⁰⁴ The level of the equitable remuneration owed for the public lending of works, the home taping and the reproduction by means of reprography is determined by a designated foundation, the board of which is so composed as to represent in a balanced manner the interests of the authors or the successors in title and the persons liable for payment. The level of the equitable remuneration owed for the reproduction of works as illustrations for teaching purposes is determined by order in council.

In addition, article 45(d) of the Dutch Copyright Act states that ‘the producer is indebted an equitable remuneration to the authors or their successors in title for all forms of exploitation of the cinematographic work. The producer is also indebted an equitable remuneration to the authors or their successors in title if he effects exploitation in a form that did not exist or was not reasonably foreseeable at the time referred to in article 45c or if he gives the right to effect such exploitation to a third party’. In *Poppenk v. NCF*,²⁰⁵ the District Court of Amsterdam was recently asked to interpret the notion of ‘equitable remuneration’ under article 45(d) of the Dutch Copyright Act. For a number of years, the plaintiff, Mr. Poppenk, worked on a freelance basis mainly as film editor for the defendant, *Nature Conservation Films B.V.* (hereinafter ‘NCF’). This dispute concerns the ‘equitable remuneration’ paid to the plaintiff for work done regarding the editing of a documentary film entitled ‘Serengeti A to Z’, on the animals in the Serengeti National Park in Tanzania. The final English version of the film not only licensed for broadcast by Canal+ in the countries of the Benelux, Norway, Sweden, Denmark, Finland, and Poland, but it has also been shown in the Naturalis museum in Leiden and has been translated in the Dutch language and licensed for broadcast in the Netherlands by the *Evangelische Omroep*. The plaintiff worked approximately 100 days on the editing of the film and received a fee of fl. 600 per days work, after presentation of related invoices. The plaintiff asked the Court to order NCF to pay him an equitable remuneration for each of the three modes of exploitation mentioned above, in accordance with article 45(d) of the Copyright Act. The District Court first pointed out that the invoices contained no mention of the payment of an equitable remuneration for each mode of exploitation and that no agreement to that effect could be inferred from them. The Court agreed with the plaintiff that the fairest method of calculation would be to base the amount of remuneration on the gross receipts generated by the exploitation of the film. Therefore, the Court ordered NCF to produce evidence, and preferably accounting documents, regarding the receipts generated by the exploitation of the film and gave the parties the opportunity to present arguments about the appropriate percentage of the gross receipts. In this case, the ‘equitable remuneration’ turned out to be the equivalent of a ‘proportional remuneration’, which seems to correspond to the relevant provision in the Dutch Directors’ Guild model contract.

²⁰² Dutch Copyright Act, art. 15c).

²⁰³ Dutch Copyright Act, art. 16(c).

²⁰⁴ Dutch Copyright Act, art. 16(1)(a)5° and (b)5°.

²⁰⁵ District Court of Amsterdam, 24 October 2001 (*Poppenk v. NCF*), *AMI* 2002-1, p. 17.

According to article 3 of the Dutch Related Rights Act, the employer is entitled to exploit the rights of a performer, where such has been agreed between the parties or derives from the nature of the employment agreement concluded between them, from usual practice or the demands of fairness and equity. However, where otherwise agreed or where it otherwise results from the nature of the agreement, from usual practice or from the demands of fairness and equity, the employer shall owe to the performer or his successor in title equitable remuneration for each form of exploitation of his rights. Article 4 of the same Act states that articles 45a to 45g of the Copyright Act apply *mutatis mutandis* to the performance of a performer that is intended as a contribution to the making of a cinematographic work. Implementing article 8(2) of the Rental and Lending Rights Directive, article 7 of the Dutch Related Rights Act provides that performing artists and phonogram producers must receive an equitable remuneration for the broadcasting of commercially published phonograms or reproductions of the same.

In 2000, a dispute arose concerning the interpretation of the term ‘equitable remuneration’ under article 8(2) of the Rental and Lending Rights Directive and under article 7 of the Dutch Related Rights Act.²⁰⁶ The case opposed the *Foundation for the Exploitation of Neighbouring Rights* (SENA), organisation charged with the collection and distribution of equitable remuneration for performing artists and phonogram producers, to the *Netherlands Broadcasting Corporation* (NOS). The question put to the Courts concerned the amount of equitable remuneration that the NOS owed the SENA for the radio and television broadcast of the music fixed on the sound recordings. More particularly, the SENA asked the Court to consider whether the concept of ‘equitable remuneration’ constitutes an autonomous community law concept, which should be interpreted uniformly in the Member States. The dispute eventually reached the Dutch Supreme Court. Instead of deciding the issue, the Supreme Court referred the whole matter to the European Court of Justice. The Dutch Supreme Court submitted the following questions to the appreciation of the European Court:

1. ‘Is the term ‘equitable remuneration’ used in Article 8 paragraph 2 of the Directive a community term that should be interpreted and applied in the same manner in all Member States of the European Union?’
2. If so:
 - a. according to what standards should the amount of equitable remuneration be determined?
 - b. should alignment be sought with compensation amounts agreed or customary between the organisations involved in the relevant Member State prior to the coming into force of the Directive?
 - c. should or could the expectations concerning the compensation created for interested parties upon the realisation of national legislation for the implementation of the Directive be taken into account?
 - d. should alignment be sought with the amount of compensations paid on the basis of performing rights in musical works concerning broadcasts by broadcasting corporations?
 - e. should compensation be related to the potential audience of listeners or viewers, or to the actual number of listeners or viewers, or partially on the aforementioned potential and partially on the latter audience, and in the latter case, in which ratios?
3. If the reply to question (1) is negative, does this mean that the Member States are entirely free in the determination of the standards according to which the amount of the equitable remuneration should be determined? Or are there limits to that freedom, and if so, what are they?²⁰⁷

²⁰⁶ HR 9 June 2000 (*SENA v. NOS*), NJ 2001/1569.

²⁰⁷ Van den Bergh and Huisman 2001, p. N-34.

At this time, the European Court of Justice must still render decision in this case, which will undeniably have an impact in all Member States on the future negotiations between authors and performing artists on the one hand and exploiters on the other hand, regarding the amount of equitable remuneration to be paid. Following the decision of the Dutch Supreme Court, it has been observed that if the European Court gives a positive answer to the first question, it will have an opportunity to clarify the vague concept of ‘equitable remuneration’. However, if the European Court finds that the term ‘equitable remuneration’ is not a community standard, one can only hope that the Court will nevertheless bring some elements of response to give national courts a stronger foothold concerning the meaning of the term.²⁰⁸

4.2.5.3 Lump sum

In **Belgium**, the payment of a lump sum is permitted under article 26(2)(2) of the Copyright and Related Rights Act in the context of a publishing contract. Neither the **Dutch** or **Luxembourg** Copyright and Related Rights Acts contain any provision, which regulates the instances where a lump sum may be paid to authors or performing artists for the use of their works or other subject matter.

4.2.5.4 ‘Best-seller’ clause

In **Belgium**, article 26(2)(2) of the Copyright and Related Rights Act states that if the author has assigned rights to the publisher under conditions such that, in view of the success of the work, the lump sum remuneration agreed upon proves to be manifestly disproportionate to the profits (*manifestement disproportionnée*) obtained from exploitation of the work, the publisher is required, at the request of the author, to agree to modification of the remuneration to afford the author an equitable share in the profits. This provision is only applicable in case a lump sum remuneration is agreed upon. Authors may not waive the benefit of this right in advance and a clause that provides otherwise may be declared, upon the author’s request, void. Nevertheless, the author may waive this right at the moment the conditions to exert this right are fulfilled.²⁰⁹ There is no time limit provided within the author has to invoke this right.²¹⁰ Article 32(2) of the Copyright Act contains a similar provision with respect to a lump sum payment made pursuant to a contract relating to the public presentation of a live performance.

Neither the **Dutch** or **Luxembourg** Copyright and Related Rights Acts contain any provision, which expressly gives authors or performing artists the right to request a revision of the terms of the contract in case the lump sum paid proves to be grossly disproportionate in relation to the proceeds generated from the exploitation of the work. In practice, a number of model contracts concluded in the **Netherlands** between associations of authors and publishers avoid this problem by providing that the royalty rate will increase with the number of copies sold. Moreover, some remedy can be found in such a case under the general provisions of the Dutch Civil Code. Commentators argue that article 6:258 of the Dutch Civil Code, which is a mandatory provision applicable to all contracts, allows the judge, at the request of a party, to change or invalidate a contract, partially or totally, even with retroactive effect if necessary. The judge may revise or change the contract on the basis of the concept of ‘unforeseeable circumstances’, if the circumstances are such that the other party in all fairness and equity should not expect the continuation of the contract.²¹¹ The ‘unforeseeable

²⁰⁸

Id.

²⁰⁹

Vanhees 1996, p. 319.

²¹⁰

Wachter 1996, p. 36.

²¹¹

Dutch Civil Code, art. 6:258. See Frequin and Vanhees 1999, p. 116.

circumstance' in question must not be such that it would, according to the nature of the contract or according to the usual practice or the demands of fairness and equity, fall under the responsibility of the person who invokes the provision. One could reasonably argue that an action based on this provision of the Dutch Civil Code could be open in the circumstances covered by the 'bestseller paragraph' of the Belgian Copyright Act.

4.2.6 Interpretation of contracts

Article 3(1)(3) of the **Belgian** Copyright Act provides that contractual provisions relating to copyright and to its modes of exploitation must be restrictively interpreted. If there is any doubt about the scope of a transfer, the contract must be interpreted in favour of the author and, therefore, against the user.²¹² Consequently, in that case the author is presumed to have transferred as few rights as possible.²¹³ Article 35(2)(2) contains a similar provision regarding the interpretation of performers' contracts and states that 'the contractual provisions relating to the rights of performers and to their exploitation modes shall be interpreted restrictively. Assignment of an object incorporating a fixation of a performance shall not constitute a right to exploit that performance'.

The **Dutch** Copyright Act states in article 2(2)(2nd sentence): 'The assignment shall comprise only such rights as are recorded in the deed or necessarily derive from the nature or purpose of the title'. According to this rule, an assignment is to be interpreted restrictively, in favour of the author.²¹⁴ Even if the wording of this provision is similar to article 31 (5) of the German Copyright Act, controversy in Dutch legal doctrine persists as to whether the purpose-of-grant rule has effectively been codified in the Dutch Act and whether it requires that all the modes of exploitation be specified in the contract. One current of opinion puts the emphasis on the word 'necessarily', where only the powers that are specified in the contract or that correspond to the primary intention of the parties fall under the transfer. Consequently, a complete transfer of rights would be impossible, especially if such a transfer were to extend to new forms of exploitation. A second current of opinion puts the emphasis on the purpose of the contract, which may encompass a complete transfer of rights as well as forms of use that are not so accurately described in the contract.²¹⁵ The Dutch courts have not yet rendered a decisive ruling on this issue. It does appear, however, that in case of doubt, a contract will be interpreted in favour of the author, and therefore will be given a restrictive interpretation.²¹⁶ Moreover, it is not entirely clear whether this rule applies by analogy to licensing contracts.²¹⁷ An agreement in support of that interpretation is given by article 9 (4th sentence) of the Dutch Related Right Act, which reads as follows: 'a *transfer* comprises only those authorizations that are recorded in the instrument or which necessarily derive from the nature or purpose of the title'. This latter provision applies indeed to both the assignment and the licence of the performers' rights. According to Frequin and Vanhees, a licence is usually interpreted more restrictively than an assignment because, by choosing to licence his rights, the author indicates that he intends to retain his rights. It is therefore only logical that the permissions to use the work be explicitly enumerated in the contract.²¹⁸

²¹² Vanhees 1993, p. 165-167.

²¹³ Frequin and Vanhees, 1999, p. 105; Dauwe 1996, p. 262; and Strowel 2000, p. 33

²¹⁴ Spoor and Verkade, p. 357.

²¹⁵ Koelman 1998, p. 69-73; Seignette 1994, p. 69-72; Spoor and Verkade 1993, p. 358-360 provide references to different opinions on this topic. Cohen Jehoram 2000, p. 36 (footnote 47) enumerates case law.

²¹⁶ Frequin and Vanhees 1999, p. 100.

²¹⁷ Koelman concludes that this cannot be inferred either from case law or legal history. However, the interpretation of licensing-contracts is influenced by the principle of reasonableness and fairness, which is laid down in the Civil Code. Koelman 1998, p. 77, 79. See also Grosheide 1998, p. 270 (footnote 46).

²¹⁸ Frequin and Vanhees 1999, p. 105.

Article 12 of the new **Luxembourg** Copyright and Related Rights Act specifies that ‘against the author, a contractual assignment and a transfer of economic rights must be proven by a writing and must be interpreted restrictively in his favour’. Article 49 of the same Act lays down the same rule with respect to the performing artist.

4.2.7 Effect of transfer in relation to third parties

4.2.7.1 Right to transfer acquired rights

According to article 26(3) of the **Belgian** Copyright and Related Rights Act, a publisher cannot assign the acquired rights without the author’s consent, except in the event of the simultaneous transfer of the whole or a part of his enterprise. The author may invoke the nullity of the contract if the rights are transferred without his consent.²¹⁹ Article 31(3) provides a similar rule with respect to performance contracts, which states that ‘the holder of a performance contract may not assign that contract to any other person without the consent of the author save in the event of a simultaneous transfer of whole or a part of his enterprise’.

The **Dutch** Copyright Act contains no express provision on this issue. Opinions are divided as to whether the rights acquired by assignment may be transferred to a third party without the author’s consent. Some commentators believe that the further transfer of the rights is possible, on the basis of article 3:83(1) of the Civil Code.²²⁰ Others argue that the relationship between The licensee is, in general, also permitted to transfer his license to a third party, unless this is not appropriate considering the nature of the licensing-contract or in case the parties agreed so.²²¹

In **Luxembourg**, the publisher may not transfer the publishing contract to a third party without the consent of the author, except in the event of concomitant transfer of whole or part of his company. Similarly, the recipient of a contract of representation of live performances cannot transfer it in whole or in part to a third party without the consent of the author, except in the event of concomitant transfer of whole or part of his company.²²²

4.2.7.2 Standing to sue

There is no provision in the **Belgian** or **Luxembourg** Copyright Acts concerning the assignee’s standing to sue for copyright infringement.

In the **Netherlands**, article 27(1) of the Copyright Act states that ‘notwithstanding the assignment of his copyright wholly or in part, the author shall retain the right to bring an action for damages against persons who infringe the copyright’. The assignee is thus entitled to sue for infringement independently from the author. Article 27a(2) of the Copyright Act provides that the author may claim damages on behalf of a licensee. The licensee is, in general, dependent on the author whether he will or will not take measures against infringement by third parties or on the licensing contract that may give the user the authority to file a claim. According to article 28(7), the licensee shall have unless otherwise agreed, the right to exercise the rights referred to in paragraphs 1 up and to included 6 in so far as their purpose is to protect the rights he is entitled to exercise. Article 16(2)

²¹⁹ Vanhees 1996, p. 321.

²²⁰ Spoor and Verkade 1993, p. 364, 365. This may also be derived from Book 3, article 83(1) of the Civil Code.

²²¹ Cohen Jehoram 2000, p. 35; Spoor and Verkade 1993, p. 365.

²²² Luxembourg Copyright and Related Rights Act, art. 18 and 19(3).

and 17(4) of the Dutch Related Right Act provide similar rules relating to the holder of a license on neighbouring rights.

4.2.7.3 Right to pledge, secure or seize acquired rights

Neither the **Belgian, Dutch or Luxembourg** Copyright and Related Rights Act contains any provision concerning the transferee's power to pledge, secure, or seize the acquired rights.

4.2.8 Termination of contract

4.2.8.1 Non-use of rights

In **Belgium**, article 3(1)(5) provides the obligation of the user to exploit the work in accordance with the fair practice of the profession.²²³ It is controversial whether this rule entitles the author to terminate the contract in case the user does not exploit the work.²²⁴ In any case, an author may, according to article 26(1)(3), recover his rights, after notification, if the publisher has not manufacture the copies of the work within the stipulated time limit, without a legitimate reason. If no time is laid down by contract, the period of time will be defined in accordance with fair practice in the profession (article 26(1)(2)). Article 31(2) states that a performance contract terminates automatically after a period of two consecutive years without a performance being carried.

The **Dutch** Copyright Act imposes on the exploiter no obligation to exploit the work either in accordance with the fair practice or within a specific time frame. In practice however, contracting parties usually agree that if one of the parties fails to fulfil his obligation under the contract, such as the non-exploitation of the work by the exploiter, the other party has the right to terminate the contract.²²⁵

In **Luxembourg**, article 15 of the new Act provides that publishing contracts must contain a mention regarding the first print and the date when the copies of this first print will be put on the market. This time limit may not extend unreasonably beyond the date of acceptance of the work to publish. This acceptance must come within the twelve months from the signature of the contract, or the author may immediately resiliated the publishing contract. Where the work is out of print, the author may terminate the publishing contract and recover his rights, if the work is not available on the market within twelve months following a notice sent to the publisher requesting him to re-print the work.

4.2.8.2 Bankruptcy of exploiter

In **Belgium**, article 20(1) of the Copyright Act states that bankruptcy of the exploiter of an *audiovisual* work, legal settlement, or liquidation of his enterprise does not imply termination of the contracts with the authors of the work. Nevertheless, each author may ask for termination of the contract if the exploiter's activities have been terminated for more than twelve months or the work is not sold to a third party within this period of time (article 20(6)). In case of bankruptcy, legal settlement, or liquidation of the *publisher's* enterprise, article 30(1) provides that the author is permitted to terminate the contract with immediate effect. If the publisher declares bankruptcy and if the author decides to terminate the contract, then all copies of works upon which copyright subsists must be offered for sale in priority to the author. The copies must be purchased at a price

²²³ This rule does not apply to works created under employment or on commission in the non-cultural field (article 3(3)(3)).

²²⁴ Vanhees 1996, p. 307, 308; Dauwe 1996, p. 283, 284.

²²⁵ Frequin and Vanhees 1999, p. 110.

agreed to between the author and the curator. In the absence of agreement, the price is fixed by a competent judge.²²⁶

In the **Netherlands**, the right of the author to terminate the contract in case of bankruptcy of the exploiter is not regulated under the Copyright Act, but under article 21(1) of the Bankruptcy Act, which states that copyright remains outside of the bankruptcy insofar as it is not susceptible to sequestration.

With respect to publishing contracts, article 17 of the **Luxembourg** Copyright and Related Rights Act contains a similar provision, which reads as follows:

En cas de faillite, d'octroi d'un concordat, de mise en liquidation ou de décès de l'éditeur, l'auteur peut résilier immédiatement le contrat d'édition par pli recommandé à la poste. Tous les exemplaires, copies ou reproductions qui font l'objet des droits d'auteurs doivent être offerts à l'achat à l'auteur par priorité, moyennant un prix qui, en cas de désaccord, est déterminé par le tribunal. L'auteur perd son droit de priorité s'il n'a pas fait connaître au curateur ou au liquidateur sa volonté d'en faire usage dans les 30 jours de la réception de l'offre'.

The rule differs with respect to the bankruptcy of an audiovisual producer:

La faillite du producteur, l'octroi d'un concordat ou la mise en liquidation de son entreprise n'entraîne pas la résiliation de la cession des droits au producteur.

En cas de cession de tout ou partie de l'entreprise ou de liquidation, le liquidateur ou le curateur est tenu d'aviser à peine de nullité chacun des autres producteurs de l'œuvre ainsi que le réalisateur. L'acquéreur est tenu des obligations du producteur dont les droits sont cédés ou vendus.

Les coproducteurs ou, à défaut, le réalisateur possèdent un droit de priorité pour acquérir les droits sur l'œuvre dont le prix d'achat est fixé par décision de justice à défaut d'accord.

4.2.8.3 Other circumstances

Under **Belgian** copyright law, the author may require termination of the publishing contract if the publisher has carried out the destruction of all copies.²²⁷

²²⁶ Frequin and Vanhees 1999, p. 109.

²²⁷ Belgian Copyright and Related Rights Act, art. 29(1).

4.3 France

4.3.1 Ownership of Rights

4.3.1.1 Creator doctrine

The creator doctrine constitutes a fundamental principle of the French authors' rights regime. The French Intellectual Property Code (French CPI) departs from the traditional creator doctrine not only with respect to anonymous or pseudonymous works, but also with respect to collective works. Collective works are works that are created by more than one author on the initiative of a single principal, i.e. a legal entity or a natural person, under whose name the work is disclosed to the public and in which the personal contributions of the various authors who participated in its production are merged in the overall work for which they were conceived, without it being possible to attribute to each author a separate right in the work as created.²²⁸ 'Collective works' must be distinguished from 'works of collaboration', which are understood as works created by more than one natural person and which are the joint property of their authors. Article L. 113-5 establishes a rebuttable presumption of ownership of rights in a collective work in favour of the physical or the legal person under whose name the work has been disclosed to the public. The authors' rights in a collective work are vested in this physical or legal person. Commentators insist that the regime of the 'collective work' represents a departure from the general principle that the rights on a work belong to the physical person who has created it.²²⁹ The term 'collective work' therefore tends to be interpreted restrictively to prevent employers from circumventing the fundamental principle that copyright vests in the creator.²³⁰ The distinction between a work of collaboration and a collective work, and consequently to the allocation of ownership of rights on the individual contributors or on the legal entity, has given rise to an abundant jurisprudence. Typical collective works are encyclopaedias and newspapers, i.e. works composed of the contributions of several authors that are purposefully assembled and arranged by an editorial team to form one collective work.

With respect to performers, the French CPI contains no rule on the initial ownership of the related rights of performing artists. It can be inferred from the definition of 'performer' that the performing artist is always *ab initio* the physical person who executes the performance, where 'performer' includes persons who act, sing, deliver, declaim, play in or otherwise perform literary or artistic works, variety, circus or puppet acts. The law is also silent regarding the presumption of ownership of rights on performances.²³¹

4.3.1.2 Works created under employment

In France, the first paragraph of article L. 111-1 of the CPI states that 'the author of a work of the mind shall enjoy in that work, by the mere fact of its creation, an exclusive incorporeal property right which shall be enforceable against all persons'. The third paragraph of the same article confirms that 'the existence or conclusion of a contract for hire or of service by the author of a work of the mind shall in no way derogate from the enjoyment of the right afforded by the first paragraph'. The strict formulation of article L. 111-1 of the CPI has led to certain problems in practice, which the French courts have solved by attenuating them in favour of employers. Despite the provisions of the CPI, the *Cour de Cassation* has read in the employment contract an implicit transfer in favour of the

²²⁸ French CPI, art. L. 113-2(3).

²²⁹ Gautier 1999, p. 573.

²³⁰ Lucas 2000, p. 49; Dreier 1995, p. 12.

²³¹ Brison 2001, p. 611.

employer of the rights in the works that the employee creates in the course of his employment, to the extent needed to conduct the employer's business.²³² The court partly based its decision on the civil law notion of possession. It ruled that an enterprise exploiting a work under its name accomplishes acts of possession which, in the absence of any contrary claim on the part of the natural person having created the work, are of such a nature as to raise the presumption, in relation to infringing third parties, that the enterprise is the owner of the author's incorporeal property right on these works, whatever their qualification.²³³

This presumption is subject to two essential conditions: first, the legal person must exploit the work under its name; and second, there must be no contrary claim on the part of the natural person having created the work. This judicial construction also has the merit of avoiding to qualify the work as a collective work, a work of collaboration or otherwise. However, the presumption is only admissible against potential infringers, thus not against the authors themselves or against non-infringing third parties, like a bank, or a co-producer.²³⁴ Of course, the presumption is only valid if the employee's consent was not obtained by mistake, fraud or undue influence at the time of signature of the employment contract.²³⁵ Nevertheless, not all French courts share this current of opinion.²³⁶ Apart from this judicial presumption of ownership for the benefit of the employer, the only express exception to the creator doctrine recognised under French copyright law is the provision relating to the creation of a computer program by one or more employees, adopted in conformity with the Computer Programs Directive. Unless otherwise provided by law or by contract, the economic rights in the software and its documentation created by one or more employees in the execution of their duties or following the instructions given by their employer shall be the property of the employer and he exclusively shall be entitled to exercise them.²³⁷

It is worth pointing out that, in addition to the provisions of the Intellectual Property Code, the status of the professional journalist is regulated under article L. 761-2 of the Labour Code, which establishes a presumption of employment for professional journalists, who are hired against remuneration by a press agency. Similarly, the status of performing artists is regulated pursuant to article L. 762-1 of the Labour Code, which establishes a presumption of employment for performing artists, who are hired against remuneration for the production of a show.

4.3.1.3 Works created on commission

The French CPI generally recognises the applicability of the creator doctrine with respect to works created on commission: the owner of a work created on commission is in principle the person who created it. The only exception to this principle is set out in article L. 132-3(1) of the French CPI, which concerns works made on commission for use in advertising. A contract relating to such a work, between an exploiter²³⁸ and a French resident²³⁹, implies, unless otherwise provided, an assignment to the exploiter of the exploitation rights in the work.

²³² Cass. Civ. 1ère, 24 March 1993 (*Société Aréo*), *RIDA* 1993/158, p. 200; Cass. Civ. 1ère, 28 March 1995 (*Société Termopa*), *RIDA* 1995/165, p. 327.

²³³ Lucas 2000, p. 53, 54; and Goutal 1998, p. 73.

²³⁴ Goutal 1998, p. 79.

²³⁵ See: Court of Appeal of Paris (4e Ch.) – 12 January 2000 (*Kannas c. Larousse-Bordas*) in *RIDA* 2000/186, p. 280.

²³⁶ Court of Appeal of Paris (4e Ch.) - 18 February 2000 *RIDA* 2000/186, p. 292.

²³⁷ French CPI, art. L. 113-9. See: Cour d'appel de Versailles, 12e Ch., 7 October 1999 (*Silas Bakary-Gando c./ Sté Fiat Auto France*), *RIDA* 2001/187.

²³⁸ Producer is the party financing the advertising campaign, not the advertising agency that controls the creative process. Lucas 2000, p. 76.

²³⁹ Lucas 2000, p. 77. Cour de Cassation (1ère Ch. Civ.) – 20 mars 2001, *RIDA* 2001/189

4.3.1.4 Audiovisual works

According to article L. 113-7(1) of the French Intellectual Property Code, the authors and initial owners of right on an audiovisual work are the physical persons who created it. In the absence of proof to the contrary, the following contributors are presumed to be joint authors of an audiovisual work: the authors of the script, the adaptation, the dialogue, and the musical compositions, the principal director, and the author of the pre-existing work, if any (article L. 113-7(2)). Other persons may also be considered among the authors if they made a creative contribution to the film.²⁴⁰ Article L.132-24 establishes a presumption of transfer of all audiovisual rights from the authors to the producer, defined as the person who takes the initiative and responsibility for making the work (article L. 132-23).²⁴¹ The presumption of transfer of rights applies neither to the author's rights on the musical composition nor to the graphic and theatrical rights on the audiovisual work itself. As a result of this presumption of transfer of rights, the producer is said to obtain all the prerogatives necessary for the normal exploitation of the work. Of course, contracting parties are free to agree otherwise and for the presumption to apply, there must exist a contract between the authors and the producer.²⁴² Regardless of the presumption of transfer of rights to the producer, the authors may exploit their contributions individually as long as these are separable and of different genres and the exploitation does not prejudice that of the whole work (L.132-29). With respect to performers, article L. 212-4 of the CPI provides that the signing of a contract between a performer and a producer for the production of an audiovisual work entails the authorisation to fix, reproduce and communicate to the public the performer's performance.

4.3.2 Forms of transfers of rights

4.3.2.1 Assignment

France follows a 'dualist' approach, whereby the author's right is considered to consist of two separate elements: the pecuniary element, or 'economic right', and a personality element, or the 'moral right'. In dualist systems, economic rights can be freely assigned, either *inter vivos* or *mortis causa*, while moral rights are considered to be inalienable.²⁴³ The same remark also holds true with respect to the performers' rights, where the economic element of the right can be assigned, but not its moral element.

4.3.2.2 Licence

Article L. 132-8 of the French Intellectual Property Code differs from the provisions of other Member States in that it provides that the author must guarantee the publisher the exclusive exercise of the rights assigned, unless otherwise agreed.

4.3.2.3 Waiver

In France, where the protection of the author's personality right is a paramount element of the *droit d'auteur* regime, the waiver of some attributes of an author's moral right has been made possible, either in the French Intellectual Property Code (CPI) or in the jurisprudence. Hence, the transfer of an author's adaptation right implies a partial renunciation to exercise the right of integrity, to the

²⁴⁰ Lucas 2000, p. 46.

²⁴¹ See: Tribunal de Grande Instance de Paris (3e Ch.) – 23 March 2001, *RIDA* 2001/189.

²⁴² Tribunal de Grande Instance de Strasbourg (2e Ch.) – 16 November 2001 (*SNJ c. Plurimedia*), available : <www.juriscom.net>

²⁴³ French Intellectual Property Code, art. L. 122-7; Belgian Copyright Act, art. 3.

extent necessary for the adaptation of the work to another medium.²⁴⁴ The CPI also provides that, '[translation] except contrary stipulation more favourable to the author of a computer program, the latter cannot oppose the modification of the program by its lawful acquirer if such modification is harmful neither to her honour or her reputation, nor can she exercise her right of repent or of withdrawal'.²⁴⁵ With respect to audiovisual works, the waiver of the author's right of integrity would also be admissible under the French CPI, provided that such a waiver is necessary to ensure the completion of the works.²⁴⁶ The presumption of transfer of rights from the joint authors of an audiovisual work to the producer also entails the formers' waiver of their right of disclosure.²⁴⁷ Article L. 121-4 provides the author's right to withdraw a work from public circulation, which exists 'notwithstanding assignment of his right of exploitation'. Article L. 212-2 of the Code contains similar provisions with respect to the waiver of the performers' moral rights. There is extensive jurisprudence in France on the question of the waiver of the author's moral rights. In general, the courts tend to be very protective of authors, especially with respect to the author's right of disclosure and right of integrity.²⁴⁸

4.3.3 Requirements of form

Article L. 131-2 of the French Intellectual Property Code (CPI) provides that a performance, publishing and audiovisual production contract, as well as a 'free performance authorization', must be in writing. The same rule applies to the assignment of the right of audiovisual adaptation of a work (article L. 131-3(3)).²⁴⁹ According to article L. 131-2(2) of the CPI, the form of all other types of contracts is regulated by articles 1341 to 1348 of the Civil Code. With respect to publishing contracts, article L. 132-7 requires the personal and written consent of the author, even in the case of legally incompetent authors. This rule does not apply however, to authors who are physically unable to give consent or when the contract is concluded by the author's successor in title. Furthermore, publishing contracts must state the minimum number of copies to be printed, unless the publisher has agreed to pay a guaranteed minimum of royalties (article L.132-10). Pursuant to article L. 132-11 of the CPI (second sentence), a publisher may not, without the written consent of the author, bring any modifications to the work. These provisions have been interpreted as establishing a rule of evidence rather than a condition for the validity of a transfer of rights. If a contract fails to meet the requirement of a writing, the author is the only party authorised to ask the court to declare the contract void.²⁵⁰

With respect to performances, article L. 212-3 of the French CPI requires a written authorization from the performing artist for the fixation, reproduction, and communication to the public of such fixation, as well as for the separate use of sounds or images. The Court of Appeal of Paris recently had the opportunity to interpret the requirement set by article L. 212-3 of the Code in a case opposing Sony Music Entertainment to the collecting society SPEDIDAM and the union of artists SNAM.²⁵¹ The case involved the rights of four musicians who had participated in the recording of a song for a commercial phonogram produced by Sony Music, but who had not authorised the making of a video-clip. The facts of the case revealed that each of the four musicians had signed a 'presence sheet' before the start of the recording sessions. On the front-side of this sheet was

²⁴⁴ Colombet 1997, p. 114.

²⁴⁵ French CPI, art. L. 121-7.

²⁴⁶ Von Lewinsky 1995, p. 688, 689; Dreier 1995, p. 18.

²⁴⁷ Gautier 1999, p. 500.

²⁴⁸ Salokannel, Strowel, and Derclaye 2000, p. 249.

²⁴⁹ Lucas 2000, p. 59.

²⁵⁰ Lucas and Lucas 2001, p. 396.

²⁵¹ Court of Appeal of Paris (1st Ch.), 11 January 2000 (*Sony Music Entertainment v. SPEDIDAM and SNAM*), RIDA 2001/187, p. 286.

written the mention ‘Destination: Phonogram published for commercial purposes’. In the opinion of the Court of Appeal, this mention entailed on the part of the musicians who signed the document the authorisation to fix their performance on a phonogram, but it did not entail the authorisation to proceed to the reproduction of their performance for other purposes, such as the making of a video-clip. The requirement of article L. 212-3 of the CPI of a written instrument had not been fulfilled and the reproduction of the musician’s performance for the purpose of making a video-clip was therefore unlawful.

4.3.4 Restrictions on transfers of rights

4.3.4.1 Limits of scope, time, and place

Article L. 131-3(1) of the French CPI states that the contract must enumerate each form of exploitation transferred and that the field of exploitation must be defined to ‘its scope and purpose as well as to place and duration’. This provision has been declared mandatory by the Courts, on a number of occasions.²⁵² The sanction attached to the failure to fulfil these requirements is the relative nullity of the contract, which is deemed to be better suited to protect the interests of the author than the sanction of absolute nullity.²⁵³ Article L. 132-19 of the CPI provides that a performance contract must be limited in time or to a specific number of performances. Furthermore, it states: ‘the validity of the exclusive rights afforded by a playwright may not exceed five years’. Agreements between the organizations representing the performers, the phonogram producers, and the persons using phonograms as laid down in items 1) and 2) of Article L. 214-1 shall be of between one and five years.

4.3.4.2 Future forms of exploitation

In France, article L. 131-6 of the CPI allows to transfer ‘the right to exploit a work in a form that is unforeseeable and not foreseen on the date of the contract’, provided that two conditions are met: first, the transfer must be explicit and second, the contract must provide ‘participation correlated to the profits from exploitation’.²⁵⁴ French courts have issued a number of decisions over the past few years on the issue of ‘unknown forms of exploitation’, particularly regarding electronic rights.²⁵⁵ In the case of *Plurimédia*,²⁵⁶ a number of journalists and their trade unions had brought legal action, not against ‘their’ newspaper publisher, but directly against the provider of the online information service concerned (Plurimédia). The case concerned the online dissemination of news items, both from printed sources (the newspaper *Dernières Nouvelles d’Alsace*), and from television (news programmes broadcast by channel FR3). The newspaper publisher and the television station had given Plurimédia prior permission to re-use the printed and televised news on the Internet. Permission of the (employed) journalists had not been sought. The Court of Strasbourg observed that, according to the rules of ownership of rights on ‘collective works’, the newspaper publisher was deemed the owner of the copyright in the newspaper. However, on the basis of article L 761-9 of the Labour Code and article 7 of the journalists’ collective bargaining agreement, the grant of rights by a journalist is limited to the article’s first publication. The right to publish a work in more than one newspaper or magazine must be agreed upon expressly, and the express agreement must define the conditions for reproduction. The Court considered the medium of a newspaper in print to be different from the medium of an online newspaper, because online distribution requires certain

²⁵² Cour d’appel de Paris (4ème Ch.) - 1er juillet 1998 (*Editions Cercle d’Art c. Pierrel, et Ruiz-Picasso*), RIDA 1999/179, p. 390.

²⁵³ Lucas and Lucas 2001, p. 402; and Von Lewinsky 1995, p. 693.

²⁵⁴ See: Lucas 2000, p. 65.

²⁵⁵ Hugenholtz and de Kroon 2000, p. 16.

²⁵⁶ *Plurimédia*, Regional Court Strasbourg, 3 February 1998, *Légipresse* 149-I, p. 19 and 149-III, p. 22.

technical manipulations; the online product is different from a newspaper, and a new means of communication is involved. Therefore, there had been publication in more than one newspaper or magazine. The journalists' collective agreement was signed in 1983, at which time Internet uses could not have been foreseen. Therefore, no express agreement was found, and the online reproduction of articles previously published in the newspaper was subject to the journalists' prior authorisation. In respect of the televised news items, the Court came to similar conclusions, even though the journalists' employment agreements with FR3 did not contain any relevant provisions. The Court concluded that the journalists could not have granted the rights required because Internet use was unknown at the time the employment agreements were entered into.²⁵⁷

The Tribunal de grand instance of Paris came to similar conclusions in the *Figaro* case.²⁵⁸ *Le Figaro*, a major French daily newspaper, offered to the public the possibility of consulting its electronic archives containing news articles published in the past two years, and to obtain copies thereof. Journalists and a trade union complained that *Le Figaro* had not asked their permission. The Court prohibited the service, concluding that, in the absence of an express agreement to the contrary, the journalists' grant of reproduction rights only covers the first publication in the form agreed upon by the parties. In yet another case on 'electronic rights', the journalists of the newspaper *Le Progrès*, supported by the national union of journalists (SNJ), took the newspaper publisher to court for putting their articles on the Internet and on Minitel without their consent.²⁵⁹ The Court of Appeal of Lyon ruled in favour of the plaintiffs invoking the Labour Code and the collective bargaining agreement of journalists.²⁶⁰ The Court held that the online publication and archiving on a server could not be considered an extension of the distribution on paper, particularly since the typographic layout and the presentation of an article in a publication corresponding to a current of ideas upheld by its author at the time the contract was concluded, had disappeared. Moreover, the newspaper's readership was extended and the duration of the publication was different. The Court further noted that article L 121-8 of the CPI provides that, unless the parties provide otherwise, the author of a work published in a newspaper or magazine may reserve the right to reproduce and exploit his work in whatever form, provided that the reproduction or exploitation does not compete with that of the newspaper or magazine.²⁶¹ Absent the express consent of the employed journalists, the re-use of their articles on the Internet and on the Minitel could not occur without the authors' prior authorisation.

4.3.4.3 Future works

Article L. 131-1 of the Intellectual Property Code states that 'a total transfer of future works shall be null and void'. Although the text of the provision may suppose otherwise, this rule also applies to the partial assignment of rights as well as assignment of rights in some of the future works to be created by the author.²⁶² Non-compliance with this rule leads to relative nullity. Consequently, a valid agreement transferring rights in 'future' works is presumed to exist unless the author raises the irregularity of the contract. The prohibition on the transfer of rights on future works has been applied with some flexibility, whereby the courts have recognised the validity of a transfer of rights on a work that is sufficiently specified with respect to its type or content.²⁶³ This is the case, for

²⁵⁷ Hugenholtz and de Kroon 2000, p. 17.

²⁵⁸ *Le Figaro*, Tribunal de grand instance Paris, 14 April 1999, *Légipresse* 162-I, p. 69 and 162-III, p.81.

²⁵⁹ *Le Progrès*, Tribunal de grand instance Lyon, 21 July 1999, *Légipresse* 166-I, p. 132 and 166-III, p. 156; and Court of Appeal of Lyon, 9 December 1999, *Légipresse* 168-I, p. 9 and 168-III, p. 7.

²⁶⁰ Hugenholtz and de Kroon 2000, p. 17.

²⁶¹ See section 2.1.2 *supra*.

²⁶² Von Lewinsky 1995, p. 698; Lucas 2000, p. 63.

²⁶³ Lucas and Lucas 2001, p. 413.

example, of rights transferred with respect to a series of stories having the same main characters.²⁶⁴ The prohibition on the transfer of rights on future works is subject to two exceptions. First, article L. 132-4 permits the author, under specific circumstances, to grant a right of preference to a publisher for publication of his future works. Second, a professional body of authors may grant, pursuant to article L. 132-18, to an entertainment promoter the right to perform, for the duration of the contract, the existing or future works constituting the repertoire of such body under the conditions stipulated by the author or his successors in title. In that case, the requirements of article L. 131-1 may be waived.

In practice, the prohibition of article L. 131-1 of the CPI on the transfer of rights in future works invariably raises problems in connection with the conclusion of labour contracts with salaried creators. As a result, it is not uncommon to observe that a number of collective bargaining agreements do not comply – entirely – with this requirement. In the sector of professional journalism for example, Vercken reports that some collective agreements between newspaper publishers and associations of journalists try to circumvent the problem by subjecting the terms of a collective agreement to the express consent of each journalist with respect to the works that he will be creating in the future or by modifying the labour contract by means of an endorsement, the writing of which has been submitted for approval by the parties to the collective contract.²⁶⁵ Some of these express consent forms and endorsements provide that the parties must periodically list the works that are created and that fall under the scope of the agreement. Another solution to the problem caused by the strict application article L. 131-1 of the CPI could lie in the grant to the publisher of a right of preference, pursuant to article L. 132-4. Here again, practical problems arise, since such a right of preference applies, with respect to works of the same genre, only to the next five works created by the journalist, or to the production of the author realised within a period of five years from the date of signature of the contract. One can easily imagine how complex and burdensome such a solution is for an enterprise that has numerous journalists on its payroll.

4.3.5 Determination of remuneration

4.3.5.1 Proportional remuneration

French copyright law imposes a system of proportional remuneration to authors (article L. 131-4, L. 132-5 and L. 132-25), including authors of works created under employment.²⁶⁶ The proportional remuneration must be based on the price, exclusive of tax, paid by the public to buy or receive communication of the work. This system is also applicable to works created under employment. It is a matter of settled case law that the provisions of articles L. 131-4 and L. 132-25 of the CPI are to be given a mandatory character.²⁶⁷ However, the *Cour de Cassation* has held that any infringement of the provisions of article L. 131-4 is punishable by relative nullity, rather than absolute nullity, and can only be invoked by the author.²⁶⁸ Moreover, an action based on article L. 131-4 is limited by a period of five years.²⁶⁹

The second paragraph of article L. 132-25 provides that ‘subject to the provisions of Article L. 131-

²⁶⁴ Cour de Cassation, (1ère Ch. Civ.), 6 November 1979, *RIDA* 1980/3, p. 167.

²⁶⁵ Vercken 2001, p. 151.

²⁶⁶ Von Lewinsky 1995, p. 693, 694.

²⁶⁷ Tribunal de grande instance de Paris (3e Ch.) - 30 November 1999, *RIDA* 2000/185; Court of Appeal of Paris (1ère Ch.) - 13 October 1998 *RIDA* 1999/180, (Audiovisual works: production contract – proportional remuneration – moral rights of the co-authors); Court of Cassation (1ère Ch. Civ.) - 16 July 1998, *RIDA* 1999/178 (Audiovisual works: videographic exploitation - proportional remuneration); and Court of Appeal of Paris (1st Ch.) - 27 March 1998, *RIDA* 1999/178.

²⁶⁸ Cour de Cassation, (1ère Ch. Civ.), 9 January 1996 (*Pactet v. S.A Masson éditeur et al.*), *IIC* 1998/08, p. 950.

²⁶⁹ Cour de Cassation (1ère Ch. Civ.), 11 February 1997, *RIDA* 1997/173, p. 279.

4, where the public pays a price to receive communication of a given, individually identifiable audiovisual work, the remuneration shall be proportional to that price...’ Although this provision was initially drafted to apply to the exploitation of films in cinemas, it also covers the exploitation of films on videos.²⁷⁰ The Paris Court of Appeal confirmed that the remuneration payable to the authors of a film for video exploitation is subject to the mandatory rules set out in Articles L. 131-4 and L. 132-25 CPI. Consequently, in a dispute between the producer’s legal successors and the successors in title of one of the authors of a film, the Court has stated that as a matter of law the remuneration due for video exploitation must be set as a percentage of the selling price to the public, exclusive of tax, of the video recordings of the film, thus ruling out a calculation basis formed by the ‘producer’s receipts’.²⁷¹ By law, the publisher, the entertainment promoter, and the film producer are all required to render accounts.²⁷²

Besides the provisions of the CPI, the payment of remuneration owed to professional journalists is subject to the provisions of articles L. 761-8 and L. 761-9 of the Labour Code. The first provision essentially states that any work not foreseen by the terms of the hiring contract between the publisher of a newspaper or periodical and a person mentioned in article L. 761-2 must be subject to special remuneration. The second provision states that any work commissioned or accepted by the publisher of a newspaper or periodical must be remunerated even if it has not been published. The right to publish in a newspaper or periodical the articles or other literary or artistic works created by a person mentioned in article L. 761-2 must obligatorily be subject to an express agreement which specifies the conditions under which the reproduction is authorised. In practice, the collective agreements signed in recent years between newspaper publishers and associations of journalists would seem to depart from the mandatory requirements of the CPI, according to which the remuneration paid must be either proportional or lump sum, while still complying with the provisions of the Labour Code.²⁷³ The remuneration paid to the journalists under most collective agreements is based on a premise accepted by both sides: the salary paid to the journalist covers at least the first exploitation of the work. The re-use of the journalists’ works gives rise to additional remuneration established either as a fixed sum or as a percentage of the revenues generated by the exploitation. The sums are then distributed either on the basis of the number of years during which the journalist has been present in the enterprise or, if it concerns a freelance journalist, on the basis of the number of contributions submitted.

With respect to performers, article L. 212-4 of the CPI provides that a contract signed for the production of an audiovisual work must fix a distinct remuneration for each mode of exploitation of the work. Article L. 212-5 completes this rule by stating that if neither the contract nor a collective bargaining agreement mentions the remuneration due for one or more modes of exploitation, the level of remuneration is determined by reference to the tariffs established by way of specific agreement concluded, in each sector of activity, between the organisations of salaried workers and employers representing the profession. The remuneration due to performers is also regulated by articles L. 762-1 and L. 762-2 of the Labour Code, subject to the provisions of article L. 212-6 of the CPI. Article L. 762-2 of the Labour Code reads as follows:

N'est pas considérée comme salaire la rémunération due à l'artiste à l'occasion de la vente ou de l'exploitation de l'enregistrement de son interprétation, exécution ou présentation par l'employeur ou tout autre utilisateur dès que la présence physique de l'artiste n'est plus requise pour exploiter ledit enregistrement et que cette rémunération n'est en rien fonction du salaire reçu pour la production de son interprétation, exécution ou présentation, mais au contraire fonction du produit de la vente ou de l'exploitation dudit enregistrement.

²⁷⁰ See Kéréver, ‘Chronique de jurisprudence’, *RIDA* 2000/186, p. 259;

²⁷¹ Cour de Cassation (1ere Ch. Civ.) 25 January 2000, (*Barlet c. Temal and Bougeault*), *RIDA* 2000/186, p. 267.

²⁷² French CPI, art. L. 132-13, L. 132-21 and L. 132-28.

²⁷³ Vercken 2001, p. 152.

However, article L. 762-2 of the Labour Code only applies to that part of the remuneration paid in accordance with the contract that exceeds the bases laid down in the collective agreement or specific agreement. The provisions of the agreements concluded, in each sector of activity, between the organisations of salaried workers and employers representing the profession may be made compulsory within each sector of activity for all the parties concerned by order of the responsible Minister.

However, article 214-1 of the CPI states that ‘where a phonogram has been published for commercial purposes, neither the performer nor the producer may oppose: 1) Its direct communication in a public place where it is not used in an entertainment; and 2) Its broadcasting or the simultaneous and integral cable distribution of such broadcast. Such uses of phonograms published for commercial purposes entitle the performers and producers to remuneration whatever the place of fixation of such phonograms. Such remuneration is paid by the persons who use the phonograms published for commercial purposes under the conditions set out in items 1) and 2) of the article. It is based on the revenue from exploitation or, failing that, calculated as a lump sum in the cases laid down in Article L. 131-4. It shall be shared half each between the performers and the phonogram producers. Subject to the international conventions, this right to remuneration shall be shared between the performers and phonogram producers for phonograms fixed for the first time in France. The schedule of remuneration and the conditions of payment of the remuneration shall be laid down by specific agreements for each branch of activity between the organizations representing the performers, the phonogram producers and the persons using phonograms as laid down in items 1) and 2) of Article L. 214-1. Such agreements shall set out the terms under which the persons using phonograms under such conditions shall satisfy their obligation to furnish to the royalty collection and distribution societies the precise program of the uses which they make and all the documentary elements that are indispensable for distributing the royalties. The provisions of such agreements may be made compulsory for all the parties concerned by order of the Minister responsible for culture. The term of such agreements shall be of between one and five years. If no agreement has been reached on expiry of the preceding agreement, the schedule of remuneration and the conditions for paying the remuneration shall be decided by a Committee, according to the prescriptions of article 214-4 of the CPI.

As an exception to the principle laid down in articles 212-3 and 213-1 of the CPI, which proclaims the exclusive right of the performer to authorise or prohibit the communication to the public of their performances fixed on a phonogram, article 214-1 must be interpreted restrictively.²⁷⁴ The acts enumerated in this article, and which fall outside the scope of the exclusive rights, cover the broadcast of ‘commercial phonograms’ only. Consequently, this provision does not encompass the communication to the public of a sound recording incorporated into a cinematographic work. In this case, the act of communication to the public is subject to the author’s prior authorisation.

4.3.5.2 Equitable remuneration

The French Intellectual Property Code contains no provision requiring the payment of an equitable remuneration to authors or performers. Note that the provisions of the CPI that relate to the payment of remuneration to authors or performers all talk about ‘remuneration’ as such without qualifying it as equitable. The method of calculation of the remuneration prescribed in the CPI is in fact either proportional or lump sum. Nevertheless, the French legal doctrine very often refers to the concept of ‘equitable remuneration’ in relation to the sums to be paid authors or performers in accordance with the provisions of the Code.

²⁷⁴ Kéréver 2002, p. 241.

4.3.5.3 Lump sum

Article L. 131-4 of the French Intellectual Property Code sets out the first list of exceptions to the system of proportional remuneration. A lump sum payment is permitted in four circumstances:

- Where it is impossible or too expensive to calculate the remuneration;
- Where the author's contribution is not significant enough;
- In case of computer programs.

Article L. 132-6(1) lists a number of additional circumstances where the payment of a lump sum is authorised in the context of a publishing agreement. It provides that in the case of trade editions of specific types of works the author's remuneration for the first edition may also be in the form of a lump sum, subject to the express agreement of the author. In the case of works of the mind published in newspapers and periodicals of any kind and by press agencies, the remuneration of an author bound to the information enterprise by a contract for hire or of service may also be laid down as a lump sum. Finally, according to L. 132-6(2) of the CPI, this type of remuneration is permitted in case the assignment is granted 'by or to a person or enterprise established abroad'. All lump sum agreements may be revised under French law.

4.3.5.4 'Best-seller' clause

Under French law, a revision of the amount of remuneration stipulated in the contract is admissible only in the case of lump sum payment. Moreover, according to article L. 131-5 of the French CPI, the author may demand the review of the contract if he suffered a loss of more than seven-twelfths of the compensation to which he is entitled and if this loss is the result of either a burdensome contract or an insufficient advance estimate of the proceeds from the work.

4.3.6 Interpretation of contracts

Articles L. 122-7(2) and (3) of the French Intellectual Property Code specify that the transfer of either the performance or the reproduction right does not imply the transfer of the other right. According to article L. 122-7(4), a complete transfer of rights is limited to the exploitation modes specified in the contract. French Courts have repeatedly held that the general rule regarding the authors' or the performers' transfer of rights is that the scope of transfer is limited to the rights expressly mentioned in the juridical act. For example, publishing rights, which are not needed for the production of a TV series, cannot be deemed to have been assigned by the author upon entering a TV production contract.²⁷⁵

4.3.7 Effect of transfer in relation to third parties

4.3.7.1 Right to transfer acquired rights

Article L. 132-16 of the French Intellectual Property Code permits the publisher to transfer the acquired rights, but only after he has obtained the consent of the author. The consent of the author is not required, however, in cases where the rights in the contract are transferred along with the publisher's business.²⁷⁶ In such circumstances however, the author may terminate the contract. The

²⁷⁵ Paris Court of Appeal (4th Ch.), 19 December 1991 (*BELBO Films Production v. Editions B. Barrault and D. Cohn Bendit*) [1993] 5 Ent. L.J. E-94.

²⁷⁶ Lucas 2000, p. 74.

consent of the performer or his representative is also required in case of transfer of a performance contract to a third party (article L. 132-19(4)).

4.3.7.2 Standing to sue

There is no provision in the French Intellectual Property Code concerning the assignee's or the licensee's standing to sue for copyright infringement.

4.3.7.3 Right to pledge, secure or seize acquired rights

The only reference in the French CPI to the right of the assignee to pledge, secure, or seize acquired rights relates to the pledge of rights on computer programs. Article L. 132-34 of the CPI provides that 'notwithstanding the provisions of the Law of March 17, 1909, on the Sale and Mortgaging of Businesses, the right of exploitation of an author of software, as defined in Article L. 122-6, may be pledged subject to the following conditions:

- The pledge shall be set out in writing on pain of nullity.
- The pledge shall be entered, failing which it shall not be invocable, in a special register kept by the National Institute of Industrial Property. The entry shall state precisely the basis for the security and, particularly, the source codes and operating documents.
- The ranking of entries shall be determined by the order in which they are requested.
- The entries of pledges shall lapse, unless renewed beforehand, on expiry of a period of five years.

Implementing conditions for this article are laid down in a Decree by the Council of State.

The rights on a cinematographic work may also be subject to a pledge or a security, according to article 36 of the French Code on the Cinematographic Industry.²⁷⁷

Whether the rights on other types of works may be subject to a pledge or a security under French law is unclear. The legal literature tends to accept the possibility without discussing the issue any further. It has been argued that, because of the intangible nature of the right and the impossibility for the owner to transfer the possession of the right to the grantor of the security, any pledge or security taken on a copyright should be registered. Since there is no such general register – outside of the special register held for computer programs and cinematographic works – the requirement of publicity can hardly be fulfilled.²⁷⁸

4.3.8 Termination of contract

4.3.8.1 Non-use of rights

The right of an author or performer to put an end to a contract because the exploiter failed to use the rights acquired is closely linked to the latter's obligation to exploit such rights. The French CPI

²⁷⁷ Article 36 of the French Code on the Cinematographic Industry reads as follows: 'Sauf dispositions contraires portées au contrat et inscrites au registre public, le bénéficiaire d'un des droits visés aux alinéas 2° et 3° de l'article 33 dûment inscrit, et sur production de l'état prévu à l'article 37, encaisse seul et directement, nonobstant toute opposition autre que celle fondée sur un privilège légal, à concurrence de ses droits et suivant l'ordre de son inscription, le montant des produits du film, de quelque nature qu'ils soient, et ce, sans qu'il soit besoin de signification aux débiteurs cédés qui seront valablement libérés entre ses mains'.

²⁷⁸ See: Lucas and Lucas 2001, p. 399.

imposes an obligation to exploit the rights on a work only on the publisher (article L. 132-12) and the producer of audiovisual work (article L. 132-27). It is an obligation of means and not of result. In any case, a publishing contract terminates automatically if, upon formal notice by the author fixing a reasonable period of time, the publisher has not proceeded to the publication of the work. The same rule applies when the publisher does not republish a work of which two orders for delivery of copies have not been met within three months (article L. 132-17). Article L. 132-19(3) provides that in case of an interruption of performances for two consecutive years, the performance contract is automatically terminated.²⁷⁹

In a case involving the contractual obligations of a record producer, the *Cour de Cassation* has recognised the obligation of the producer to exploit the performances on the basis of article 1315 of the French Civil Code. However, the Court further declared that it is up to the beneficiary of an obligation of means to provide evidence of the default of the person owing the obligation. The breakdown of a negotiation is not sufficient to reverse the burden of proof and to establish a breach by the producer. This is precisely where lies the difference between an obligation of means and an obligation of result. In practice, the solution seems severe, for it will be almost impossible for the performer to establish default by the producer. Since the French CPI is silent on the possibility for a performer to put an end to a contract for non-use of his rights, it is a matter falling under the provisions of the French Civil Code whether a performer is entitled to unilaterally end a contract under such circumstances.

4.3.8.2 Bankruptcy of exploiter

Article L. 132-15 of the French Intellectual Property Code provides that an author may request termination of a publishing contract if ‘the activities of the enterprise have ceased more than three months earlier or where judicial liquidation is pronounced’. Article L. 132-30 provides a similar rule for audiovisual production contracts. It is unclear whether these rules may be applied by analogy to other types of contracts.²⁸⁰

4.3.8.3 Other circumstances

Under French copyright law, the author may require termination of the publishing contract if the publisher has carried out the destruction of all copies.²⁸¹

²⁷⁹ Cour d’appel de Paris (1ère Ch.) - 8 June 1999 (Audiovisual works : Obligation to exploit of the distributor), *RIDA* 2000/183, p. 311.

²⁸⁰ Von Lewinsky 1995, p. 715. See: Cour d’appel de Paris (3e Ch.) - 7 May 1999 (Audiovisual works: liquidation of the assignee of the rights - consequences for the author’s rights), *RIDA* 2000/183, p. 299.

²⁸¹ French Intellectual Property Code, art. L. 132-17(1).

4.4 Germany

At the outset, mention must be made of the recent legislative developments concerning copyright contract law in Germany. After almost three decades of discussions, the German Parliament has finally adopted in the first months of 2002 a number of substantive modifications to the German law on copyright contracts.²⁸² These amendments are meant to improve the situation of authors and performing artists and focus primarily on the rules of interpretation of copyright contracts, on the determination of remuneration to authors and performing artists, and on collective bargaining.

4.4.1 Ownership of Rights

4.4.1.1 Creator doctrine

The creator doctrine (*Schöpferprinzip*) constitutes a fundamental principle of the German authors' rights regime. Someone other than the natural person who created the work can be presumed the author of the work and the owner of the rights therein only in one instance: in the case of anonymous or pseudonymous works. In principle, the person whose name or generally known pseudonym or signature appears in the usual manner on copies of the work or when it is disclosed to the public, is deemed, in the absence of proof to the contrary, to be its author. However, if a work is published without any indication of the name of the author, the editor, if he is named, or otherwise the publisher, is deemed to represent the author.²⁸³ With respect to performers, the German Copyright and Related Rights Act contains no rule on the initial ownership of the related rights of performing artists. German commentators share the unanimous opinion that the performing artist is always *ab initio* the physical person who executes the performance. The law is also silent regarding the presumption of ownership of rights on performances.²⁸⁴

4.4.1.2 Works created under employment

The only exception to the creator doctrine recognised under German law is paragraph 69b of the Copyright Act which implements article 2(3) of the Computer Programs Directive concerning the employer's ownership of software created by employees in execution of their duties or following given instructions. For all other works created under employment, the ownership of rights vests in the physical person who created the work in accordance with the principle laid down in paragraph 7 of the German Copyright Act. According to paragraph 43 of the Copyright Act however, paragraphs 31 to 42 of the Act relating to the exploitation of rights apply 'if the author has created the work in execution of his duties under a contract of employment or service provided nothing to the contrary transpires from the terms or nature of the contract of employment or service'. As examined in greater detail in Chapter 4 of this study, paragraphs 31 to 42 of the Act in fact contain measures designed to protect the author in his or her contractual relationship with entities that exploit his or her work under a licence. For paragraph 43 to apply there must exist an employer-employee relationship, i.e. one characterised by the employer's possibility to exercise control over the employee's actions.²⁸⁵ This requirement therefore excludes any application of paragraph 43 of the Act to freelancers, independent and autonomous workers, and the like. On the basis of this provision, German courts have constantly held that author employees have an obligation to grant

²⁸² Gesetz zur Stärkung der vertraglichen Stellung von Urhebern und ausübenden Künstlern, BGBl. I, No. 21, 28 March 2002, p. 1155.

²⁸³ German Copyright Act, art. 7.

²⁸⁴ Brison 2001, p. 611.

²⁸⁵ Kraßer 1995, p. 89.

their employer a licence of exploitation so as to give the latter the necessary powers to use the work to carry out his normal business activities.²⁸⁶

The German Copyright Act contains a similar provision applicable to performers bound by an employment contract. Paragraph 79 provides that ‘if a performer has given a performance in execution of his duties under a contract of employment or of service, the extent and conditions under which his employer may use it or authorize others to use it shall be determined, if not otherwise agreed, by reference to the nature of the contract of employment or service’. According to this paragraph, unless the parties agree otherwise, the performer is deemed to have granted his or her employer an implied licence for the use of the performance in accordance with the employer’s normal business activities.²⁸⁷

4.4.1.3 Works created on commission

The German Copyright and Related Rights Act contains no provision regulating the ownership of works or other subject matter created on commission. One must therefore conclude that, whenever a work is created on commission, the creator doctrine applies and the actual author is recognised as having the ownership of the rights on the work thus created.

4.4.1.4 Audiovisual works

Articles 88 to 94 of the German Copyright and Related Rights Act set out special rules on cinematographic works (“*Filmwerke*”).²⁸⁸ According to the creator doctrine, codified in article 7 of the Act, authors of a cinematographic work are the natural persons who have contributed to the creation of the work.²⁸⁹ Thus, all rights are primarily conferred to the physical persons making a creative contribution to the audiovisual work. In order to exploit the work, the exploiter must therefore acquire the rights from the different co-authors. According to article 89(1), any person who undertakes to participate in the production of a film is deemed, in doubt, to have granted to the producer of the film an exclusive right to utilize (*Nutzungsrechte*) the cinematographic work as also translations and other adaptations or transformations of the cinematographic work in any known manner. This presumption does not apply to authors of pre-existing works, such as novels, screenplay and film music (article 89(3)). These authors have the right to use their works for other cinematographic purposes after the expiration of ten years from the conclusion of the contract. With respect to performers, article 92(1) provides that, in case of doubt, a contract between a performer and a producer constitutes assignment of the right to record, reproduce and broadcast the performance. However, contrary to what articles 2(5) and (6) of the Rental and Lending Rights Directive allows, the German Copyright Act establishes no legal presumption of transfer of the rental right from the authors or performers to the producer of the audiovisual work. In other words, authors of all kinds as well as performing artists and producers dispose of an exclusive rental right under German law.

²⁸⁶ Dietz 2000, p. 50. See also BGH, September 27, 1990, GRUR 1991/ 523 (*Grabungsmaterialien*).

²⁸⁷ Rojahn 1999, p. 1219.

²⁸⁸ Cinematography is defined by the Court of Berlin as “the recording and communication to the public of moving pictures, by which pictures are recorded and projected very fast, in analogues order”. LG Berlin, March 17, 1998, 16 O 93/98. See Haupt 1999, p. 901. According to article 95, the rules of article 88, 90, 91, 93 and 94 apply likewise to moving pictures (“*Laufbilder*”), i.e. “sequences of images and to sequences of images and sounds which are not protected as cinematographic works”.

²⁸⁹ Depending on the question whether the work can be separately exploited, a creator is deemed author of a joint work (article 8) or author of a compound work (article 9). Ulmer 1980, p. 200, 201; Dietz 2000, p. 48, 49.

4.4.2 Forms of transfers of rights

4.4.2.1 Assignment

Germany differs from most countries of continental Europe in that they follow a ‘monist’ approach to author’s rights. Under this approach, the author’s economic and moral rights are considered to be so thoroughly intertwined that the economic aspect of the right cannot be dissociated from the right’s personality aspect.²⁹⁰ Following the monist approach, copyright is a unitary right that protects the author with respect to intellectual and personal relations to his work, as well as with respect to the exploitation of his work. The German Copyright and Related Rights Act allows authors to grant licences to use their works, but do not permit transfer of ownership, except by testamentary disposition.²⁹¹ The exploitation of the author’s economic interest (*Verwertungsrechte*) occurs therefore only through the grant of ‘privileges’ to use the work (*Nutzungsrechte*), which can be exclusive (*Werknutzungsrecht*) or non-exclusive (*Werknutzungs-bevilligung*).²⁹² The ownership of the authors’ economic rights may therefore not be transferred, except by way of testamentary disposition. A mention in contract to a transfer of the rights of ownership in a work by way of a security pledge has been interpreted as an unrestricted privilege to use the work.²⁹³ Although an author may grant a global licence of all exploitation rights in a work, upon termination of the licence for any reason, all rights revert to the author. In Germany, the monist system’s strong personal rights foundation does not extend to the protection of the rights of the performing artists. Contrary to the protection afforded to authors, where neither the exploitation nor the moral rights may be assigned, the German Copyright Act expressly provides that a performing artist may freely transfer his exploitation rights to third parties.²⁹⁴ In other words, performing artists may transfer the right to consent to transmission by screen or loudspeaker, recording, reproduction and distribution, broadcasting and communication to the public. In practice, artists must often transfer all their rights to the exploiter, with the exception of the protection against distortion.²⁹⁵

4.4.2.2 Licence

In Germany like in Austria, an author may grant an exclusive exploitation right, which entitles the exploiter to use the work to the exclusion of all other persons, including the author. Where the license is non-exclusive, the exploiter uses the work concurrently with the author or any other entitled person (article 31(2)). However, according to the recently modified article 33 of the Copyright Act,²⁹⁶ the exclusive exploitation right and the non-exclusive permission to use remain opposable to subsequent holders of licences. The same applies when the rights holder who granted the right to use changes or when he waives his right. Article 38(1) provides that if the author consents to the inclusion of his work in a periodical, the publisher or editor is deemed, in case of doubt, to have acquired an exclusive right of reproduction and distribution. According to article 38(2), the publisher or editor is deemed to have acquired a non-exclusive exploitation right if the contribution is made to a newspaper. If the author of the contribution granted an exclusive exploitation right, he may, unless otherwise agreed, nevertheless use the work immediately after the appearance of the contribution. Article 2(1) of the Publishing Act provides that the author must, during the subsistence of the contractual relationship, refrain from all such exploitation of the work

²⁹⁰ Schricker 1999, p. 553.

²⁹¹ German Copyright Act, § 29.

²⁹² Strowel 1993, p. 356; and Boytha 1991, p. 201.

²⁹³ BGH, 20 January 1994 (*Holzhandelsprogramm*) IIC 1995/05, p. 720.

²⁹⁴ German Copyright Act, § 78. See: Nordemann and Schierholz 1998, p. 83.

²⁹⁵ Nordemann and Schierholz 1998, p. 83.

²⁹⁶ *Gesetz zur Stärkung der vertraglichen Stellung von Urhebern und ausübenden Künstlern*, Deutscher Bundestag, 14. Wahlperiode, Drucksache 14/8058, 25 January 2002, Bundesrat, Drucksache 74/02, 8 February 2002.

as is prohibited to any third party during the subsistence of the copyright. However, article 2(2) of the Publishing Act holds an extensive list of rights that the author is deemed to retain. These are the right to: translate the work; reproduce a novel in the form of a drama, or vice versa; adapt a musical work; reproduce the work mechanically for the ear; and, to make a pictorial representation of the work. Moreover, article 2(3) states that the author may use his work in a compilation twenty years after the work was published. Article 8 states the author's obligation to secure the publisher the exclusive right to multiplication and distribution.

4.4.2.3 Waiver

In a 'monist' country like Germany, the author's economic and moral rights are considered to be so thoroughly intertwined that the economic aspect of the right cannot be dissociated from the right's personality aspect. In principle, neither the economic nor the moral rights of authors are transferable. Article 11 affirms the principle that copyright protects the author's intellectual and personal relationship to his work. In particular, the Copyright Act recognises the following three attributes to the author's moral rights: the right of first publication (article 12); the right to paternity (article 13); and the right of integrity (article 14). According to article 39, the holder of an exploitation right may make such alterations to the work and its title that the author cannot reasonably refuse. Article 62 enumerates circumstances under which alterations are permissible with respect to the use of works, which use falls within the limitations on copyright provided by the Code. Finally, article 93 explicitly limits the moral right provided in article 14, with respect to cinematographic works, to gross distortion to or other gross mutilation of the author's contribution. German courts use the balance of rights test for almost each right and will enforce a waiver of rights to the extent that it corresponds to practical needs and to a fair weighing of interests.²⁹⁷

4.4.3 Requirements of form

In general, German copyright law fixes no formal requirement for the validity or the evidence of a transfer of rights. The form of the contract is thus free subject to the application of the general rules of civil law laid down in the *Bürgerliches Gesetzbuch* (BGB).²⁹⁸ Article 40 of the Copyright Act states, however, that agreements by which an author undertakes to grant exploitation rights in future works which are in no way specified or only referred to by type shall be in writing. In the absence of an instrument in writing, the agreement is null. Not all contracts are covered by this provision however. The only contracts that are regulated by this provision are contracts that pertain to works that are not specified or only referred to by type, such as contracts of agency, contracts of preference, and contracts of employment. For example, a contract that relates to the creation of a catalogue of the works of a particular painter has been considered not to fall under the scope of article 40 of the Act.²⁹⁹ In this case, the Court of Appeal of Frankfurt upheld the validity of an oral contract regarding the publication of the catalogue since it concerned one work that was not yet created but the type and content of which was sufficiently determined.

4.4.4 Restrictions on transfers of rights

4.4.4.1 Limits of scope, time, and place

Article 31(1) of the German Copyright Act provides that an author may grant another person a licence on one or all of his rights to use the work. A licence may be exclusive or non-exclusive and

²⁹⁷ Dietz 2000, p. 94.

²⁹⁸ Schricker 1999, p. 650.

²⁹⁹ OLG Frankfurt, 12 July 1990 (*Werkverzeichnis*), GRUR 1991/08, p. 601.

may be limited in respect of place, time, or purpose. The mention in the contract of the scope of the transfer of rights with respect to the place, time, and purpose of the intended use is not an obligation. However, the consequence of the failure to mention each right to use with respect to each independent means of exploitation is that such right will not be deemed included in the licence. For instance, the Federal Supreme Court has ruled, in application of article 31 of the Copyright Act, that the owner of an exclusive licence to publish a ‘paperback’ edition of a book is not entitled to prevent a third party from publishing a special, cheap hard-cover edition of the same work.³⁰⁰

4.4.4.2 Future forms of exploitation

Article 31(4) of the German Copyright Act states that ‘a licence purporting to grant rights with respect to unknown means of utilisation, and any obligation with respect thereto shall have no effect’. Obviously, under the rule of article 31 (4) the moment of knowledge of a novel use is crucial in determining the scope of a license. German courts must consider whether the language used in the contract may or may not have contemplated the specific use at issue.³⁰¹ Generally, ‘future or unknown forms of exploitation’ have been defined as those forms of use that are not technically possible or, even if so, the economic relevance of which is not known at the time of conclusion of the contract. Hence, a form of use is deemed to be new, when it is a clearly distinguishable economic and technical mode of exploitation of a work. In turn, a mode of exploitation is distinguishable from others when it permits a better quality or a larger quantity of use. These concepts were developed by the German Federal Supreme Court in a series of cases, known as *Videozweitverwertung* cases, which pertained to the secondary exploitation of films on video.³⁰²

More recently, the District Court of Hamburg had to decide whether the use of photographic works in an annual CD-ROM compilation of news magazine *Der Spiegel* infringed the rights of freelance photographers.³⁰³ The annual CD-ROM, which contained the full texts and illustrations of the printed volumes (not including advertisements), started to appear in the spring of 1993. The photographers had granted no express permission for electronic uses. According to FreeLens, an association of some 70 freelance news photographers, the licences previously granted by its members to *Der Spiegel*, either in oral or in written form, did not extend to re-uses on CD-ROM. According to the District Court, at the time the licences were granted (in 1989 or later) CD-ROM was a known use, even if market success for the new medium came only later. Thus, the photographers could not invoke article 31(4). In interpreting the licences, the District Court noted that the photographers had never previously objected to republication of their works in printed compilations, or in microfilm versions of the same. Accepting *Der Spiegel’s* argument, the District Court observed that the CD-ROM edition was merely a substitute for previous paper or microfilm editions. The licences were deemed to include the right to republish the photographs on CD-ROM. On appeal, the FreeLens decision was overturned.³⁰⁴ The Court of Appeal of Hamburg considered that the CD-ROM, compared to the magazine, the bound volume, and the microfilm, constituted a new independent means of exploitation, since a CD-ROM allows for a more intensive use, and is not merely a new technique for transmission. Moreover, consumers perceive CD-ROM as a medium different from print or microfilm.³⁰⁵

³⁰⁰ BGH, 12 December 1991 (*Taschenbuch-Lizenz*), IIC 1993/03, p. 416.

³⁰¹ For case law on this topic, see Dietz 2000, p. 53 (footnotes 26, 27). See also Soetenhorst 1993, p. 112 for literature on this topic.

³⁰² BGH, 11 October 1990 (*Videozweitverwertung I*), GRUR 1991, p. 133, English translation in IIC 1991, p. 574; BGH, 26 January 1995 (*Videozweitverwertung III*), GRUR 1995, p. 212; see also: BGH, 13 May 1982 (*Altverträge*), GRUR 1982, p. 727.

³⁰³ LG Hamburg, 19 August 1997 (*FreeLens*), M&R 1998, p. 44.

³⁰⁴ OLG Hamburg, 5 November 1998 (*FreeLens*), M&R 1999, p. 225.

³⁰⁵ Hugenholtz and de Kroon 2000, p. 18.

In July 2001, the Federal Supreme Court upheld the decision of the Court of Appeal in the *Spiegel-CD-ROM* case.³⁰⁶ In essence, the Supreme Court ruled that the publisher had no right to reproduce the photographs in a CD-ROM without the author's consent and that a permission to make such a use of the photographs had neither expressly nor tacitly been licensed. Moreover, even if the CD-ROM did not constitute a new form of exploitation at the end of 1988 when the plaintiff first licensed the rights in his photographs, such rights had not been transferred to the publisher insofar as they were not expressly and individually mentioned in the contract. The Court added that even if the commercialization of the CD-ROM edition of the Spiegel did not yield the economic revenues expected, this edition was suitable to encompass a new independent market of exploitation, because in comparison with the printed and microfilm editions of the compilation, the CD-ROM had an entirely different market potential.

4.4.4.3 Future works

Article 40 of the German Copyright Act permits the grant of exclusive exploitation rights with respect to future works. Under the circumstances described in the first paragraph, the grant of rights must be in writing. Agreements on future works may be terminated after a period of five years. If no shorter period has been agreed, six months notice of termination shall be given. This right to terminate may not be waived (*verzichtet*) in advance (article 40(2)). Termination of the agreement by which the future rights are granted means that the provision regarding these works shall cease to have effect in respect of works that have not yet been supplied at that time (article 40(3)).

4.4.5 Determination of remuneration

4.4.5.1 Fair compensation

The recent modifications to the German Copyright Act constitute a significant exception to the noticeable reluctance of European legislators to rely on the principle of 'fair compensation' as a usable mode of determination of the compensation due to authors and performing artists, instead of proportional remuneration or lump sum payments.³⁰⁷ Article 32 of the new Act, entitled 'fair compensation', contains extensive protection measures guaranteeing authors the payment of a fair remuneration for the exploitation of their work. According to the first paragraph, 'the author has a right, for the grant of an exclusive exploitation right and the non-exclusive permission to use, to the contractually agreed remuneration. If the amount of the remuneration is not specified, the parties are presumed to have agreed to a fair remuneration. If the agreed compensation is not fair, the author may request from his co-contractor the authorisation to modify the contract so that a fair compensation is guaranteed.' The second paragraph establishes a presumption according to which a compensation fixed in the context of collective agreement is fair. This presumption is to be read in conjunction with the new article 36, on collective bargaining, which is described below. If there is no collective bargaining agreement in force in a particular branch, the compensation is deemed fair if it corresponds at the time of conclusion of the contract – and not at the time the claim is made – to what is usual and fair in the practice, having regard to the nature and scope of the rights to use, and to all circumstances in particular the duration and the scope of the use. In other words, as Lenselink points out: "'fair' is what is common in a particular branch, provided that it is fair!"³⁰⁸ Pursuant to paragraph three of article 32, an agreement that deviates from the first two paragraphs to the disadvantage of the author is held invalid. Moreover, the prescriptions of the first paragraph are also

³⁰⁶ BGH, 5 July 2000, *ApP* 2002/1, p. 35.

³⁰⁷ *Gesetz zur Stärkung der vertraglichen Stellung von Urhebern und ausübenden Künstlern*, Deutscher Bundestag, BGBl I, No. 21, 28 March 2002, p. 1155.

³⁰⁸ Lenselink 2002, p. 36.

applicable when other arrangements apply. However, the author may grant anyone a free non-exclusive permission to use his work.³⁰⁹ According to the fourth paragraph, the author may not ask for the revision of the contract, if the remuneration paid for the use of his work is regulated under a collective bargaining agreement.

According to some commentators, this new provision may lead to some difficulties in practice. First, it has been observed that the notion of ‘fair compensation’ is an entirely new concept in German copyright law, which the courts have yet to interpret. As Schippan points out, ‘although a certain insecurity is implied in all grey legal concepts, the new regulation might lead to a large number of legal proceedings because in practice authors and producers will have extremely different considerations in regard to the fairness of the compensation in a single case’.³¹⁰ Furthermore, the fact that the fair compensation applies in addition to any other sum that the author or performing artist might receive under a contractual arrangement may affect the current contractual practice of some exploiters, like film and broadcast producers, and not always to the advantage of the author or performer. Indeed, it is not uncommon in this branch for authors and performing artists to be paid on the basis of a buy-out-contract. According to this remuneration scheme, the producer pays authors and performers receive a lump sum, which allows him to calculate his risks accordingly. With the introduction of article 32, the producer may be caught in a situation where he can no longer assess the risk in a reasonable manner as he does not know what the authors and performers participating in the production of the work will claim as their fair compensation in the future years in addition to the already paid contractual remuneration. As a consequence, producers will probably lower the basic contractual remuneration paid to authors and performers, letting them share the risk of the production, which may ultimately have a negative impact on their financial position.³¹¹

The new German Copyright Act also introduces, at article 36, unique provisions on collective bargaining, also known as ‘overall agreements’, according to which associations of authors or performers may conclude general agreements with associations of exploiters regarding rules of remuneration. The law encourages therefore the parties to negotiate collective agreements. It follows in this sense the American example, where groups of authors and performing artists and groups of exploiters successfully negotiate collective agreements, also known as *Guild Agreements*, on the conclusion of exploitation contracts.³¹² These ‘overall agreements’ will contain certain ‘common remuneration rules’ building the basis for the single contracts with authors and performers.³¹³ Where the parties fail to reach an agreement, articles 36 and 36a also set up an arbitration procedure open to all parties, for the determination of a fair compensation. German copyright law further sets out a number of specific instances where authors must receive a fair remuneration. According to the wording of article 22(1) of the Publishing Act, there exists an implied obligation of the user to pay remuneration if, ‘under the circumstances, the delivery of the work could not be expected except for payment’. If the amount of payment is not specified, the parties are presumed to have agreed to ‘an appropriate payment in money’ (article 22(2)). Where the compensation is fixed in accordance with the number of copies sold, the publisher shall render annually to the author an account for the preceding business year, and shall permit the inspection of the books of his firm, so far as is necessary for the examination of such account. Article 86 of the German Copyright Act states that ‘if a published audio recording on which a performance has been fixed is used for public communication, the producer of the audio recording may claim from the performer a fair participation in the remuneration which the performer receives pursuant to Article 76(2) and Article 77’.

³⁰⁹ This provision is aimed to allow the ‘open source licensing’ phenomenon. See: Lenselink 2002, p. 36.

³¹⁰ Schippan 2002, p. 172.

³¹¹ Ibid.

³¹² Lenselink 2002, p. 36.

³¹³ Schippan, p. 173.

4.4.5.2 'Best-seller' clause

Until recently, the principle known as the 'bestseller clause' was laid down in article 36(1) of the German Copyright Act. According to this principle, if an author had granted an exploitation right on conditions which caused the agreed remuneration to be grossly disproportionate to the income from the use of the work, the user could be required, at the demand of the author, to assent to a change in the agreement 'such as will secure for the author a fair share of the income having regard to the circumstances'. This claim expired two years from the time the author obtains knowledge of the circumstances that gave rise to the claim or after ten years, irrespective of such knowledge (article 36(2)). Authors could not waive or renounce ("*verzichtet*") this claim in advance (article 36(3)). In practice, this clause has never been of great importance, because the courts were too reluctant in the factual circumstances presented to them to find the existence of a gross disproportion.³¹⁴ Moreover, authors of cinematographic works had, according to article 90(2) of the Act, no right to demand revision of their contract under article 36. Moreover, it was unclear whether performing artists could invoke the application of article 36(1) of the Act and request the revision of their contract.

With the adoption of the recent amendments to the German Copyright Act, authors and performing artists now have the right to request the modification of the copyright contract according to article 32a of the Act. Paragraph one states that where the author grants a right to use under such conditions that, taking account of the entire relationship between the parties, there exists an obvious disproportion between the agreed consideration and the proceeds and benefits flowing from the use of the work, the other party is under the obligation to allow, at the author's request, the modification of the contract to ensure a fair participation. Whether the contracting party had or could have foreseen the amount of the actual proceeds or benefits is irrelevant. Where, as a result of the contracting party's transfer of his right to use or further grant of non-exclusive licenses, an obvious disproportion in the proceeds and benefits of a third party occurs, the author may hold the latter directly liable as provided in the previous paragraph, but taking the chain of contractual relationships in consideration. The liability of the initial contracting party falls.³¹⁵ The author may not renounce in advance the rights granted under these two paragraphs. The author may not ask for the revision of the contract under paragraph 32a(1), if the remuneration paid for the use of his work is regulated under a collective bargaining agreement or a collective wage agreement and expressly provides for the payment of a fair participation in the circumstances described in the first paragraph. Most importantly, the provisions of article 32 and 32(a) have been declared mandatory under article 32(b) of the Act, whenever German law is declared applicable to the contract in the absence of a clause on choice of law, or when the subject-matter of the contract falls under the scope of the Copyright Act.

4.4.6 Interpretation of contracts

Contrary to the law of a number of other Member States, German copyright law does not follow the rule '*in dubio pro auctore*'. Article 31(5) of the German Copyright Act codifies the so-called 'purpose-of-transfer' rule (*Zweckübertragungslehre*). This provision has been recently modified to add a second paragraph setting out the factors to consider in the evaluation of the scope of the transfer. It now reads as follows: 'If the types of use to which the exploitation right extends have not been specifically designated when the right was granted, the scope of the exploitation right shall be determined in accordance with the purpose envisaged in making the grant. Appropriate factors to consider for the question of whether a right to use is granted, is whether it concerns a simple or exclusive right to use, how far extend the right to use and the right to prohibit and what restriction

³¹⁴ Nordemann and Schierholz 1998, p. 93. For case on law this provision, see Dietz 2000, p. 61 (footnotes 60-62).

³¹⁵ Id., art. 32a(2).

affect the right to use'.³¹⁶ According to this rule, if the contractual terms do not specifically enumerate the uses for which the rights are transferred, the author will not be deemed to have granted more extensive rights than would be required by the purpose pursued in the transfer at issue. The application of this rule of interpretation has led to a number of important decisions from the Federal Supreme Court.³¹⁷ In the *Spiegel CD-ROM* case,³¹⁸ the Supreme Court observed that, thanks to the 'purpose-of-transfer' rule, the copyright powers have the tendency to remain as far as possible with the author so that the latter can take part in appropriate way in the profits generated from his work. The Court added that the purpose of transfer rule is not only useful to determine whether the questionable use concerns an type of use specifically designated when the right was granted, but is also useful to establish the boundaries of the right to use with respect to a particular type of use.

For a long time, it remained unclear whether the purpose-of-transfer rule applied to contracts concluded by performing artists. In the absence of an express provision in the German Copyright Act, the Federal Supreme Court eventually held, in the *White Christmas* decision,³¹⁹ that the purpose-of-transfer rule did apply to the transfer of right by a performing artist and that consequently, each intended use must be explicitly enumerated in the contract. In view of the persisting uncertainty regarding the interpretation of performers' contracts, the German legislator has recently amended the Copyright Act, in order to make article 31(5) of the Act expressly applicable to performing contracts.³²⁰

The Copyright Act provides additional interpretation rules of interpretation, which only apply in case there is doubt about the scope of rights transferred. Article 37 provides therefore that 'if an author grants to another an exploitation right in his work, he shall be deemed in case of doubt to have retained his right to authorize the publication or exploitation of any adaptation of the work'. Similarly, if an author grants to another the right to reproduce his work, he shall be deemed, in doubt, to have retained his right to record his work on video or audio mediums. The same presumption applies where an author grants to another the right to communicate his work to the public. In doubt, the licensee is not presumed to be entitled to make the communication perceivable to the public by screen, loudspeaker, or other similar technical device other than at the event for which it is intended. Articles 88(2), 89(1), and 92(1) contain special provisions relating to audiovisual works. The Publishing Act provides in article 4 that a publisher is not entitled to exploit a single work as part of a collective work, or to exploit part of a collective work as a separate edition.

4.4.7 Effect of transfer in relation to third parties

4.4.7.1 Right to transfer acquired rights

In principle, nothing precludes a transferee from further transferring the acquired rights to a third party.³²¹ Following the recently modified article 33 of the German Copyright Act, the exclusive exploitation right and the non-exclusive permission to use remain effective against subsequent licences of use. The same rule applies, when the rights holder, who has transferred the right to use, changes or when he has waived his right. According to article 34(1) of the Act, the holder of an *exploitation right* may, with the consent of the author, transfer this right or grant non-exclusive rights

³¹⁶ See Dietz 2000, p. 54 (footnote 34) for relevant case law and also Donle 1993.

³¹⁷ BGH, 5 July 2001 (*Spiegel CD-ROM*), *AfP* 2002/1, p. 35; BGH 131, p. 8 (*Pausshale Rechtseinräumung*); BGH 137, p. 387 (*Comic-Übersetzungen I*).

³¹⁸ BGH, 5 July 2001 (*Spiegel CD-ROM*), *AfP* 2002/1, p. 35.

³¹⁹ BGH, 23 February 1979 (*White Christmas*), *GRUR* 1979, p. 637.

³²⁰ *Gesetz zur Stärkung der vertraglichen Stellung von Urhebern und ausübenden Künstlern*, BGBl. I, No. 21, 28 March 2002, p. 1155, art. 14.

³²¹ See: OLG München, 8 February 1996 (*Accatone*), *GRUR* 1996/12, p. 972 (the license of television broadcast rights of a film 'within the territory of the licence' may be validly transferred to a third party 'outside' of that territory).

to use to a third party. However, the author may not unreasonably withhold his consent. An exploitation right may be transferred without the author's consent when the transfer occurs in the context of the sale of whole or part of an enterprise. However, the author is entitled to redeem his right, if he cannot be expected to agree to the exploitation of his work by the purchaser in good faith. The author is also entitled to redeem his right if the participation rates of the company owning his exploitation rights are changed fundamentally (new article 34(3)).³²²

The rules concerning the right transfer of exploitation rights have been further improved in favour of the author. The transferee of an exploitation right is thus jointly and severally liable for discharging the transferor's obligations pursuant to his agreement with the creator, when the author has not expressly and individually consented to the transfer of the exploitation right (new article 34(4)). The author may not waive in advance the right to redeem his right nor the liability of the subsequent acquirer. In all other respects, the holder of the right to use and the author may agree otherwise (new article 34(5)).³²³ However, the grant of non-exclusive licenses solely for the administration of the author's interests does not need the author's consent (article 35(1)). Articles 34 and 35 of the Act are not applicable to the transfer of the right to produce a cinematographic work and, after the shooting of the film has begun, to the transfer of the right to make a cinematographic adaptation of an existing work (new article 90). It is worth pointing out that, although a proposal in this sense had been made in an earlier draft of the Bill, the protection granted under articles 34 and 35 of the Act has not been extended to performing artists who make a contribution to a cinematographic work. Finally, until the recent amendments to the German law of copyright contracts, the Publishing Act provided in article 28(1) that, the rights of the publisher could be transferred, provided the transfer had not been precluded by stipulation between the author and publisher. The publisher could not, however, transfer his rights respecting a specific work without the consent of the author. Consent could only be refused for an important reason and would be considered given if the author had not reacted within two months after the publisher's request. This provision has been revoked.

4.4.7.2 Standing to sue

Although the German Copyright Act is silent on this point, the Federal Supreme Court has held that neither the licensee of an exclusive copyright exploitation right, who himself grants an exclusive sublicense, nor the author of the work in question, when granting exclusive licences, loses his right to sue, insofar as the former has a personal interest, which is worthy of protection, in prosecution. This interest can be based on an impairment of his claim to licence fees.³²⁴ In addition, article 9(2) of the Publishing Act provides that the publisher is entitled, as far as is required for the protection of the right of publication, to exercise the rights provided by the law for the protection of copyright, against the author as well as against third parties.

4.4.7.3 Right to pledge, secure or seize acquired rights

There is no provision in the German Copyright Act concerning the transferee's power to pledge, secure, or seize the acquired rights.

³²² Schippan 2002, p. 173.

³²³ Lenselink 2002, p. 37.

³²⁴ BGH, 17 June 1992 (*Aff*), *IIC* 1993/04, p. 539.

4.4.8 Termination of contract

4.4.8.1 Non-use of rights

Under German law, an author has the right to revoke (*zurückrufen*) the exploitation right if the holder does not exercise the right or exercises it insufficiently on the condition that the non-use causes serious injury to the author's legitimate interests and is not due to circumstances that the author can remedy (article 40(1) of the Copyright Act). The author may exercise this right after expiration of two years from the date of transfer or delivery. In case of a contribution to a newspaper this period is three months, for periodicals appearing at monthly intervals or less: six months and for contributions to other periodicals: one year (article 40(2)). The holder shall be notified and afforded an additional period of time adequate to sufficiently exercise the right (article 40(3)). The author must indemnify the person affected by the revocation if, and to the extent required by equity (article 40(6)). This right may not be waived in advance and its exercise may not be precluded in advance for more than five years (article 40(4)). A number of contributors to a cinematographic work do not have this right of termination (article 90).

Article 17 of the German Publishing Act provides that the author may rescind the contract if the publisher does not exercise his right to publish a new edition after expiration of an appropriate term. According to article 32, the author may rescind the contract if the work is not exploited in the manner stipulated in the contract. Article 35(1) states that until multiplication has begun, the author is entitled to rescind the contract of publication when circumstances arise which could not have been foreseen at the time of making the contract, and which would have kept the author from publishing the work if he had known the facts and reasonably evaluated the case. Where the publisher is authorized to issue a new edition, the foregoing provisions shall apply *mutatis mutandis*. Where the author rescinds the contract in accordance with the provisions of subsection (1), he must compensate the publisher for expenses incurred by him. Where the author publishes the work elsewhere within one year from the rescission, he shall be liable for damages for non-fulfilment; but such liability for damages shall not arise where the author has subsequently offered the publisher to fulfil the contract, and the publisher has not accepted such offer. The provisions of Section 346 and 356 of the Civil Code, relative to the rescission of contracts, shall apply to the right of rescission provided in Sections 17, 30, 35 and 36. Where rescission takes place through a circumstance for which the other party is not to be held responsible, such party shall be liable only in accordance with the provisions relative to restitution for unjust enrichment. Where a contract of publication is rescinded after the work has been delivered in whole or in part, the question whether the contract is to remain in force partially is to be determined by the circumstances. It is in principle immaterial whether the rescission takes place on the basis of the statute or in pursuance of a reservation in the contract. In case of doubt, the contract remains in force in so far as it related to copies, which are no longer within the control of the publisher, as well as to former instalments of the work, and previous editions. If the contract remains in force, the author may claim a proportionate part of the payment. These provisions also apply where the contract is rescinded in some other manner. Finally, article 45 gives the author of a contribution the right to terminate the contract if his work is not exploited within one year from the date it was delivered to the publisher.

4.4.8.2 Bankruptcy of exploiter

Article 36(3) of the German Publishing Act provides in that the author may rescind the publishing contract, if, at the time of commencing the bankruptcy proceedings, the reproduction had not begun.

4.4.8.3 Other circumstances

Article 42 of the German Copyright Act provides that the author may revoke an exploitation right if the work no longer reflects his conviction. The author must equitably indemnify the holder of the exploitation right. Certain contributors to a cinematographic work do not have this right (article 90). The Publishing Act describes in article 18, 30 and 31 three circumstances that give the publisher the right to terminate the contract. These circumstances are: the purpose that the work was to serve ceases to exist; the work is not delivered in due time; or, the work is not of the nature stipulated in the contract. An author has the right to terminate the publishing contract until the moment the multiplication of the first or a new edition has begun, when circumstances arise which could not have been foreseen at the time of making the contract, and which would have kept the author from publishing the work if he had known the facts and reasonably evaluated the case (article 35(1)). The author has to compensate the publisher and he may not publish the work elsewhere within one year from the rescission or else he is liable for damages for non-fulfilment (article 35(2)).

4.5 Greece

4.5.1 Ownership of Rights

4.5.1.1 Creator doctrine

Articles 6 of the Greek Copyright Act³²⁵ incorporates the creator doctrine, when it states that ‘the initial holder of the economic rights and the moral rights in a work shall be the author of that work’ and that ‘the above-mentioned rights shall be vested in the author of a work without resort to any formality’. However, paragraph 10(1) of the Act establishes a rebuttable presumption of authorship in favour of the ‘person whose name appears on a copy of a work in the manner usually employed to indicate authorship’. In turn, paragraph 10(2) establishes a rebuttable presumption of ownership in favour of the natural or legal person whose name or title appears on a copy of a collective work, a computer program, or an audiovisual work. Article 11 of the Act designates, in relation to third parties, the publisher of an anonymous or pseudonymous work as the initial holder of the economic and moral rights in that work. When the true author of the work reveals his or her identity, he or she acquires these rights in the state that they are as a result of the actions taken by the fictitious rights holder.

4.5.1.2 Works created under employment

Article 8 of the Greek Copyright Act has been modified in 1997 to provide that the economic rights in works created by an employee are transferred automatically to the employer in the absence of any agreement to the contrary and to the extent that the transfer is necessary to achieve the purpose of the employment contract.³²⁶ In the same direction, article 40 of the Act states that proprietary rights on computer software developed in the framework of a work contract belong to the employer, unless otherwise provided by contract³²⁷. However, the latter limitation, which was intended initially to cover all employees, does not apply to works created in the course of the performance of duties arising from the employee’s function where the employer is the State or a legal entity governed by public law. In other words, not only the economic rights ‘necessary to achieve the purpose of the employment contract’ are transferred to the State or the public entity, but the *whole* economic component of the copyright in the work.³²⁸ Like the Irish and Spanish Acts, article 38(5) of the Greek Act provides, with respect to the ownership of photographs published in a newspaper or periodical, that these cannot be lent or published in a book or album by the employer without the employee’s consent. With regard to performers bound by an employment contract, article 46(3) states that a performer is presumed to authorise all the acts listed in article 46(2), including the first fixation of his live performance, the reproduction of fixations of his performance, the distribution of the recording of that performance, and its broadcasting and the communication to the public.

³²⁵ Law No 2121/1993 as amended by Laws 2173/93, 2435/1996, 2557/1997, 2819/2000.

³²⁶ Act No. 2557/1997, art. 8, par. 17.

³²⁷ Kanellos in Copyright software protection in the EC, Kluwer 1993, p. 106

³²⁸ Koumantos 2000, p. 18, 19.

4.5.1.3 Works created on commission

The Greek Copyright and Related Rights Act contains no provision regulating the ownership of works created on commission. One must therefore conclude that, whenever a work is created on commission, the creator doctrine applies and the actual author is recognised as having the ownership of the rights on the work thus created.

4.5.1.4 Audiovisual works

Under the Greek Copyright Act, the author of an audiovisual work is its principal director. Nevertheless, other creators may also be deemed authors of the work. The Act contains a non-exhaustive list of persons who are considered to be the creators of such contributions: the author of the screenplay, author of the dialogues, composer of the music, director of photography, set designer, costume designer, sound engineer and editor.³²⁹ According to article 10(2) of the Greek Copyright Act, in the case of collective works, computer programs or audiovisual works, the natural or legal person whose name or title appears on a copy of the work in the manner usually employed to indicate the right holder shall be presumed to be the right holder of the copyright in the particular work. Article 34(2) of the Act specifies that ‘the contract between the producer of an audiovisual work and the creators of individual contributions incorporated in the work, shall specify the economic rights which are transferred to the producer. If the aforementioned provision is not met, the contract between the producer and the authors of individual contributions, other than the composers of music and writers of lyrics, shall be deemed to transfer to the producer those powers under the economic right, which are necessary for the exploitation of the audiovisual work, pursuant to the purpose of the contract. Where the contributions to an audiovisual work are capable of separate use, the economic right in relation to other uses shall remain with their authors’. Thus, if a contract between a producer and an author does not specify the economic rights to be transferred, it is presumed that only the rights necessary for the exploitation of the work are transferred to the producer.³³⁰ The author of an audiovisual work has the right to receive a separate remuneration for each form of exploitation of the work (article 34(3)). Article 46(2) provides that performers shall have the right to authorize or prohibit: (a) fixations of their live performances on a visual or sound or audiovisual recording; and (b) the direct or indirect reproduction of fixations of their performances as well as the distribution of the recording via a transfer of ownership, a rental arrangement or public lending. There is therefore no presumption of transfer of ownership from the performer to the producer under Greek law.

4.5.2 Forms of transfers of rights

4.5.2.1 Assignment

Greece follows a ‘dualist’ approach, whereby the author’s right is considered to consist of two separate elements: the pecuniary element, or ‘economic right’, and a personality element, or the ‘moral right’. In dualist systems, economic rights can be freely assigned, either *inter vivos* or *mortis causa*, while moral rights are considered to be inalienable. The same remark also holds true with respect to the performers’ rights, where the economic element of the right can be assigned, but not its moral element.

4.5.2.2 Licence

³²⁹ Koumantos 1999b, p. 78.

³³⁰ Marinis 1999, p. 18.

The author of the work may conclude contracts, by which he entrusts economic rights to the other contracting party (exploitation contracts). The other party to the contract undertakes the obligation to exercise the rights thus entrusted. The author of the work may authorize another person to exercise economic rights (exploitation licenses). Exploitation contracts and licenses may be exclusive or non-exclusive. Exclusive exploitation contracts and licenses shall empower the other contracting party to exercise the rights conferred by the contract or license excluding any third person. Non-exclusive exploitation contracts and licenses shall give the right to the other contracting party to exercise the rights conferred by the contract or license in parallel to the author and other contracting parties. In the absence of an agreement to the contrary, the other contracting party shall be entitled in his own name to seek legal protection against illegal infringements by third parties of the rights he exercises. In case of doubt, article 13(4) of the Act specifies that the license is non-exclusive.³³¹

4.5.2.3 Waiver

According to article 12(2) of the Greek Copyright Act, moral rights are not transferable. Article 4(1) sets out a non-exhaustive list of moral rights, which are: the right of disclosure (article 33(7) and 38(4)); the right of integrity (article 34(1)); the right of access to the work; and, the right of withdrawal of the work from public. The granting of consent by an author for something that would otherwise constitute an infringement of his moral right is regarded to be a form of exercise of his moral right, and is binding upon him (article 16). Performers have, during their lifetime, the right to full acknowledgment and credit of their status and the right to prohibit any form of alteration of their performances. According to article 50 of the Act, the moral rights of performers are not transferable but may be waived, just like those of authors.

4.5.3 Requirements of form

In Greece, the transfer of an author's economic rights must be concluded in writing. The absence of a written instrument is met with the relative nullity of the contract.³³² The same rule applies to a waiver of moral rights. Article 52(a) provides that 'agreements concerning performers' rights shall be valid legal agreements only when concluded in writing'. It is unclear, however, whether in the latter case the absence of an instrument in writing leads to an absolute or a relative nullity.³³³

4.5.4 Restrictions on transfers of rights

4.5.4.1 Limits of scope, time, and place

Under Greek law, article 15(1) states that the transfer of the economic right and exploitation contracts or contracts licensing the exploitation of that right may restrict the rights they confer, their scope and duration, the geographical application and the extent or the means of exploitation. Following article 15(2) of the Greek Copyright Act, if the contract does not fix the duration of the rights transferred and nothing else derives from conventional usage³³⁴, the duration of the contract is limited to five years. Similarly, if the geographical application of the transfer or of the exploitation contract or license is unspecified, the said legal acts shall be deemed to apply to the country in which they were concluded.

³³¹ However, Koumantos [1996, p. 312] maintains that in case of doubt a licence is to be deemed exclusive.

³³² Greek Copyright Act 1993, art. 14.

³³³ Marinos 1999, p. 23; Koumantos 1996, p. 313.

³³⁴ Koumantos 2000, p. 20.

4.5.4.2 Future forms of exploitation

Article 13(5) of the Greek Copyright and Related Rights Act prohibits the licensing of rights for uses which do not exist or which are unknown at the time of the conclusion of the contract. As Koumantos explains, the contracts that authors and performing artists conclude to transfer their rights and to ensure or allow their exploitation should not bind their personality exaggeratedly nor put a brake on their creativity.³³⁵ This would be the case if a contract referred to forms of exploitation of works that was still unknown at the time of conclusion of the contract and for which the author was not in a position to assess the economic impact of such a clause. In all likelihood, the courts could already invalidate such a clause on the basis of article 179 of the Greek Civil Code, according to which 'is null, in particular as contrary to the good morals, the juridical act which excessively hinders the freedom of the person'. During the copyright reform of 1993, the Greek legislator wanted to make things even clearer and introduced an express provision to this effect in the Copyright and Related Rights Act. The question of which forms of exploitations are covered by the contract remains a matter of interpretation however.³³⁶

4.5.4.3 Future works

The Greek Copyright Act states in article 13(5) that 'a contract or license may in no circumstance confer any total right over the future works of the author'.

4.5.5 Determination of remuneration

4.5.5.1 Proportional remuneration

The copyright reform of 1993 has introduced in Greek copyright law an obligation to pay a proportional remuneration to the author applicable to all juridical acts concerning copyright, whether assignments or licences, unless the contract deals with works created under employment, computer programs or advertisement in any form. Article 32(1) reads as follows:³³⁷

The fee payable to the author by the other contracting party to legal agreements relating to the transfer of all or part of the economic right, the granting of the exploitation or for the exploitation license shall be obligatorily determined as a percentage, agreed freely between the parties. The computation of the percentage shall be based on gross revenues without exception or the gross expenditure or on the combined gross revenues and expenditure realized from the activity of the other contracting party in the course of the exploitation of the work.

Although the intention was commendable, the wording of this provision has raised a lot of criticism. The prescribed method of calculation is indeed very obscure: it can be either on the gross revenues without exception or the gross expenditure or on the combined gross revenues and expenditure realized from the activity of the other contracting party in the course of the exploitation of the work.³³⁸ Commentators wonder what accounting expert would be able to make sense of this rule: the revenues and expenses may be added, or the expenses may be subtracted from the revenues. And what are the expenses that derive from the exploitation of the work? In the case of publishing contracts or of any contract that involves the production of copies, the rule may be easy to apply: the

³³⁵ Koumantos 1996, p. 319.

³³⁶ Liakopoulos 1999, p. 74 referring to art. 173 and 200 of the Greek Civil Code.

³³⁷ Magliveras 1994, p. 304.

³³⁸ Koumantos 1996, p. 313.

remuneration is then based on the sales price of each copy. Outside of these circumstances, like in the case of public performance contracts, commentators argue that the mode of calculation, as it is written in the Act, makes the application of the rule impossible.³³⁹ The obligatory percentage arrangement of the fee prescribed in the first sub-paragraph must be implemented in all circumstances, provided that the Act does not stipulate otherwise, and provided that it does not concern works created by employees in the execution of the employment contract, computer programs or advertisement in any form.

Articles 33 to 37 contain detailed rules on the minimum remuneration due to authors of specific categories of works. Any clause containing less favourable arrangements for the author is considered null and void (article 39). The question of whether the ensuing nullity is relative or absolute must be examined in each particular case.³⁴⁰ In the case of a literary works published in book form in its original language, the fee payable to the author by the publisher after the sale of thousand books cannot be less than ten percent of the selling price of all books sold (article 33(1)).³⁴¹ Where the author's fee is fixed as a percentage of retail sales, and unless some other method of monitoring is agreed, each of the copies to be sold is signed by the author. In case of an audiovisual work, the author is entitled to a separate proportional remuneration for each form of exploitation of the work (article 34(3)). The film producer has the obligation once a year to give the author of the work all information concerning the exploitation of the work, in writing, showing him also all relevant documents. Composers of the music of films that are shown to the public in cinemas have the right to receive one percent of gross receipts (article 37). Although, the re-broadcasting of a work by the broadcasting organization does not require consent from the author additional to that granted for the first broadcast, the broadcasting organization must pay an additional fee to the author. For the first rebroadcast, unless provided otherwise, the fee must be at least fifty percent of the fee for the first broadcast, and for each subsequent broadcast, the additional fee shall be twenty percent of the initial fee (article 35(1)). Writers of playwrights are entitled to receive a minimum of twenty-two percent of the gross receipts of the performances in state theatres and ten percent for performances in private theatres. For translations of contemporary international plays, the minimum fee is set at five percent (article 36).

4.5.5.2 Equitable remuneration

According to article 46bis(3) of the Greek Copyright Act, if the distribution rights on an audiovisual work are assigned to the producer, the translators of a cinematographic work are entitled to an equitable remuneration for every use of the work from the distributing organization or those persons exercising the exploitation rights. This right to remuneration may not be waived (article 46bis(4)). Article 49 states that when sound or audiovisual recordings are used for a radio or television broadcast by any means, such as wireless waves, satellite or cable, or for communication to the public, the user must pay a single and equitable remuneration to the performers whose performances are carried on the recordings and to the producers of the recordings.

4.5.5.3 Lump sum

Article 32(1) (3rd sentence) of the Greek Copyright and Related Rights Act states that the remuneration to the author may, by way of exception, be paid as a lump sum,

³³⁹ Koumantos 1996, p. 314.

³⁴⁰ Koumantos, 1994, p. 254.

³⁴¹ Article 33(1)(*) provides examples of literary works. Pocketbook editions are excluded. In case of more than one author, the percentage is, in accordance with their contribution, spread among them (article 33(3)).

- (a) When it is practically impossible to establish the basis for the calculation of a percentage fee or when there are no means of monitoring the implementation of a percentage arrangement;
- (b) When the expenditure required for the calculation and the monitoring is likely to be out of reasonable proportion to the fee to be collected;
- (c) When the nature or the conditions of the exploitation make the implementation of a percentage impossible, notably when the author's contribution is not an essential element in the intellectual creation as a whole, or when the use of the work is secondary in relation to the object of the exploitation.

While some of the exceptions listed in this section may be readily justified, for example when there are no means of monitoring the implementation of a percentage arrangement or when the expenditure required for the calculation and the monitoring is likely to be out of reasonable proportion to the fee to be collected, the exception presented in sub-paragraph (a) raises particular concerns. Indeed, some commentators fear that, considering the obscure formulation of the rule set out in article 32(1) (1st sentence) on the proportional remuneration, the exception allowing the payment of a lump sum when 'it is practically impossible to establish the basis for the calculation of a percentage fee' will become the rule instead of remaining the exception.

In addition, article 33(2) of the Act provides that the fee payable to the author may be agreed as a lump sum, when the work is any of the following:

- (a) Collective works;
- (b) Encyclopaedias, dictionaries or anthologies of works of others;
- (c) Schoolbooks;
- (d) Albums, calendars, agendas, instructional books, printed games and educational items such as maps or atlases;
- (e) Prefaces, comments, introductions, presentations;
- (f) Illustrations or photographic material in printed editions;
- (g) Non-literary picture books for children;
- (h) Luxury editions of a limited number of copies;
- (i) Magazines or newspapers.

According to article 38(1) of the Copyright Act, the author has the right to the payment of a fee equal to half the current fee, in case of a subsequent publication of a photograph in a newspaper, periodical or other mass medium the author has the right to payment of a fee equal to half the current fee. Performers retain at all times the right to remuneration for the communication to the public of their live performances or an illegal fixation of their performances; and, the fixation of their live performances and the reproduction and distribution thereof (article 46(3) (2nd sentence)).

4.5.5.4 'Best-seller' clause

There is no provision in the Greek Copyright and Related Rights Act, which expressly gives authors the right to request a revision of the terms of the contract in case the lump sum paid proves to be grossly disproportionate in relation to the proceeds generated from the exploitation of the work. In such a case however, the disadvantaged author or performer could probably claim reparation under the general rules of contract law, and more particularly, he could probably argue that the gross disproportion between the remuneration paid and the revenues generated are against public order and good morals.

4.5.6 Interpretation of contracts

Greek law follows the 'purpose-of-transfer' rule, laid down in general terms in article 15(4) of the Act, and in more specific terms in article 34(1) and (2), which relate to audiovisual works.³⁴² Hence, article 15(4) of the Greek Act states that if the extent and the means of exploitation which the transfer concerns or for which the exploitation or the exploitation license is agreed are unspecified, it shall be deemed that the said acts refer to the extent and the means that are necessary for the fulfilment of the purpose of the contract or license. Moreover, article 15(3) provides that if the contract does not specify the geographical reach of the transfer, its reach is limited to rights effective within the country where the contract was concluded.

4.5.7 Effect of transfer in relation to third parties

4.5.7.1 Right to transfer acquired rights

Under Greek law, a licensee may not transfer any of the rights he has acquired without the consent of the author (article 13(6)). This rule does not apply in case of works created under employment (article 8 and 40).³⁴³ Article 35(2) provides a similar rule on contracts between authors and broadcasting organizations. Unless provided otherwise, such agreements do not empower the organisation to permit third parties to (re)broadcast the work that is the object of the contract.

4.5.7.2 Standing to sue

In Greece, article 13(3) (4th sentence) of the Copyright and Related Rights Act recognises the right for the licensee to seek legal protection, in his own name, against infringements by third parties of the rights he exercises, unless provided otherwise.³⁴⁴ This rule also applies in case of assignment of rights.³⁴⁵

4.5.7.3 Right to pledge, secure or seize acquired rights

Articles 64- 66 of the Greek Copyright Act allow the transferee to pledge, secure, or seize the acquired rights in case there is an alleged breach of copyright or neighbouring rights. In such a case, the First Instance Court may order interim measures such as conservative seizure or the detailed listing of the infringing material according to articles 687 (1) and 691 (2) of the Civil Procedure Code. Said provisions also apply to protect the *sui generis* right existing on databases.

³⁴² Kotsiris, 1996, p. 522

³⁴³ Marinos 1999, p. 16.

³⁴⁴ Koumantos 1996, p. 317.

³⁴⁵ See Koumantos, 1994, p. 248.

4.5.8 Termination of contract

4.5.8.1 Non-use of rights

Under Greek law, the producer is under the obligation to exercise the rights that were entrusted to him. With respect to exploitation contracts, this obligation is stated in article 13(1)(2nd sentence) of the Greek Copyright and Related Rights Act. In case of assignments and exclusive exploitation licenses, article 15(5) provides that the user shall ensure that, within a reasonable period of time, the work is accessible to the public via an appropriate form of exploitation.³⁴⁶ According to general contract law, the author has the right to rescind the transfer of rights if the other party does not fulfil his obligations.³⁴⁷

4.5.8.2 Bankruptcy of producer

There is no provision in the Greek Copyright Act concerning the right of the author to terminate the contract in case of bankruptcy of the producer. However, termination may be obtained on the basis of other provisions of civil or commercial law.

4.5.8.3 Other circumstances

Under Greek law, the author of a literary or scientific work may rescind a contract, if he considers this necessary for the protection of his personality because of a change in conviction or in circumstances. The recession takes effect after the author has paid material damages to the producer. If, after the rescission, the author decides to transfer the right in the work, he must give, in priority, the former user the opportunity to reconstitute the old contract under similar terms (article 4(1)(e) and (2)).

³⁴⁶ Marinos thinks that the legislator, in article 15(5), has forgotten to provide an obligation on part of the user to actually use the granted rights in case of exploitation contracts. Marinos 1999, p. 16.

³⁴⁷ Articles 382-387 Greek Civil Code. Koumantos 2000, GRE-21.

4.6 Italy

4.6.1 Ownership of Rights

4.6.1.1 Creator doctrine

Chapter 2 of the Italian Copyright Act deals with the ownership of rights in a copyrighted work, including provisions concerning the ownership of collective, derivative, pseudonymous, and anonymous works. According to article 6, copyright is acquired on the creation of a work that constitutes the particular expression of an intellectual effort. Articles 7 to 10 establish a presumption of ownership of rights in favour of ‘any person’ who publishes or performs the collective, derivative, pseudonymous, or anonymous work respectively. The formulation of these provisions would seem to suggest that only natural persons could be presumed copyright owners. However, according to article 11 of the Act, the copyright in works created and published under the name and at the expense of the State, the provinces, or the communes belongs to them. In the absence of an agreement to the contrary with the authors of the works published, the same right also belongs to private legal entities of a non-profit-making character, as well as to academies and other public cultural organizations, in respect of records of their proceedings and their publications.³⁴⁸

4.6.1.2 Works created under employment

In Italy, the creator doctrine has been set aside with respect to the ownership of three categories of works created under employment: computer programs, databases and photographs. Under article 12*bis* of the Italian Copyright Act, the economic rights in a computer program and a database³⁴⁹ created by one or more employees in the execution of their duties or following the instructions given by their employer are the property of the latter. In practice, there is a *cessio legis* of the economic rights. The onus of proving an agreement to the contrary lies with the employee. Thus, in contrast to the general rule, the burden of proof rests with the author.³⁵⁰ In addition, article 88 of the Act states that if a photograph is produced in the execution of a contract of employment, the exclusive right belongs to the employer within the limits of the object and purpose of the contract. Note that this is true only insofar as the very activity of the photograph is described in the contract of employment. The Courts accept only a restrictive interpretation of this article.³⁵¹

4.6.1.3 Works created on commission

In Italy, except for article 88 of the Copyright Act, which grants to the commissioner the ownership of rights in photographs made on commission, the law is otherwise silent with regard to the ownership of other categories of works created on commission. Opinions vary as to whether the commissioning of a work does in itself give rise to a legal presumption of copyright ownership in favour of the commissioning party.³⁵² There is a similarity with the employee-situation, but the

³⁴⁸ Fabiani 2000, p. 34. It is controversial whether these legal entities also own the moral rights. See Von Münchhausen 1988, p. 78 and footnote 11.

³⁴⁹ Art. 12*bis* of the Italian Copyright Act was modified by Legislative Decree of 6 May 1999, No. 169 implementing EC Directive 96/9/CE concerning the legal protection of databases, Official Gazette No. 138 of 15 June 1999.

³⁵⁰ Fabiani 1998, p. 100.

³⁵¹ Corte Cassazione (Supreme Court) 28.06.1980, n. 4094, Corte Cassazione 04.07.1992, n.8186, Corte Cassazione 07.05.1998, n. 4606 and 06.05.1998, n. 4557.

³⁵² According to Fabiani further questions about the vesting, extent and durations of the commissioning party's rights have been subject to debate. Fabiani 2000, p. 36.

presumption of ownership is much less strict in the case of a work created on commission. Nevertheless, the Italian Supreme Court did rule that the commissioner has the right to use the works ‘within the limits of the object and purpose of the contract.’³⁵³ In any case, even if the commissioner is presumed to be the owner of the rights in a work created on commission, the moral rights in such work rest with the author.

4.6.1.4 Audiovisual works

Articles 44 to 50 of the Italian Copyright Act contain special rules relating to ‘cinematographic works’, which are considered to be works in collaboration. It is common opinion that these rules also apply to other types of audiovisual works, such as television or video works.³⁵⁴ Joint authors of a cinematographic work are: the author of the subject matter; the author of the scenario; the composer of the music; and, the artistic director (article 44). The leading opinion among commentators holds that this list is non-exhaustive, considering in particular that any creative contribution would be protected under the copyright regime. Article 45 provides a *cessio legis* of exploitation rights to the producer. However, the authors of the literary or musical parts may exploit these in any manner, ‘provided no prejudice is caused to the exploitation rights belonging to the producer’. Moreover, article 18*bis* states that ‘the author shall have the exclusive right to authorize rental or lending by third parties’. By contrast, article 84(1) of the Italian Copyright Act states that ‘unless otherwise agreed by the parties, performers shall be presumed to have assigned the rights of fixation, reproduction, broadcasting (including communication to the public by satellite) and distribution, and also the right to authorize rental, on the conclusion of the contract for the production of a cinematographic or audiovisual work or sequence of moving images’.

4.6.2 Forms of transfers of rights

4.6.2.1 Assignment

Italy follows a ‘dualist’ approach, whereby the author’s right is considered to consist of two separate elements: the pecuniary element, or ‘economic right’, and a personality element, or the ‘moral right’. In dualist systems, economic rights can be freely assigned, either *inter vivos* or *mortis causa*, while moral rights are considered to be inalienable. The same remark also holds true with respect to the performers’ rights, where the economic element of the right can be assigned, but not its moral element.

4.6.2.2 Licence

Under Italian law, publishing contracts may be exclusive or non-exclusive. But in the absence of a stipulation to the contrary, it shall be presumed that the rights transferred are exclusive (article 119(2nd sentence). Article 136 of the Italian Copyright Act provides that contracts by which an author grants the right to perform a work intended for performance in public are, unless provided otherwise, non-exclusive.

4.6.2.3 Waiver

The Italian Copyright Act recognises four attributes to the moral rights. The first attribute is the right to attribution of authorship, which is laid down in article 20, and which is applicable to all types

³⁵³ Fabiani 2000, p. 37, footnote 22.

³⁵⁴ See: Sordelli, *L’Opera dell’ingegno*, pp 244, 245. And Greco – Vercellone, *I Diritti sulle Opere d’Ingegno*, in ‘Trattato di diritto civile italiano’, red. F. Vassalli, UTET. See also case Tribunale di Roma, 01.09.1980; and Fabiani 2000, p. 32.

of works. Special provisions apply regarding authors of anonymous and pseudonymous works (article 21); authors of newspaper articles (article 40); and, authors and performers of works recorded (article 62). The second attribute is the right to the integrity of the work (article 20) or the performance (article 81). Exceptions to this right are stated in article 20(2nd, 3rd and 4th sentence) (works of architecture); article 41 (articles in newspaper); and, article 63 (records). The third attribute is the right of disclosure (article 111, 112). Fourth, the author enjoys the right to withdraw a work from the market (article 142, 143). As a principle, moral rights are inalienable.³⁵⁵ However, article 22(2nd sentence) provides that if the author is aware of and has accepted modifications to his work, he is not entitled “to intervene to prevent the performance thereof or to demand its suppression”.

4.6.3 Requirements of form

Article 110 of the Italian Copyright Act states that ‘the transfer of exploitation rights shall be set out in writing’.³⁵⁶ This requirement applies to assignments as well as licenses.³⁵⁷ The requirement of an instrument in writing for the licence of reproduction is a formality *ad probationem*, not *ad substantiam*.³⁵⁸ Publishing contracts should also specify, according to article 122 of the Act, the minimum number of copies of each edition. If a specified minimum is not provided, the contract is considered null and void. A further formality consists in the transcription of the transfer in the public registers maintained by the ‘Public Registry of Protected Works’, a Ministerial Office, as set out by art.104 of the Italian Copyright Act. For film productions and computer programs the Italian Collecting Society SIAE maintains a special register, in accordance with article 103 (2) and (4) of the Copyright Act.

4.6.4 Restrictions on transfers of rights

4.6.4.1 Limits of scope, time, and place

In Italy, the duration of a publishing contract ‘by period’ may not exceed twenty years (article 122). If a longer term is agreed upon or the contract provides no term at all, than the maximum term of twenty years applies. If, however, this term has been concluded as an essential clause of the contract, the contract is considered void (article 1419 of the Civil Code).³⁵⁹ This maximum term does not apply to contracts concerning certain categories of works. These are: encyclopedias and dictionaries; illustrations and photographs for industrial use; cartographical works; and, dramatico-musical and symphonic works, i.e. all works for which the author’s remuneration usually and normally originates from a relationship of employment or commission, or works for which the market-penetration involves a considerable amount of time.³⁶⁰ Article 120 provides a rule relating to publishing contracts and future works. The second paragraph of this article states that, without prejudice to the rules governing contracts for works made under employment, such contracts may not extend for a term in excess of ten years. This period is the term within the author is obliged to transfer the rights in the works to be created to the publisher. After the rights are transferred, the contract can be considered as a regular publishing contract, subject to the twenty years-term of article 122.³⁶¹

³⁵⁵ Fabiani 2000, p. 59.

³⁵⁶ See also article 2581 of the Italian Civil Code.

³⁵⁷ Von Münchhausen 1988, p. 165 (footnote 1).

³⁵⁸ Case n. 3463, Corte di Cassazione (Supreme Court), 07.09.1957.

³⁵⁹ Von Münchhausen 1988, p. 180, 181.

³⁶⁰ Fabiani 2000, p. 40, 41.

³⁶¹ According to the Court of Cassation of May 11, 1959 (nr. 1371). Von Münchhausen 1988, p. 187, 188.

4.6.4.2 Future forms of exploitation

Article 119(3rd sentence) of the Italian Copyright Act states that ‘future rights which may be afforded by subsequent laws and which provide copyright protection of wider scope or longer duration may not be included in the transfer’.³⁶² The vast majority of the doctrine holds that this provision protects authors from assigning or licensing their rights with respect to forms of exploitation that are not yet technically possible at the time of conclusion of the contract.³⁶³ The Courts have also adopted this view.³⁶⁴

4.6.4.3 Future works

Italian copyright law also permits the conclusion of agreements concerning the transfer of rights in future works. Article 120 sets out three rules relating to future works and publishing contracts. First, any such contract is null and void if it concerns *all* the works or all the works of a certain category that the author may create, without limitation in time. Secondly, without prejudice to the rules governing employment contracts and contracts for services, such contracts may not exceed ten years. If the work to be created has been specified, but the delay within which such work must be delivered has not been determined, the publisher may at any time request the court to fix such term. If a term has been set, the court may extend it.³⁶⁵

4.6.5 Determination of remuneration

4.6.5.1 Proportional remuneration

In Italy, article 130 of the Copyright Act provides that in case of publishing contracts the author's remuneration consists of a share of the proceeds, calculated, unless otherwise stipulated, as a percentage of the retail price of the copies sold. If the contract does not provide a proportional remuneration, the publishing contract is void.³⁶⁶ However, if the contract does not contain any provision with regard to a possible exclusion of the remuneration and nothing on this subject is mentioned, the author maintains the right to the share he normally applies on similar works.³⁶⁷ With respect to the remuneration paid under a publishing contract, the retail price is set by the publisher, after having given the author sufficient notice. The author may object to the price set or altered by the publisher if it would gravely prejudice the interests of the author or the dissemination of the work. With respect to audiovisual works, the Italian Copyright Act provides in article 46 that the authors of the music and the lyrics are entitled to receive separate remuneration directly from persons publicly showing the work. Authors of the subject matter and the scenario and the artistic director are entitled to receive, if they do not receive a proportional remuneration, additional remuneration when the level of receipts agreed upon is reached.

4.6.5.2 Equitable remuneration

In Italy, article 46*bis*(1) of the Act states that where the distribution rights are assigned to the producer, the authors of cinematographic or assimilated works are entitled to equitable remuneration

³⁶² Von Münchhausen 1988, p. 49 (footnote 6) ; Fabiani 2000, p. 44, 45.

³⁶³ Cian-Trabucchi, Commentario breve della concorrenza, CEDAM, Padua 1997 and Piola Caselli, Codice del Diritto d'Autore, 1927, Turin.

³⁶⁴ Corte di Cassazione, case n. 2621, 10.11.1961.

³⁶⁵ In these cases the contract term may extend ten years. Von Münchhausen 1988, p. 188.

³⁶⁶ Article 1419 CC. Von Münchhausen 1988, p. 250.

³⁶⁷ Greco-Vercellone II, p. 287-288

from the distributing organizations for every use of the work that takes the form of communication to the public by electromagnetic waves, cable or satellite. For every use of cinematographic or assimilated works that is different from that provided for in paragraph (1) above and paragraph (5) of Article 18bis, the authors of the said works are entitled to equitable remuneration from those exercising the exploitation rights for each separate act of exploitation. Authors are also entitled to receive equitable remuneration for every use of cinematographic or assimilated works of which the original language is not Italian. This right to equitable remuneration may not be waived. Moreover, article 88 provides that photographs created on commission belong to the commissioner of the work, subject to the payment of equitable remuneration to the photographer by any person who commercially utilises the reproduction.

4.6.5.3 Lump sum

According to article 130 of the Italian Copyright Act, a lump sum payment is allowed with respect to publishing contracts in case of works produced in collaboration, translations, articles in newspapers and magazines, speeches or lectures, scientific works, cartographical works, musical or dramatico-musical works, and, works of figurative art.

4.6.5.4 'Best-seller' clause

There is no provision in the Italian Copyright Act, which expressly gives authors the right to request a revision of the terms of the contract in case the lump sum paid proves to be grossly disproportionate in relation to the proceeds generated from the exploitation of the work.

4.6.6 Interpretation of contracts

According to article 119(5th sentence) of the Italian Copyright Act, 'in the absence of an agreement to the contrary, the transfer of one or more of the exploitation rights shall not imply the transfer of other rights which are not necessarily dependent on the right transferred, even if they are included (...) in the same category of exclusive rights'.³⁶⁸

4.6.7 Effect of transfer in relation to third parties

4.6.7.1 Right to transfer acquired rights

Under Italian law the publisher is not allowed, unless otherwise provided, to transfer the acquired rights to a third party without consent of the author (article 132).³⁶⁹ Although consent is not required if the transfer occurs as part of the transfer of the publisher's enterprise, the publisher may not transfer the acquired rights if this were prejudicial to the reputation of the author or to the dissemination of the work.³⁷⁰ The author's consent is also required in case of transfer of a license.³⁷¹ Article 136 provides that a contract by which an author grants the right to perform a work in public is, unless provided otherwise, not transferable and non-exclusive.

³⁶⁸ Corte d'Appello di Milano (Milan court of Appeal), 21.05.1985

³⁶⁹ The same rule applies in case of transfer of the *publishing contract* (article 1406 CC). Von Münchhausen 1988, p. 258.

³⁷⁰ It is controversial whether this rule also applies in case of partial transfer of the publisher's enterprise. Von Münchhausen 1988, p. 259, 260.

³⁷¹ Von Münchhausen 1988, p. 263.

4.6.7.2 Standing to sue

There is no provision in the Italian Copyright and Related Rights Act (explicitly) concerning the assignee's or the licensee's standing to sue for copyright infringement. Nevertheless, the doctrine extends the rules concerning the assignment of rights to the grant of licences. More specifically, the doctrine considers that article 20 and 165 of the Copyright Act are applicable to licences: the author maintains his right to protect his rights against infringements even when the action is initiated by the licensee or the assignee.³⁷²

4.6.7.3 Right to pledge, secure or seize acquired rights

Article 111 of the Italian Copyright Act states that the right of publication of an intellectual work and the exploitation rights of a published work, insofar as they belong personally to the author, may not be the subject of any pledge, seizure or sequestration, either by contractual act or by way of forced execution. Copies of the work and the proceeds of exploitation may, on the other hand, be the subject of a pledge, or be seized or sequestered, in accordance with the Code of Civil Procedure.

4.6.8 Termination of contract

4.6.8.1 Non-use of rights

The Italian Copyright Act allows the termination of a contract for non-use of rights with respect to newspaper and magazine articles, audiovisual works and publications. Article 39 of the Act deals with articles sent to magazines or newspapers. If, in the absence of a prior contractual agreement, a person who is not a member of the editorial staff sends an article to a magazine or newspaper, she may recover the right to dispose of it unrestrictedly if she does not receive notice of acceptance within one month of sending the article or, if it is not reproduced, within six months of the notice of acceptance. If the article is furnished by a member of the editorial staff, the director of the magazine or newspaper may defer reproduction beyond the mentioned periods. However, once a period of six months as from delivery of the manuscript has expired, the author shall be entitled to utilize the article for reproduction in a volume or as an offprint in the case of newspaper, and also in any other periodical in the case of a magazine. Article 50 states that if the producer of an audiovisual work fails to complete the work within a period of three years from the delivery of the literary or musical parts, or does not show the completed work within three years from its completion, the authors of those parts shall be entitled to dispose of the part of the work representing the very contribution itself without restriction. As a result, the producer does not lose his right – as a matter of fact, he remains entitled to dispose of the contribution in question but he simply loses the exclusivity of this right.

Articles 124, 127 and 128 of the Italian Copyright and Related Rights Act concern publishing contracts. According to article 124, the publishing contract terminates in case the publisher has stated that he does not intend to proceed with a new edition or if he does not do so within a period of two years from the notification of such declaration. The author is entitled to damages for the failure to make a new edition, unless the publisher shows a valid explanation.³⁷³ Article 127 provides that the publication or reproduction of the work must take place within the period laid down in the contract, which may not exceed two years from the date of delivery to the publisher of the work. If no period is agreed upon, publication or reproduction of the work must take place within two years following a written request to the publisher. This maximum period does not apply to collective

³⁷² V.M De Sanctis – M. Fabiani, 'I contratti nel Diritto d'Autore' Giuffrè, Milano 2000.

³⁷³ Von Münchhausen 1988, p. 246, 247.

works. If the work is not published within the agreed period, the author is entitled to terminate the contract. Courts may grant the user an extension of time. However, this extension may not exceed one half of the above-mentioned period and is subject, where necessary, to a suitable guarantee (article 128). The court is entitled to set a shorter period if justified by the nature of the work or by any other special circumstances. The provisions of Articles 127 and 128 also apply to performance-contracts (article 139).³⁷⁴ Fourth, article 140 provides another rule relating to performances. In case the user fails to continue to perform the work after a first (cycle of) performance(s), the author of the musical or literary part who proves that the user is at fault is entitled to request the termination of the contract.

4.6.8.2 Bankruptcy of the publisher

Under Italian law, as a rule, the bankruptcy of the publisher does not bring about termination of the publishing contract (article 135 together with article 83 Bankruptcy Law n. 267). However, the publishing contract terminates if the liquidator, within one year of the declaration of bankruptcy, does not continue the activities of the publishing business or does not transfer it to another publisher. The judge normally excludes the applicability of this norm to phonographic reproductions. When bankruptcy of a phonographic producer occurs, articles 72 and 74 Bankruptcy Law are applicable and all the different contributions can be sold.

4.6.8.3 Other circumstances

Article 134 of the Italian Copyright Act lists a number of circumstances under which a publishing contract may be terminated. The most important are the expiration of the contractual period, the death of the author before completion of the work, the impossibility to exploit the work by reason of a judicial decision or a provision of law, and the lack of success of the work. The unsuccessfulness of the work may only result from the work itself, and not from the publisher's failure to fulfil his duties towards the author. In principle, this ground to terminate the contract may be invoked twenty-four months after the first edition, or eighteen months after a subsequent edition is published.³⁷⁵ The accidental loss of the original work, provided the impossibility to retrieve it or substitute it is another valid reason for the termination of the contract. A possible financial aggravation on the side of the producer or the occurrence of economic problems does not constitute a valid cause of termination.³⁷⁶

³⁷⁴ The period referred to in the second paragraph of Article 127 is increased to five years in the case of dramatico-musical works.

³⁷⁵ Von Münchhausen 1988, p. 274, 275.

³⁷⁶ Corte d'Appello di Bologna 27.04.1976, IDA 77, 219.

4.7 *Spain and Portugal*³⁷⁷

4.7.1 Ownership of Rights

4.7.1.1 Creator doctrine

The Spanish and Portuguese Copyright Acts contain somewhat diverging provisions concerning the creator doctrine and the initial ownership of works, such as collective works, where the creator doctrine would seem to play a greater role in Portugal than Spain. Article 8 of the **Spanish** *Texto Refundido de la Ley de Propiedad Intelectual* (TRLPI) provides that, in the absence of agreement to the contrary, the rights in a collective work vests in the person who publishes it and discloses it in his name.³⁷⁸ According to Bondía Román, this provision does not mean that a legal entity may claim authorship by virtue of the fact that the collective work was published under its name.³⁷⁹ Moreover, the natural persons who participate in the creation of a collective work may reserve their rights, in which case the rights in the collective work will vest in them. In this commentator's opinion, article 8 of the TRLPI 'confines itself to conferring the rights in a collective work, in the absence of contractual agreement, without going into considerations as to who owns the rights initially, this being the authors of the various contributions forming the collective work'.³⁸⁰

In *droit d'auteur* systems like the **Portuguese** one, the principle of authorship or -*Urbeberschaftsgrundsatz* or *Schöpferprinzip* is a fundamental principle. Under the Portuguese Copyright Code, the author is thus the creator of the work; legal persons cannot be assimilated to authors, despite the strict wording of some provisions.³⁸¹ According to well-established case law, the creation of the work is the only 'constituting factor' for the grant of author's rights. Examples of collective works recognized by the jurisprudence are not only newspapers and other periodicals, but also encyclopaedias, dictionaries, painting albums. Their typical characteristic is the coordination of the contributions of several authors within an undertaking.³⁸² Following article 19 of the Code, collective works are not to be understood as an exception to the creator doctrine. Rather, it must be interpreted in restrictive terms, according to which it only provides for a legal assignment (*cessio legis*) of the economic rights. Furthermore, it could be added that computer programs and databases created within an undertaking are deemed to be collective works (see Art 3(2) of Decree-Law n. 252/94 of 20 October; Art. 5(2) of Decree-Law n. 122/2000 of 4 July).

4.7.1.2 Works created under employment

Paragraphs 51(1) to (3) of the **Spanish** TRLPI provide that, unless a written employment contract states otherwise, the economic rights are presumed transferred to the employer, to the extent necessary for the exercise of the customary activity of the employer.³⁸³ However, in no event may the employer exploit the work in a manner or for purposes different from those deriving from the

³⁷⁷ The Institute for Information Law wishes to thank Mr. Alexandre Dias Pereira (Portugal) and
³⁷⁸ Spanish Copyright and Related Rights Act, art. 8; and Portuguese Copyright and Related Rights Act, art. 19.

³⁷⁹ Bondía Roman 1997, p. 14.

³⁸⁰ Id., p. 16.

³⁸¹ Dias Pereira 2001, p. 274 et seq. "§ 27. Autoria e Titularidade".

³⁸² See for example: Decision of the Supreme Court of Justice (STJ) of 14 December 1995, in CJ, Year XX, III, p. 163.

³⁸³ According to art. 51(4) of the Spanish Copyright and Related Rights Act, "the remaining provisions of this Law shall apply mutatis mutandis to the aforesaid assignments insofar as the purpose and subject matter of the contract so determine". This paragraph seems to presuppose a written contract. In all probability, the rule means that fundamental principles of the Spanish Copyright Act relating to transfer of rights also apply in case of transfer of rights from the author to his employer. Bercovitz and Bercovitz 2000, p. 33; Dietz 1990, p. 72

customary activity of the employer. Like in Ireland, article 52 of the Spanish Act provides that the authors of works reproduced in periodical publications retain, in the absence of contractual stipulation to the contrary, their right to make use of those works in any form that does not prejudice the normal exploitation of the publication in which they have been inserted. With respect to computer programs, paragraph 97 (1) grants the authorship, and thereby the initial ownership, to the person or group of natural persons who has created the computer program, or to the legal person designated as the rights holder in the circumstances expressly defined by the Act. By granting authorship of a computer program to a legal entity, this provision departs from the creator doctrine recognized in other sections of the Spanish TRLPI.³⁸⁴ The breach made in the general intellectual property system is a significant one, which commentators find all the harder to explain that it was not imposed by the Computer Programs Directive.³⁸⁵ In compliance with paragraph 2(3) of the Directive however, paragraph 97(4) of the Spanish TRLPI provides that, unless otherwise agreed, the ownership of the exploitation rights in the computer program created by an employee in the course of duties entrusted to him or following instructions from his employer belongs exclusively to the employer, including the source and the object codes. In the case of a performance made under an employment contract, article 110 of the Spanish TRLPI establishes a presumption according to which the employer acquires the right to reproduce and communicate to the public the performance realised by the employee.

Article 14(1) of the **Portuguese** Copyright and Related Rights Code states that the ownership ('titularidade') of the copyright in a work created 'on behalf of another person, either in fulfilment of official duties or under an employment contract' must be determined on the basis of the agreement concluded between the parties. In the absence of an agreement, the employee is presumed to own the copyright in his work, unless the work is published without indication of the name of the creator.³⁸⁶ Article 15 provides that the employee who owns copyright may, however, not make use of the work that prejudices the purposes for which it was produced. The moral rights always remain with the creator.³⁸⁷ However, paragraph 2(3) of the Computer Programs Directive has been incorporated at article 3(3) of the Implementation Act, which states that 'when a computer program is created by an employee in the exercise of its functions, or following instructions from the employer, or on commission, the rights in the program belong to the employer, unless there a stipulation to the contrary or unless the nature and object of the contract dictate otherwise'.³⁸⁸ The same rule has been made to apply to databases created under employment.³⁸⁹ Article 165 contains a special rule with respect to photographic works. According to this provision, the copyright belongs originally to the employer and the author is entitled to an equitable remuneration when the photograph is used for commercial purposes. It's not undisputed whether the provisions regarding software, databases, and photographs created under employment provide an exception to the creator doctrine. Some commentators argue that these are cases of *cessio legis*, since legal persons cannot have the initial ownership of 'copyright', because they cannot be creators of works. The Software and Databases Directives do not require such a «copyrightalisation» of the Portuguese system; on the contrary, they clearly leave room for the creator doctrine.³⁹⁰ The same remark has been made with respect to article 174 of the Portuguese Code, which establishes a special regime for journalists, making a distinction between freelancers and salaried journalists. Article 174 grants to freelance journalists the ownership of rights on their individual works, including texts, sounds, images, or

³⁸⁴ Rodríguez Tapia and Bondía Román 1997, pp. 36-37, 47-48, and 357-361; Delgado 1996, p. 124.

³⁸⁵ Bondía Román 1997, p. 10.

³⁸⁶ Portuguese Copyright and Neighbouring Rights Code, art. 14(2) and (3).

³⁸⁷ Rebello 1986, p. 18.

³⁸⁸ Decreto-Lei No. 252/94, 20 October 1994.

³⁸⁹ Decreto-Lei No. 122/2000, 4 July 2000, art. 5(3).

³⁹⁰ Dias Pereira 2001, pp. 492 et seq.

drawings, while such right is granted to salaried journalists, only if their works are signed. If the works are not signed, then the ownership is presumed transferred to the enterprise.³⁹¹

4.7.1.3 Works created on commission

In **Spain**, commentators³⁹² and the relevant case law³⁹³ hold that there is no presumption of transfer of rights that derives from the commission of a work alone.³⁹⁴ However, the transfer of rights can be explicitly stipulated in the commissioning contract, or it can be implicitly inferred from it taking account of its nature and its purpose. Indeed, in the case of a work created on a commissioned basis, like a computer program, the author does not have a relationship of dependence with the person who commissions it and the service concerns only a particular creation. Considered as contracts for services, contracts for the commission of a work are subject to articles 1588-1600 of the Spanish Civil Code. Under such a contract for services, the author undertakes to deliver the work and possibly, if provided in the contract, to assign certain exploitation rights.³⁹⁵ In any case, it is generally accepted that in application of the principle of good faith, the commissioning party acquires at least the right to use the work, even if there is no provision to this effect in the contract. Thus, unless the commissioner obtains a transfer of copyright on the work he has commissioned, he will only acquire the tangible property of the work (and, of course, the right to 'use' it), but no exploitation rights on it. This may be 'solved' by means of art.1258 of the Civil Code :

Art.1258 CC : « Los contratos se perfeccionan por el mero consentimiento, y desde entonces obligan no sólo al cumplimiento de lo expresamente pactado, sino también a todas las consecuencias que, según su naturaleza, sean conformes a la buena fe, al uso y a la ley. »

A contract obliges not only to what has been expressly agreed, but also to '*all other consequences which, according to their nature, are according with good faith, custom and the law*'.

It could be argued that despite the fact that no licence of exploitation rights was agreed upon when commissioning the work, such a license should be inferred from it because it is the custom and it is fair (in good faith) to expect that the commissioner will not only acquire the property of the work but also (at least, some) exploitation rights on it. So far, there is no case law applying art.1258 to maintain the existence of a copyright license.

With respect to the ownership of performances made on commission, article 110 of the Spanish TRLPI is more explicit. It states that 'where the performance is given in compliance with an employment or commission contract, it shall be understood, unless otherwise specified, that the employer or commissioning party acquires therein such exclusive rights to authorize reproduction and communication to the public as are provided for under this Title and may be deduced from the nature and subject of the contract'.

In **Portugal** for example, article 13 of the Code declares that 'any person who has in any way either totally or partially subsidized or financed the preparation, conclusion, disclosure, or publication of a work shall not thereby obtain any of the powers derived from the copyright, unless there is written agreement to the contrary.' Consequently, the ownership of the copyright in a work carried out on commission must be determined on the basis of an agreement concluded between the parties. In the absence of any agreement, it shall be deemed that ownership of copyright in a work carried out

³⁹¹ Rebello 2001, p. 227.

³⁹² Rodríguez Tapia and Bondía Román 1997, p. 251-252.

³⁹³ Sentencia del Tribunal Supremo de 12 de diciembre de 1988.

³⁹⁴ The more reason to be surprised with the presumption of transfer provided for commissioned performances in art. 110.

³⁹⁵ Bondía Román 1997, p. 48.

on behalf of another person belongs to the intellectual creator. However, where the name of the creator is not mentioned in the work or is not shown in the customary place, it shall be deemed that the copyright remains the property of the person or entity on whose behalf the work is carried out.³⁹⁶ In rare cases however, the ownership of specific works created on commission has been awarded to the commissioner of the work instead of to its physical creator. The qualification under the Civil Code of a commissioning contract is disputed. Case law of the Supreme Court has balanced from a contract for work to a *sui generis* services contract.³⁹⁷ However, the nature of the contract has no influence on the ownership of rights, since the provisions of the Copyright Code are to be considered, in systematic terms, as special rules.

4.7.1.4 Audiovisual works

Article 87 of the **Spanish** TRLPI contains an exhaustive list of co-authors of audiovisual works, which are the director, the authors of the script, the adaptation, the scenario, and the dialogue, and the musical compositions.³⁹⁸ Article 88 establishes a presumption according to which the author assigns to the producer, by signing an audiovisual contract, the exclusive rights of reproduction, distribution, and communication to the public, as well as the rights of synchronization or subtitling of the work.³⁹⁹ Only as far as cinematographic works are concerned, this presumption does not include the right to distribute copies of the work for use within the family circle or broadcasting (article 88(1)(2nd sentence).⁴⁰⁰ Furthermore, authors of audiovisual works may make use of their individual contributions separately, if this does not prejudice the normal exploitation of the audiovisual work and absent provisions to the contrary (article 88(2)). The same rules apply to contracts with authors of pre-existing works incorporated in the audiovisual work (which are denied co-authorship status on the audiovisual work), although such authors retain their right to graphic publication or stage performance of the work and they, in any event,⁴⁰¹ may make use of the work for any other audiovisual work after a period of fifteen years (article 89(2)). Article 109 provides, with respect to performers, that where the performer, either individually or with others, concludes contracts with a producer of audiovisual recordings, for the production of such recordings, it shall be presumed that, unless otherwise agreed in the contract and subject to the unwaivable right to the equitable remuneration (...), he has transferred his rental rights’.

³⁹⁶ Portuguese Copyright Code, art. 14(1) to (3).

³⁹⁷ See Ac. STJ, 3.11.1983, in: BMJ n° 331, 1983, p. 489; Ac. de 2.2.1988, BMJ n° 374, 1988, p. 449.

³⁹⁸ Müller 1997, p. 12.

³⁹⁹ It is interesting to mention one possible “mishap” between this presumption of transfer in favour of the producer and the exploitation rights granted to the producer of an audiovisual recording under art. 120. It is true that according to the EU Directive definition, an audiovisual recording does not necessarily incorporate an audiovisual work. However, arts. 120 et ss. grant the audiovisual producer several exploitation rights on the recording (basically, reproduction, public communication and distribution), regardless of whether that recording incorporates an audiovisual work or not. As a result, this premise holds impossible when the recording incorporates an audiovisual work and the producer has not been granted any exploitation rights by the audiovisual authors (or at least, the rights presumed to be transferred by virtue of article 87) on the audiovisual work, or also (though quite unlikely) when the producer of the audiovisual work and the producer of the audiovisual recording do not coincide. In other words, when the recording incorporates an audiovisual work, the rights granted to the producer of the audiovisual recording by the provisions in these arts. 120 et ss. will depend upon the same rights (this time, on the audiovisual work) having been transferred to him by the audiovisual authors (notice that the author of the pre-existing work upon which the audiovisual work embodied in the recording is based, should also be taken into account -see article 88); otherwise, they will be completely ineffective.

⁴⁰⁰ Paragraph 2 in article 88.1 is specially, and exclusively, intended for cinematographic (theatrical) works later exploited on television or by means of video copies; co-authors must expressly consent to any of this kind of exploitation, though nothing forbids that such consent be granted in the production contract. The presumption of transfer of rights on an audiovisual work which is not “cinematographic” (for instance, a TV program or a musical video-clip) will cover the full extent of art. 88.1 (1st sentence).

⁴⁰¹ “in any event” seems to imply that this is not subject to contrary agreement; yet no case law on the issue exists so far.

In **Portugal**, copyright in audiovisual works belongs to all those who collaborated therein (article 17(1)). According to article 22 of the Portuguese Copyright Code, authors in this joint work are: the director and, the authors of the script, the dialogue, the music and the adaptation of a pre-existing work. Nevertheless, despite the fact that the authors of the script, the dialogue, and the music are considered by the Code to be authors of 'audiovisual works', commentators argue that only the director is the author *stricto sensu* of such works. Accordingly, the concept of composite work or '*Gesamtkunstwerk*' would not apply to audiovisual works. The issue is, however, very controversial. All these authors are the owners of separate rights on the work (article 20(2)). However, presumptions laid down in Chapter III, Section IV of the Code give the producer exclusive exploitation rights to produce copies of, and distribute and project the cinematographic work. According to article 125(2), where the author has specifically or implicitly authorized the film's projection, the exercise of the rights of economic exploitation of the cinematographic work shall belong to the producer. In addition, authorization for cinematographic production shall imply authorization for the distribution and presentation of the film in cinemas open to the public, as well as for its economic exploitation by this means, without prejudice to payment of the agreed remuneration. According to article 140, these provisions apply likewise to works produced by any process analogous to cinematography. The author's permission is still required for cinematographic production (article 124) and for other forms of exploitation, such as broadcasting and video reproduction (article 127).⁴⁰² Furthermore, authors of the literary and musical parts may exploit their parts separately, provided that this does not prejudice the exploitation of the work as a whole (article 135). The authors are entitled to a proportional remuneration for the exploitation of their work (article 131). The producer is, as stated in article 126: 'the impresario of the film and the person who organizes the execution of the cinematographic work, guarantees the necessary means, and assumes the corresponding technical and financial responsibilities'. He is the representative of the authors in order to defend their rights. The exclusive rights of the producer lapse twenty-five years after conclusion of the contract, unless otherwise provided.⁴⁰³ Interestingly, the Portuguese Copyright and Related Rights Code would seem to contain no specific provision concerning the ownership of the performers' contribution to an audiovisual work. One can only assume that such issues as transfers of exclusive exploitation rights from the performer to the producer occur solely on a contractual basis.

4.7.2 Forms of transfers of rights

4.7.2.1 Assignment

Spain and Portugal follow a 'dualist' approach, whereby the author's right is considered to consist of two separate elements: the pecuniary element, or 'economic right', and a personality element, or the 'moral right'. In dualist systems, economic rights can be freely assigned, either *inter vivos* or *mortis causa*,⁴⁰⁴ while moral rights are considered to be inalienable. The same remark also holds true with

⁴⁰² Portuguese Copyright Code, art. 125(2), 127 and 128. According to Dietz articles 124 and 127 both use the broad definition of "author". This includes not only authors within the meaning of article 22, but also authors of pre-existing works incorporated in the film. Dietz 1990, p. 63.

⁴⁰³ Portuguese Copyright Code, art. 128(2).

⁴⁰⁴ By any 'means recognized in law', which means wills, legacy, inheritance. The transfer of an author's rights *mortis causa* is only allowed as to the **exploitation rights** (they may be transferred *mortis causa* either in whole or in part, and they may refer to all the author's works or to specific works...). **Moral rights** may only be "exercised" by somebody other than the author after his death, according to articles 15 and 16. However, there seems to be no reason to exclude the "**other**" **economic rights** from being transferred *mortis causa*: the remuneration for private copying (article 25) is "unrenounceable" but nothing is said against a transfer *mortis causa*. The same may be applied to the remuneration rights for public communication and for rental granted to the authors of audiovisual works (article 90) which are subject to different treatment (while the remuneration for communication to the public is expressly "unrenounceable and non-transferable by *inter vivos* transactions", the remuneration for rental is only "unrenounceable"), and finally, the *droit de suite* may be transferred 'solely by succession *mortis causa*' (article 24.3).

respect to the performers' rights, where the economic element of the right can be assigned, but not its moral element.

4.7.2.2 Licence

According to article 48 of the **Spanish** TRLPI, the licensing of exclusive rights gives the user the right to exploit the work to the exclusion of any other person, including the author. In the case of non-exclusive licenses, the user has the right to use the work in competition with other users and the author (article 50(1)). Article 22 states that a license with respect to a certain work does not prevent the author from publishing that work in a compilation of his works.

In **Portugal**, licenses are considered non-exclusive (article 41(2)). However, the licence given by authors for the production of a cinematographic work, whether it has been specially created for this form of expression or has been adapted to it, imply the granting of exclusive rights (article 128(1)). The publishing licence prevents the authors from making or authorising another edition of the work in the same language until the exhaustion of the first edition or the end of the term of the contract, unless new circumstances may prejudice the interest of the edition and require the updating of the work (Art. 88(3)). Contracting parties may, however, stipulate otherwise, and, in any case, the author keeps the right to contract the complete edition of his works (Art. 103).

4.7.2.3 Waiver

Article 14 of the **Spanish** TRLPI recognises the following attributes to the moral rights: the right of disclosure; the right to determine the name under which the work is disclosed; the right of paternity; the right of integrity; the right to alter the work; the right to withdraw the work from circulation for reasons of changed convictions; and, the right of access to the sole or a rare copy of the work when it is in another person's possession, for the purposes of the exercise of any applicable right. In case of audiovisual works, article 93(1) provides that the moral rights of authors may only be exercised in relation to the final version of the audiovisual work.⁴⁰⁵ Article 113 gives the performer the right to have his name mentioned and to object to any act in relation that might adversely affect his standing or reputation. Furthermore, this article provides that the express authorization of the performer is necessary for the synchronization of his performance in his own language. Given that article 14 declares moral rights to be "unrenounceable and inalienable", they cannot be waived. According to Bercovitz and Bercovitz, it remains to be seen how the courts will apply this principle.⁴⁰⁶

In **Portugal**, according to article 9(3) of the Copyright Code, the author has, independently of economic rights, moral rights in his work that persist even after their transfer or expiration. In addition, article 56 states that 'independently of rights of an economic nature, and even if they have been assigned or transferred for payment' the author enjoys the right to claim authorship of his work⁴⁰⁷ and the right of integrity.⁴⁰⁸ These rights are 'perpetual, inalienable and imprescriptible'. In

⁴⁰⁵ This provision clearly restricts the authors' moral rights on the audiovisual work: they can only exercise their moral rights upon the final version of the work. It means that authors can only object to alterations to the final version, not to alterations of their contributions before the setting of the final version; yet, no case law exists on the issue, so far. Besides, according to art. 92, the 'final version' is decided (and approved) as agreed upon by the director and the producer; this may most likely keep all contributors (and most co-authors) away from deciding the final version. According to paragraph 2, unless otherwise agreed upon, the producer may allow any transformation which is 'strictly dictated by the manner of programming' the television broadcast. No case law exists regarding the limits of that definition: does it only mean commercial cuts? or also time-compression, panning and scanning, etc.?

⁴⁰⁶ Bercovitz and Bercovitz 2000, p. 54.

⁴⁰⁷ The right of attribution of authorship is also laid down in the articles 60(3) (right to deny paternity in cases of modified works of architecture); 97 (publishing contracts); 115(4) and 121(2) (performances and recitation and performance); 134 (audiovisual

addition, articles 62 and 114 give the author the right to withdraw a work from circulation. Several authors agree with the opinion expressed by Dietz that the Copyright Code indirectly recognises authors a ‘right of disclosure’ of their work.⁴⁰⁹

Like in all Member States, moral rights are intended in Portugal to protect the honour and reputation of the author as such. This means, for example, that the right to modify the work can be limited to certain consented modifications, although it cannot be waived.⁴¹⁰ On the other hand, since moral rights are one dimension of the general right of personality (Art. 70 of the Civil Code), it is acceptable to recognize specific moral rights other than those expressly provided in the Code. In this sense, most of the moral rights of the Spanish legislation are recognized by doctrine. However, opinions are not unanimous on this point.

4.7.3 Requirements of form

Under article 45 of the **Spanish** TRLPI, any transfer of rights must be evidenced in writing. This does not mean, however, that non-written licenses are not valid. According to article 48, ‘*the transfer of exclusive rights shall be granted with an express statement of that character*’. Both articles have been construed in the sense that written form is only required for exclusive licenses. Thus, a non-exclusive license may be granted (and valid) without written form. If, after having been formally called upon to do so, the transferee fails to meet this requirement, the author may choose to terminate the contract. If the author is comfortable with the non-written form and/or does not wish to terminate (when the transferee fails to formalize it in writing when required), the license still exists and is valid. The licensing of rights for each of the various modes of exploitation must also be evidenced in independent documents (article 57 (2nd sentence)). According to article 51(1) of the TRLPI, the transfer to the exploiter of the exploitation rights in a work created under employment must be made in writing. In the absence of an agreement in writing, it is presumed that the exploitation rights have been granted exclusively and with the scope necessary for the exercise of the customary activity of the exploiter at the time of the delivery of the work made by virtue of the said employment relations. Articles 60 to 63 of the Spanish TRLPI lay down special rules for publishing contracts. These contracts must be in writing, and establish the modes and dates of distribution and the proportional remuneration. Any contract that is not made in writing, and a contract that does not specify the maximum and minimum numbers of copies for each edition (not required for musical works) and the remuneration to be paid to the author shall be null and void.⁴¹¹ It is not clear whether it is only the author or also the editor who are legitimated to consider the contract null and void. It seems that the minimum contents is set to protect the author rather than the publisher, and therefore, only the former should be allowed to request the annulment of a publishing contract that does not fulfil it. In case of publication of a work in book-form the contract shall also specify: the language of publication; where appropriate, the advance royalties to be paid by the publisher; and, the form(s) of publication. Book publishing contracts must also fulfil some additional minimum requirements of content (article 62): they must specify the language (failure to state it will only allow publication in the original language), the amount of any advance payment – if applicable –, and the

works); 142 (phonograms and videograms); 154 (broadcasting); 160(3) (art); 161 (architecture); 167(1) and 168(2) (photographs); 171 (translations and other transformations).

⁴⁰⁸ The right of integrity of the work is also laid down in the articles 59(1) (in general); 93 (publishing contracts); 115(3) and 121(2) (performances and recitation of performance); 129(1) (audiovisual works); 146 (phonograms and videograms).

⁴⁰⁹ Nevertheless, according to Dietz, the articles 7(4), 58, 101(2), 116, 195(2) can be regarded as such. Dietz 1992, p. 14.

⁴¹⁰ Dias Pereira 2001, p. pp. 339 *et seq.*

⁴¹¹ Both the written form and the minimum contents is *ad solemnitatem*. Other “omissions” may be simply covered either by means of other articles in the LPI and the circumstances involving the contract (for instance, exclusivity will be decided according to article 48, territorial scope according to article 43.2, manner of distribution according to articles 43.2 and 48); the omission of the time limits in paragraphs 6 (which does not apply to publishing contracts concerning the works listed in article 63!) and 7 simply allows both parties to compel each other to rectify it.

form of publication. When the editor fails to fulfil all publications he contractually agreed upon within 5 years, the author may ‘partially’ terminate the contract.

Article 106 of the TRLPI grants the performer the exclusive right to authorize the fixing of his performances, the direct or indirect reproduction of fixations, and the communication of his performances to the public, except where any such performance constitutes in itself a performance transmitted by broadcasting or made from a previously authorized fixation. Such authorizations must be granted in writing. Article 111 of the TRLPI further specifies ‘that Performers who collectively take part in one and the same performance, such as the members of a musical ensemble, choir, orchestra, ballet troupe or theatre company, shall designate one of their number to be their representative for the grant of the authorizations mentioned under this Title. For such designation, which shall be set down in writing, the majority consent of the performers shall prevail’.

In **Portugal**, article 41(2) states the rule that a *license* has to be granted in writing. Article 41(3) provides that ‘the written authorization must show specifically the authorized form of disclosure, publication and use, as well as the relevant conditions governing duration, place and remuneration’’. Case law of the Portuguese Supreme Court of Justice holds that the requirement of an instrument in writing for the licence of reproduction is a formality *ad probationem*, not *ad substantiam*.⁴¹² According to article 43(2), the *partial* assignment of rights requires a written document bearing signatures. Case law of the District Court of Lisbon states that it is a formality *ad substantiam*.⁴¹³ A *total* and permanent assignment of economic rights requires a public deed (*escritura pública*) identifying the work, as well as the relevant remuneration.⁴¹⁴ Article 109 contains a similar provision with respect to performing contracts. In addition, article 111 provides that the competent authority shall be given documentary proof that the author has agreed to its performance. Publishing contracts must also be laid down in a written document to be valid. The requirement of writing is clearly a formality *ad substantiam*. According to article 87 of the Act, the resultant nullity of the lack of instrument in writing is presumed attributable to the publisher and can be invoked only by the author. Moreover, publishing contracts must mention the number of editions concerned, the number of copies for each edition, and each copy's sale price to the public. Article 87 also applies to contracts regarding cinematographic production or an analogous process, phonographic and video-graphic fixation and broadcasting.

4.7.4 Restrictions on transfers of rights

4.7.4.1 Limits of scope, time, and place

Under article 43(1) of the **Spanish** TRLPI, the transfer of the author's exploitation rights in a work is limited to the right or rights transferred, to the means of exploitation expressly provided for and the duration and territorial scope specified. Failure to mention the duration shall limit the transfer for five years, and failure to mention the territorial scope shall limit it to the country in which it is effected. Where the conditions governing the exploitation of the work are not mentioned specifically and categorically, the transfer shall be limited to such exploitation as is necessarily deduced from the contract itself and is essential to the fulfilment of the purpose of the contract. With respect to performers, the exclusive transfer of the performance right must be for a maximum of five years (article 75(1)). However, article 69(3) of the TRLPI provides exceptions to this rule that only apply to publishing contracts. According to this provision publishing contracts end after a period of ten years in case of first editions of dictionaries, anthologies, encyclopaedia, annotations, introductions,

⁴¹² Ac. STJ, 21/4/88.

⁴¹³ Ac. RL, 26/3/98.

⁴¹⁴ Portuguese Copyright Code, art. 44.

scientific works, illustrations, translations, and reduced-price popular editions. According to article 69(4) publishing contracts end, in any event, fifteen years after the author has placed the publisher in a position to carry out the reproduction of the work. It is still unsettled whether the interpretation rules of article 43 (as to term, territory and means of exploitation) must apply to the presumption of transfer of art.88 (and alike); it would not make much sense to do so, but there still no caselaw on the issue. The presumption of transfer may be subject to contrary agreement (granting the producer more or less rights), and in that case (where there's an express license) article 43 would clearly apply.

In **Portugal**, article 68(3) of the Copyright Code proclaims the author's '*bestimmingsrecht*' or '*droit de destination*', according to which the copyright holder has the right to freely choose the processes and the conditions of use and exploitation of the work. Article 68(4) proclaims the principle of autonomy and speciality, according to which the different types of use of works are independent one from another and the adoption of any of them does not preclude the exercise of the others. In addition, article 43(3) of the Code requires that the duration, place of exercise and, where payment is involved, the amount of remuneration, be laid down in the document for each of the rights transferred. Article 43(4) states that, if an assignment is temporary and no duration has been fixed, the duration of the assignment is considered to be twenty-five years in general and ten years in the case of works of photography or applied art.

4.7.4.2 Future forms of exploitation

Article 43(5) of the **Spanish** TRLPI provides that 'the transfer of exploitation rights shall not apply to methods of use or means of dissemination that do not exist or are unknown at the time of the transfer'. With respect to computer programs created by employees in the course of their duties or following instructions from the employer, commentators believe that the employer cannot acquire the rights for forms of exploitation, which do not exist at the time of the assignment.⁴¹⁵ Such acquisition would be contrary to article 43(5) of the TRLPI, which is considered to be applicable to any transfer of rights, whether by contract or by law.

Article 68 of the **Portuguese** Copyright Code provides that the use and exploitation of a work can take place by any means presently known or later developed. The Code contains further no provision concerning the transfer of rights in relation to unknown or future forms of exploitation. Some commentators argue that this silence of the legislator could be interpreted in the following way: concerning licences and partial assignments of rights, such transfers would not be possible since the law requires that contracts determine the process of use or exploitation (1). However, the total assignment of rights might be said to naturally include the transfer of rights in relation to unknown or future forms of exploitation (2).⁴¹⁶

4.7.4.3 Future works

Article 43(3) and (4) of the **Spanish** TRLPI renders null and void any '*global* transfer of exploitation rights in *all* the works that the author may create in the future' and 'stipulations whereby the author undertakes not to create any work in the future'. Furthermore, according to article 59(1) of the TRLPI, future works may not be the object of a publishing contract. Agreements to create works under employment or on commission in the future are permitted, as would be any transfer of exploitation rights in a specific work to be created in the future (what is forbidden is the *global* transfer of rights in *all* future works created by an author).⁴¹⁷

⁴¹⁵ Bondía Román 1997, p. 41.

⁴¹⁶ Dias Pereira 2001, pp. 303 et seq.

⁴¹⁷ Bercovitz and Bercovitz 2000, p 43.

In **Portugal**, the assignment of rights relating to future works is allowed. According to article 48 of the Copyright Code, the contract for the assignment of rights in future works must provide a time limit to constitute a valid agreement. The assignment may only apply to works to be produced by the author within a maximum period of ten years. If a contract concerns works produced over a longer period of time, its effect is reduced to a maximum period of ten years. Article 85 specifies that publishing contracts may have as their object one or more existing or future, published or unpublished works. According to article 104(1), the provisions of article 48 are said to apply also to publishing contracts. Where the publication of a future work has been agreed to without the contract specifying the time limit for handing the work over to the publisher, the latter shall have the right to request the judicial authorities to fix the time limit for this purpose. Subject to valid reasons, the time limit fixed in the contract may be legally extended at the author's request. The same rule applies to contracts concerning the exploitation of cinematographic works or works of analogue process, phonograms and videos, and broadcasting.⁴¹⁸

4.7.5 Determination of remuneration

4.7.5.1 Proportional remuneration

Article 46(1) of the **Spanish** TRLPI lays down the general rule that the licensing of rights entitles the author to a proportional share in the proceeds of exploitation, the amount of which agreed upon with the user. Under certain conditions, a lump sum can be agreed upon (article 46(2)). Article 108 (2) provides that the equitable remuneration for the communication to the public which both the performer and the producer of the phonogram are entitled to will be divided into two equal parts if they do not agree otherwise. The co-authors, and the authors of a pre-existing work incorporated in an audiovisual work, which is not of promotional character, have a non-transferable right to receive a percentage of the proceeds from the person who shows the work in public (article 90(1)). In case the work is exported, the authors may receive a lump sum (article 90(2)). All the co-authors and the author of the incorporated work have a right to proportional remuneration for each of the authorized forms of exploitation (article 90(1)).⁴¹⁹ In addition, co-authors and authors of pre-existing works, are also entitled to remuneration :

- For public communication of the work in public places; remuneration will vary depending on whether an admission charge is required (in that case, remuneration will be a percentage of the proceeds) or not (flat fee remuneration). Where the work is exported, the proportional remuneration may be substituted by a flat fee, also according to article 46. All remuneration for the communication of works in public places is non-renounceable and non-transferable *inter vivos*.
- For rental of copies of the work. This right only accrues when the audiovisual work is embodied in an audiovisual recording (otherwise, if the work is not recorded somehow, no copies to be rented may be derived from it). Rental remuneration is also non-renounceable and equitable. Notice that this second paragraph in article 90 not only states the remuneration for rental, but it also provides for a rebuttable presumption of transfer of this rental right from the co-authors (and authors of pre-existing works) to the producer of the audiovisual recording.

All these remuneration rights must be exercised by collecting societies.

⁴¹⁸ Portuguese Copyright Code, art. 139(1), 140, 147(1) and 156(1).

⁴¹⁹ Thus, complying with article 46. Yet, what is the point of providing for a presumption of transfer, and still obliging parties to set a remuneration for each means of exploitation transferred?

According to article 91(2) of the **Portuguese** Copyright Act, the grant of a license to publish a work is in principle subject to payment, which may consist of a fixed lump sum, a percentage of the selling price of each sample, the attribution of a number of samples, or any other remuneration, according to the nature of the work, or a combination of those modalities of remuneration. The author of a published work has the right to a minimum remuneration of twenty-five percent of the proceeds from each copy sold, unless otherwise provided (article 91(3)). This rule also applies to contracts concerning cinematographic production or analogue process works, phonograms and videograms, and broadcasting.⁴²⁰ Pursuant to article 108(3) of the Act the transfer of a performing artist's right to perform is also deemed to be subject to payment, unless that right is transferred to amateurs. Article 131 provides that 'remuneration due to authors of cinematographic works may consist of a fixed lump sum, a percentage of the receipts derived from the film's projection, a specified sum for each projection, or any other form agreed upon with the producer'.

If an employee is not the initial owner of the economic rights in the work or if the work is created outside the responsibility or task entrusted, or if it is used for purposes or generates profits not foreseen in the agreement on remuneration, article 14(4) of the Code states that the employee is entitled to special remuneration in addition to the agreed remuneration. Where ownership of the economic rights belongs to the person on whose behalf the work was carried out, the intellectual creator shall be entitled to special remuneration, in addition to the agreed remuneration and whether or not the work is disclosed or published, in the following cases: (a) when the intellectual creation has been carried out with all due care but clearly goes beyond the responsibility or task entrusted; (b) when benefits or uses not foreseen in the agreement on remuneration arise.

Article 135 of the Portuguese Code provides that the remuneration of authors of cinematographic works may consist in a fixed global amount (1), or a percentage of a receipts of the exhibition and a certain amount for each exhibition (2), or any other form agreed with the producer (3).

4.7.5.2 Equitable remuneration

Under **Spanish** law, the co-authors and the authors of a pre-existing work incorporated in an audiovisual work, which is not of promotional character, have a right to remuneration for each of the forms of exploitation authorized (article 90(1)). As a principle, this remuneration is proportional. However, if an audiovisual work is shown without admission charge the authors have the right to collect such remuneration as is appropriate according to the general tariffs laid down by the corresponding administration entity (article 90(3)). If the parties nevertheless agree to a commission, the remuneration agreed upon is considered as an advance on the royalties accruing to the author from publication.

In **Portugal**, where the author has assigned his right of rental over a phonogram etc to the producer he is entitled to an unwaivable right to equitable remuneration. In addition, article 144 of the Copyright Code provides that 'musical works and corresponding texts that have been the subject of commercial phonographic fixing without opposition by the author may be fixed anew'. In this case, the author retains the right to equitable remuneration and, in the absence of agreement between the parties, the Ministry of Culture determines the fair amount. In relation to photographic works, article 165(3) states that 'any person who uses a photographic reproduction for commercial purposes shall pay the author equitable remuneration'. Authors are also entitled to equitable remuneration on the basis of their «*droit de suite*» (Art. 54), as well as for reproductions of works for private purposes (Art. 82).

⁴²⁰ Id., art. 139(1), 140, 147(1) and 156(1).

4.7.5.3 Lump sum

Pursuant to articles 46(2) and 52 of the **Spanish** TRLPI, authors may receive a lump sum remuneration under the following special circumstances:

- If it is difficult to calculate or verify the proceeds;
- If the use of the work is of minor importance; or
- If the work is used in periodicals and first editions of dictionaries; anthologies; encyclopaedia; annotations; introductions; presentations; scientific works; illustrations; translations; and, reduced-price popular editions.

The lump sum contract may be reviewed.⁴²¹ The authors of an audiovisual work may agree upon a lump sum if the work is exported and it is impossible or extremely difficult for the authors to exercise their right to a proportional remuneration effectively in the importing country (article 90(2)).

Article 91 of the **Portuguese** Copyright and Related Rights Code provides that the grant of a licence to publish a work entitles the author to proportional or lump sum remuneration or ‘payment on some other basis, according to the nature of the work, and a combination of such forms may be used’. Article 110(1) and 131 provide similar rules for performers and authors of cinematographic works. Article 170 provides that where the publisher, impresario, producer, or other entity uses a translation for purposes additional to the conditions agreed upon or established in the Code, the translator shall have the right to additional compensation.

4.7.5.4 ‘Best-seller’ clause

Under **Spanish** law, article 47 allows the court to review a lump sum contract, if the remuneration is manifestly out of proportion with the profits obtained by the user. The court is entitled to award an equitable remuneration in the light of the circumstances of the case. This right may only be exercised within ten years following the transfer.

Under **Portuguese** copyright law, the intellectual creator or his successors in title may claim additional compensation in case there is an evident disproportion between the remuneration received for the assignment of their rights and the profits earned by the transferee of the rights (article 49(1)). If nothing is agreed upon concerning the additional compensation, this amount of compensation is fixed, taking into account the normal results of exploitation of all the author's similar works (article 49(2)). This right lapses, if it is not exercised within a period of two years from date of becoming aware of the grave economic prejudice suffered (article 49(4)). For equitable reasons, the Code also provides a complementary compensation for translators where their work has been used beyond the licence or the Code (Art. 170).

4.7.6 Interpretation of contracts

The German ‘*Zweckübertragungslehre*’ has, to some extent, also influenced the adoption of article 43(2) (2nd sentence) of the **Spanish** TRLPI.⁴²² This provision states that where the conditions governing the exploitation of the work are not mentioned specifically and categorically, the transfer shall be limited to such exploitation as is necessarily deduced from the contract itself and is essential to the fulfilment of the purpose of the contract. Article 43(2) provides that if the territorial scope is not

⁴²¹ Within ten years, if the remuneration is manifestly out of proportion to the profits obtained by the licensee, the author may apply for a review of the contract and – failing an agreement – may go to court to seek an equitable remuneration (art.47).

⁴²² Dietz 1990, p. 183; Schlatter and Götz 1995, p. 793.

laid down in the contract, this scope is limited to the country in which the license is effectuated. As a result, neither the nationality of the contracting parties, nor their place of residence is important, but only the place in which the agreement is concluded.⁴²³ The same is true for article 51(2), relating to the presumed transfer of rights to the employer. Article 76 of the Spanish TRLPI provides that if a contract does not specify the types of performance licensed, it shall be limited to performances for which a sum of money is charged for admission.

The general rules set out in articles 236 to 239 of the **Portuguese** Civil Code apply to the interpretation and integration of copyright contracts. However, the ‘*Zweckübertragungslehre*’ has been adopted by Portuguese literature.⁴²⁴ This particular rule of interpretation has also been expressly codified in article 11(3) of the Software Act, apparently according to the Computer Programs Directive. However, it can also be derived from articles 41(1) and 88(1) of the Portuguese Copyright Act, which provide that a license granted to a third party to disclose, publish, or exploit a work does not in any way imply the transfer of copyright in the work. In addition, according to article 43(1), ‘the sole object of a partial assignment shall be the forms of use designated in the relevant agreement’. Article 86(2) and 88(2) provide special rules of restrictive interpretation relating to publishing contracts. According to these provisions, a publisher is licensed to produce one edition, in the case the number of editions is not contractually stipulated. Furthermore, a license does not give the publisher the right to translate, transform, or adapt the work to other types and forms of use. These rules also apply to contracts concerning cinematographic production or analogue process works, phonograms and videos and broadcasting.⁴²⁵

4.7.7 Effect of transfer in relation to third parties

4.7.7.1 Right to transfer acquired rights

According to article 48 of the **Spanish** TRLPI, the holder of an *exclusive* license may, unless otherwise agreed, grant non-exclusive licenses to third parties. The holder of an exclusive license may transfer her exclusive right to a third party, with the explicit consent of the author. In the absence of consent, the user and the third party are jointly responsible towards the author for the obligations arising out of the contract (article 49(2)). It is also a ground to terminate a publishing contract. Consent is not required if the licensing occurs as a result of the liquidation or a change in the ownership of the corporate user (article 49 (1) and (3)). *Non-exclusive* licenses do not give the user the right to transfer the acquired rights, except in case of liquidation or change of ownership of the corporate user (article 50).

In **Portugal**, article 40 of the Copyright Code lays down the general rule that the assignee may only with the consent of the author transfer his rights. No consent is required however, if the transfer is the result of the liquidation or a change in the ownership of the corporate user, in case of publishing contracts (article 100(1)), performance contracts (article 118), and, phonographic and fixations on video (article 145). The producer of a cinematographic work is allowed to transfer rights, but he remains responsible towards the author for the fulfilment of the contract (article 133).⁴²⁶ One can reasonably argue that this rule also applies *a fortiori* to licences of exploitation.

⁴²³ Schlatter and Götz 1995, p. 793.

⁴²⁴ Dias Pereira 2001, pp. 337, n. 587, 598, n. 996, 605, n. 1007, with the references therein.

⁴²⁵ Portuguese Copyright Code, art. 139(1), 140, 147(1) en 156(1).

⁴²⁶ These rules also apply to contracts concerning cinematographic production or analogue process works, phonograms and videograms and broadcasting (articles 139(1), 140, 147(1) en 156(1)).

4.7.7.2 Standing to sue

According to article 48 of the **Spanish** TRLPI, the licensing of exclusive rights gives the user the right to institute proceedings for violations that affect the powers given to him.

There is no provision in the **Portuguese** Copyright Act concerning the assignee's or the licensee's standing to sue for copyright infringement.

4.7.7.3 Right to pledge, secure or seize acquired rights

According to the **Portuguese** Copyright Code, copyright – except moral rights – can be given as pledge (security of movable things) and can be object of seizure and apprehension, except for unpublished works, which require, in principle, the author's consent (Arts. 46, 47 and 48). However, while the acquisition of copyright does not require register; the contractual pledge and judicial seizure and apprehension must be registered (Arts. 213 and 215).

The **Spanish** TRLPI contains no provision concerning the right of the transferee to pledge, secure or seize the acquired rights.

4.7.8 Termination of contract

4.7.8.1 Non-use of rights

Under **Spanish** law, an author may terminate the publishing contract if the publisher fails to produce the edition of the work in the agreed time and under the agreed conditions (article 68(1)(a)). The author may also terminate the publishing contract if the publisher fails to exploit the work continuously and distribute the work conforming the usual practice in the publishing profession, in spite of an express demand from the author calling on him to do so (article 68(1)(b)). The author has the same right if the last edition produced is out of print, i.e. when the number of unsold copies is less than five percent, and in any event if it is below hundred, and the publisher does not produce the next edition within one year of having been called upon to do so by the author (article 68(1)(e)). In case of stage and musical performance contracts, article 81(1) provides that these contracts may be terminated by the author in case the producer who has acquired exclusive rights, after having started public performances of the work, suspends them for a year. This rule does not apply to broadcasting of the performance (article 84(1)).

Under **Portuguese** law, the author may terminate the publishing contract in case the publisher does not conclude the edition to within the term specified in the contract, unless the failure to publish is justified for reasons of *force majeure* (Art. 106(1)(c)). In relation to cinematographic works, article 136 provides that if the producer fails to complete the production of the work within a period of three years from the date of handing over the literary and musical parts, or fails to have the finished film projected within a period of three years from the date of its termination, the author or co-authors have the right to cancel the contract.

4.7.8.2 Bankruptcy of exploiter

Article 68(1)(f) of the **Spanish** TRLPI entitles an author to terminate the publishing contract in the event of 'the liquidation or change of ownership of the publishing firm, insofar as the reproduction of the work has not been put in hand'. Under these circumstances, the courts may, according to paragraph 2, 'at the author's instigation, set a period for the resumption of such exploitation'. The publishing contract terminates if the resumption does not occur.

Under **Portuguese** law, the situation of bankruptcy of the publisher may be considered to imply the termination of contract (Art. 102).

4.7.8.3 Other circumstances

Under **Spanish** law, an author is, in general, entitled to terminate the contract if the user fails, after having been formally called upon to do so, to prove the transfer in writing (article 45). In case of publishing contracts, the author is entitled to terminate the contract if the publisher fails to submit proofs from the print-run to the author or to fails remit to the author the remuneration specified, after called upon to do so (article 68(1)(b)). Furthermore, the author is entitled to terminate the publishing contract, which does not relate to musical works, if the publisher proceeds to destroy the remaining copies of an edition without meeting the requirements of article 67 (article 68(1)(c) and article 71(3)). Finally, the author may terminate the contract when the user transfers his rights to a third party without the author's consent (article 86(1)(d)). In case of stage and musical performance contracts, the author is entitled to terminate the contract, according to article 81(3), if the exploiter, after having been called upon to do so, fails either:

- 'to effect the communication without subjecting the work to alterations that have not been agreed to by the author, and under technical conditions that do not prejudice the latter's moral rights' (article 78(2));
- 'to allow the author the inspect the performances and attend them free of charge' (article 78(3)); or
- 'to submit to the author or to his representatives the exact program of communications to the public, and, when the remuneration is proportional, a statement of proceeds' (article 78(5)).

Note that, according to article 82, these contracts expire at the moment that the first performance of a work has been clearly rejected by the public.

In **Portugal**, article 100(1) and (2) provide the author's right to terminate the publishing contract in case the transfer of rights by the publisher to a third party is the result of the selling and other acts of disposition of the undertaking and this disposition leads to moral prejudice of the author. This right must be invoked within six months from the date on which the author is informed of the disposition. The publisher has the right to claim compensation for damages. Article 104(5) states that where the author exceeds the limits of length of volumes or instalments mentioned in the contract without the prior consent of the publisher, he shall not have any right to additional payment and the publisher may refuse to publish the additional volumes, instalments or pages. The author shall however retain the right to cancel the contract, compensating the publisher for the expenditure incurred and the anticipated profits. Where the work has already been sold in part, the results obtained shall form the basis for calculating compensation. Furthermore, article 106 provides a list of occasions in which a publishing contracts may be cancelled, such as in case of a prohibition imposed on the publisher; the death of the individual publisher; and, in general, where it is proven that any of the contractual clauses or the direct or supplementary legal provisions applicable have not been fulfilled. These rules also apply to contracts concerning cinematographic production or analogue process works, and, phonograms, videograms, and broadcasting.⁴²⁷ Article 120 provides a

⁴²⁷ Portuguese Copyright Code, art. 139(1), 140, 147(1) en 156(1).

similar provision relating to performance. In addition, article 120(1)(c) states that the contract may be cancelled in case the public obviously and continuously does not attend the performances.

4.8 *Nordic Countries*

4.8.1 Ownership of Rights

4.8.1.1 Creator doctrine

In the Nordic Countries, someone other than the natural person who created the work can be presumed the author of the work and the owner of the rights therein only in one instance: in the case of anonymous or pseudonymous works. In principle, the person whose name or generally known pseudonym or signature appears in the usual manner on copies of the work or when it is disclosed to the public, is deemed, in the absence of proof to the contrary, to be its author. However, if a work is published without any indication of the name of the author, the editor, if he is named, or otherwise the publisher, is deemed to represent the author.⁴²⁸

4.8.1.2 Works created under employment

The Copyright and Related Rights Acts of the Nordic countries contain no provision regulating the ownership of works created under employment, with the exception of the provision concerning the creation of a computer program by an employee as a part of his tasks or following instructions by the employer.⁴²⁹ Under Finnish law, the provisions relative to the transfer of rights in a computer program created by an employee to the employer also apply to the transfer of rights relative to a database created by an employee in an employment relationship (Article 40b). In general, the courts would seem to have accepted the idea that an employer may, within his field of activities, use the works that have been created as a result of duties under the employment contract, but only for purposes that could be foreseen at the time the work was created.⁴³⁰ In Finland, there is currently a government appointed expert whose task is to examine whether special provision with regard to transfer of rights in employment relationship is needed in Finnish copyright law.

4.8.1.3 Works created on commission

The Copyright and Related Rights Acts of the Nordic countries contain no provision regulating the ownership of works created on commission. One must therefore conclude that, whenever a work is created on commission, the creator doctrine applies and the actual author is recognised as having the ownership of the rights on the work thus created.

4.8.1.4 Audiovisual works

In the Nordic countries, the authors of an audiovisual work are the natural creators thereof. However, article 39 of both the **Swedish** and the **Finnish** Copyright Acts establishes a presumption of transfer of the right to produce a work, which includes the right of the producer to make the work available to the public, by showing the film in cinemas, on television or by any means, as well as subtitle or dub that work.⁴³¹ This presumption does not apply to musical works. In Finland, the interpretation of the presumption is somewhat unclear. According to the strictest interpretation, it would only apply to performing rights in the film and would not convey any reproduction rights to

⁴²⁸ Danish Copyright Act, art. 1; Finnish Copyright Act, art. 1; Swedish Copyright Act, art. 1.

⁴²⁹ Danish Copyright Act, art. 59; Finnish Copyright Act, art. 40b; and Swedish Copyright Act, art. 40a.

⁴³⁰ In various sectors standards have developed. See: Muldin 1997, p. 169; Karnell 2000, p. 25.

⁴³¹ Levin and Kur 1995, p. 734.

the producer. The *travaux préparatoires* of the law would, however, indicate that it covers all exploitation rights in the film.⁴³² Article 40 of both Acts imposes on the producer the duty to produce the cinematographic work and to make it available to the public within a reasonable time. According to article 27 of both Acts, the provisions governing the transfer of copyright apply only in the absence of an agreement to the contrary. While the provisions of the Swedish and Finnish Acts guarantee the same treatment to authors of audiovisual works, they give their national performers a different treatment. According to article 45 of the Swedish Copyright Act, article 39 first sentence is applicable to performances, whereby a presumption of transfer of the right to record a performance includes the right of the producer to make the work available to the public, by showing the film in cinemas, on television or otherwise, as well as subtitle or dub that work. The same provision specifies that the transfer of a copy of a recording within the European Economic Area does not confer a right to make available to the public copies of recordings, through rental or other similar legal acts, or copies of a film or other material support on which moving images have been recorded, through lending. In other words, rental and lending rights in audiovisual works are not subject to exhaustion by first transfer of ownership of the copy of the work within the European Community. Since, under Finnish law, the performers are not conferred the same spectrum of rights with regard to their performances fixed in audiovisual works as is done under Swedish and Danish laws, performers rights are not subject to the presumption of transfer of rights under § 39 of the Finnish Copyright Act. However, according to Article 45 of the law ‘the transfer of the right to film a performance shall, unless otherwise agreed, include the right to distribute the recorded performance to the public by rental’. This means that only rental rights of performers with regard to their performances fixed in audiovisual works are subject to the presumption of transfer of rights to the producer.

In **Denmark**, article 58 of the Copyright Act contains a similar, but more elaborate presumption of transfer of rights from the author to the producer. The first paragraph provides that an agreement to participate in the recording of a film implies that the author neither has the right to oppose to reproduction, distribution and performance in public of the film or copies thereof, nor has the right to oppose to the subtitling or dubbing of the film. According to the second paragraph, this presumption does not apply to authors of pre-existing works, scriptwriters, composers, nor to the principal director. In relation to performing artists, article 65(3) of the Danish Copyright and Related Rights Act enounces that ‘an agreement between a performing artist and a film producer to take part in the recording of a film implies that in the absence of any opposite agreement the performing artist is assumed to have assigned his right to the rental of the film to the producer’.

4.8.2 Forms of transfers of rights

4.8.2.1 Assignment

Under the Copyright and Related Rights Acts of **Denmark** and **Finland**, authors’ rights are assignable or transferable, in whole or in part.⁴³³

4.8.2.2 Licence

The authors’ and the performers’ rights are transferable, in whole or in part, in the three Nordic countries. In **Finland and Sweden**, article 30 of the Copyright Act specifies that the transfer of the right to perform a work in public will be regarded as a non-exclusive license, unless otherwise provided. If the agreement by which the rights are transferred provides exclusivity, the author may

⁴³² Salokannel, Ownership of rights in audiovisual productions, Kluwer Law Internationa 1997,, pp. 229-235.

⁴³³ See Danish Copyright Act, art. 53(1); and Finnish Copyright Act, art. 27.

nevertheless perform the work himself or transfer the right of performance to others if those rights are not exercised for a period of three years.

Besides the traditional licences between an individual author or performer on the one hand and a producer on the other hand, authors and performers license their rights under a system known in the Nordic countries as the ‘extended collective agreement’. An extended collective agreement license applies to the use of works in a specific manner, mainly in the context of unauthorised uses of works or other subject matter, when an agreement has been concluded concerning such a use with an organization which represents a substantial number of local authors or performers in the field concerned. The extended collective agreement license gives the user the right to use works of the type referred to in the agreement notwithstanding the fact that the authors of those works are not represented by the organization. The extended collective license gives the user the right only to exploit the unrepresented works in the manner and on the terms that follow from the agreement made with the organisation and from the provisions mentioned above. Some extended collective license provisions give the unrepresented authors the right to prohibit the use of their works under the applicable extended collective license regime, and some do not. In the latter case, when the unrepresented authors do not have the right to veto the use of their works, the extended collective license provision amounts to a legal license with regard to use of their works.

4.8.2.3 Waiver

Article 3 of the **Swedish** and the **Danish** Copyright Acts grants the author the right of paternity and the right of integrity. According to the last sentence of this article, the author may waive his moral rights only *ex ante*⁴³⁴ with regard to ‘uses limited as to their character and scope’. Consequently, a non-specific waiver of moral rights is not binding upon the author. Article 28 of the Swedish and 56(1) of the Danish Copyright Act provide that an assignment of copyright does not give the user the right to alter the work. However, it also provides that the author and user may agree otherwise.⁴³⁵ In addition, only the Danish Copyright Act states that the ‘usual or obviously presumed’ alteration of the work is permitted. The same rules apply to the exploitation of the recordings of performances (article 45(4) Swedish and 65(4) Danish Copyright Act).

Similarly, article 3 of the **Finnish** Copyright Act states that when copies of a work are made or when the work is made available to the public in its entirety or in part, the name of the author must be stated in the manner required by proper usage. Furthermore, a work may not be altered in a manner that is prejudicial to the author’s literary or artistic reputation or to his individuality, nor may it be made available to the public in such a form or context as to prejudice the author in the manner stated. However, the author may waive his rights under this article with binding effect only in relation to use that is limited as to the type and extent of use.

4.8.3 Requirements of form

The Copyright and Related Rights Acts of the Nordic Countries contain no specific provision requiring the use of an instrument in writing as a condition for validity or evidence. The validity and evidence of oral and written copyright contracts concluded by individual parties in Denmark, Finland, and Sweden is regulated under the general rules of civil law pertaining to the formation of contracts. However, it is worth pointing out that, according to the **Danish** rules on extended collective agreements, rights holder organisations that make agreements on simultaneous and unaltered retransmission of broadcasts or on the public performance of a musical work must be

⁴³⁴ Rosén 1993, p. 367.

⁴³⁵ Levin and Kur 1995, p. 741.

approved by the Minister of Culture. Agreements concluded in contravention of this requirement are null and void.⁴³⁶

4.8.4 Restrictions on transfers of rights

4.8.4.1 Limits of scope, time, and place

None of the Copyright Acts of the Nordic countries contains a rule limiting the transfer of rights in scope or geographical territory. However, article 30 of the **Finnish** and **Swedish** Copyright Acts does limit the transfer of the right to perform a work in public to a period of three years. If a longer period is agreed upon or if exclusive rights are transferred then the author may perform the work himself or transfer the right to another person if these rights have not been exercised for a period of three years. This provision does not apply to cinematographic works.⁴³⁷

4.8.4.2 Future forms of exploitation

None of the Copyright Acts of the Nordic countries contains a rule regarding the assignment of rights in future forms of exploitation. One could therefore conclude from the legislator's silence that a transfer of rights in relation to unknown or future forms of exploitation could be possible under the laws of the Nordic countries. Nevertheless, some commentators have argued that, in case of doubt, the transfer of rights does not extend to forms of exploitation of the work that are not yet known at the time the agreement was signed.⁴³⁸

4.8.4.3 Future works

None of the Copyright Acts of the Nordic countries contain a rule regarding the assignment of rights in future works. Hence, nothing precludes the transfer of rights in future works, subject of course to the judicial review of unfair contract terms.⁴³⁹

4.8.5 Determination of remuneration

4.8.5.1 Proportional remuneration

The Copyright and Related Rights Acts of the Nordic countries all contain the requisite provision regarding the unwaivable right to remuneration for authors of audiovisual works and authors of works fixed in a phonogram. Under Finnish (Article 29) and Danish (Article 58a) laws, the remuneration has to be paid by the producer. The Swedish law leaves this open (Article 29). However, while article 35 of the **Finnish** and **Swedish** Act does not regulate the form of remuneration to be paid to authors, it does put an obligation on the publisher to give account of the receipts. Thus, if during the fiscal year sales have taken place for which the author is entitled to remuneration, the publisher must render account to him within nine months from the end of the year, stating the number of copies sold during the year and the number in stock at the end of the year. At his request, the author is also otherwise entitled to obtain a statement of the number in stock by the end of the year. Similarly, article 57(1) of the **Danish** Copyright and Related Rights Act does specify that 'if the author's remuneration depends on the assignee's turnover, sales figures, etc., the author may demand that settlement is made at least once a year. The author may likewise

⁴³⁶ Danish Copyright and Related Rights Act, art. 50(3) and (4).

⁴³⁷ Levin and Kur 1995, p. 736.

⁴³⁸ Schönning 2000, p. 33.

⁴³⁹ Karnell 2000, p. 28; Strömholm 1987, p. 25; Schönning 2000, p. 33. See section 3.2.3 *supra*.

demand that the settlement be accompanied by satisfactory information on the circumstances forming the basis of the calculation of the remuneration'. In addition, article 57(2) states that the author may demand that the accounts, bookkeeping and inventory together with certifications by the party who has exploited the work in connection with the annual settlement according to subsection (1) be made available to a state-authorized public accountant or registered accountant appointed by the author. The accountant shall inform the author of the correctness of the settlement and of irregularities, if any. The accountant shall otherwise observe secrecy about all other matters that become known to him in connection with his review. The parties to a contract may not deviate to the detriment of the author from the protection granted under these provisions.

4.8.5.2 Equitable remuneration

A number of provisions in the Copyright and Related Rights Acts of the three Nordic countries grant authors and performers a right to remuneration for specific unauthorised uses of their works or other subject matter. In **Denmark**, uses that are subject to the terms of an extended collective agreement concern the reproduction of works for educational activities, the reproduction of works by business enterprises, the making by governmental or municipal institutions and other social or non-profit institutions of reproduction of works for the visually handicapped and hearing-impaired persons, the use of works of fine art in a generally information presentation, and the broadcast and retransmission of works.⁴⁴⁰ In such circumstances, the conditions concerning the use of the works that result from the extended collective agreement, apply.⁴⁴¹ As regards remuneration deriving from the agreement and as regards other benefits from the organization, which are essentially paid for out of the remuneration, the author shall be treated in the same way as those authors who are members of the organization. Without prejudice to what has now been stated such authors have, however, always a right to remuneration in respect of the utilization provided that they claim such a remuneration within three years from the year in which the use took place. Unrepresented authors may claim an individual remuneration although such a right appears neither from the agreement with the user nor from the organisation's rules on remuneration. The amount of the individual remuneration may be fixed according to the provision of Section 47(1). Claims for remuneration may be directed only against the organization. In the absence of any result of negotiations on the making of extended collective agreements, each party may request mediation following the procedure set out in article 52 of the Act.

Certain uses of works by means of reprography, for educational purposes, and for radio and television broadcasts, are subject in Finland and Sweden to the conditions laid down in the applicable extended collective agreement. Article 26 of the **Finnish** Copyright Act states that any agreement that the organization representing a large number of Finnish authors in a certain field may have concluded regarding the apportionment of remuneration for the reproduction or broadcasting of a work among authors represented by the organization, or regarding the use of the remuneration for the joint purposes of those authors, shall apply accordingly to authors who are not represented by the organization. If the provision made by the organization and referred to above does not include the right to individual remuneration for the authors represented by the organization an author not represented by the organization does however have the right to claim individual remuneration. The remuneration shall be paid by the organization referred to in the first paragraph. The right to individual remuneration shall have lapsed, however, where no claim concerning it has been verifiably submitted within three years from the end of the calendar year in which the reproduction or broadcasting of the work took place. Similarly, article 26i of the **Swedish** Act provides that as regards remuneration deriving from the agreement and as regards other benefits

⁴⁴⁰ Danish Copyright and Related Rights Act, art. 13, 14, 17(5), 23(2), 30 and 35.

⁴⁴¹ Danish Copyright and Related Rights Act, art. 50.

from the organization, which are essentially paid for out of the remuneration, the author shall be treated in the same way as those authors who are members of the organization. Without prejudice to what has been stated such authors have, however, always a right to remuneration in respect of the utilization provided that they claim such a remuneration within three years from the year in which the use took place. Claims for remuneration may be directed only against the organization.

4.8.5.3 'Best-seller' clause

While none of the Copyright and Related Rights Acts of the Nordic countries contains a specific 'best-seller' clause, article 29 of the **Finnish** Copyright and Related Rights Act does state that 'the provisions of the Contracts Act shall apply to the amendment of an unfair clause in an agreement on the transfer of copyright'. A similar provision has been incorporated in article 36 of the Swedish Act on Contracts and other Legal Transactions in the Field of Property Rights, which allows for the modification or nullification of unreasonable contract terms.⁴⁴² This last provision replaced the former article 29 of the Swedish Copyright and Related Rights Act. The **Danish** Act on Contracts provides the same rule. One could therefore argue that

4.8.6 Interpretation of contracts

While the Finnish and Swedish Copyright Acts contain no special provision on the interpretation of copyright contracts, the **Danish** Copyright Act states in article 53(3) that 'where a right to exploit the work in a specific manner or through specific means has been assigned, the assignment does not give the assignee the right to exploit the work in any other manners or through any other means' than stipulated. This provision clearly calls for a restrictive interpretation of transfers of rights.

4.8.7 Effect of transfer in relation to third parties

4.8.7.1 Right to transfer acquired rights

Under **Finnish** and **Swedish** law, the assignee of rights does not have, unless provided otherwise, the right to transfer the acquired rights to third parties without the consent of the author (article 28). This rule applies to the partial as well as a full assignment of economic rights⁴⁴³ and to the transfer of performing rights.⁴⁴⁴ However, if the copyright forms part of a business, it may be transferred together with the business or part thereof, but the user remains liable to the author for the fulfilment of the contract.

Article 56(2) of the **Danish** Copyright Act states that 'the assignment of copyright does not give the assignee any right to reassign copyright unless the reassignment is usual or obviously presumed'. If the user transfers his acquired rights, he will remain liable for the performance of the contract with the author. This rule applies correspondingly to performers' performances and recordings of such performances (article 65(4)).

4.8.7.2 Standing to sue

There is no provision in the Copyright Acts of the Nordic Countries concerning the assignee's or the licensee's standing to sue for copyright infringement. One must therefore refer to the general principles of civil procedure.

⁴⁴² Levin and Kur 1995, p. 744, 745; Karnell 2000, p. 28, 29; Nyh 1998, p. 299, 301; and Strömholm 1968, p. 17.

⁴⁴³ Levin and Kur 1995, p. 742.

⁴⁴⁴ Swedish Copyright Act, art. 45(4), 47(3), and (4).

4.8.7.3 Right to pledge, secure or seize acquired rights

Article 42 of the **Finnish** and **Swedish** Copyright Acts states that ‘copyright shall not be subject to legal seizure as long as the copyright remains vested in the author or in any other person who has acquired the copyright by virtue of marital entitlement to property, inheritance or testamentary provision. The same rule applies to manuscripts and works of art that have not been exhibited, placed on sale or otherwise authorized for dissemination’. One can therefore conclude from this provision that a copyright may be subject to legal seizure once it has been transferred – by assignment or licence – to a third party.

There is no provision in the **Danish** Copyright Act concerning the assignee’s or the licensee’s power to pledge, secure or seize acquired rights.

4.8.8 Termination of contract

4.8.8.1 Non-use of rights

Article 34 of the **Finnish** and **Swedish** Copyright Acts gives the author the right to terminate the publishing contract in case of non-use of the transferred rights and to keep the remuneration received. In case of literary or artistic works, the period of non-use is more than two years from the time when the author has delivered the work, and four years in case of musical works. The same rule applies when the publisher fails to exercise his right to publish a new edition, within one year from the time of the request by the author to do so. These rules do not apply to contributions to newspapers or periodicals, and contributions to other composite works (article 38). Article 40 of both Acts provides that in case the producer does not produce the film and make it available to the public within a reasonable time, the author is entitled to terminate the contract, keep the remuneration received and request compensation for incurred damages. If the work has not been produced within five years from the time when the author fulfilled his obligations, the author has the same rights even if the non-use is not the fault of the producer.

More generally, article 54 of the **Danish** Copyright Act provides that the assignee is under an obligation to exploit the work. The author may terminate the contract if the user has not exploited the work within a reasonable time or, at the latest, five years after the time where the obligation arising out of the contract have been fulfilled by the author. The author is also entitled to terminate a contract, subject to a reasonable notice, provided that the contract does not expressly specify the individual forms of exploitation assigned, if the user does not implement one or more unspecified forms of exploitation within three years from the time the author fulfilled his obligations arising out of the contract. Articles 54 and 55 apply correspondingly to performances and recordings thereof (article 65(4)).

4.8.8.2 Bankruptcy of exploiter

There is no provision in the Copyright Acts of the Nordic Countries concerning the right of the author to terminate the contract in case of bankruptcy of the exploiter.

4.8.8.3 Other circumstances

According to article 33 of the **Finnish** and **Swedish** Copyright Acts, the author may terminate the publishing contract if the publisher fails to distribute the work in the usual manner, and to follow up the publishing to the extent determined by marketing conditions and other circumstances. The

author may keep the remuneration received, and the publisher must compensate the damages suffered by the author.

4.9 *United Kingdom and Ireland*

4.9.1 Ownership of Rights

4.9.1.1 Creator doctrine

Articles 11(1) of the **British** Copyright Design and Patent Act and 21(1) of the **Irish** Copyright and Related Rights Act define the ‘author’ as the person who creates a work. But the rule contains several exceptions, according to which the ‘author’ includes:

- a) in the case of a sound recording, the producer;
- b) in the case of a film, the producer and the principal director;
- c) in the case of a broadcast, the person making the broadcast or in the case of a broadcast which relays another broadcast by reception and immediate retransmission, without alteration, the person making that other broadcast;
- d) in the case of a cable programme, the person providing the cable programme service in which the programme is included;
- e) in the case of a typographical arrangement of a published edition, the publisher;
- f) in the case of a work which is computer-generated, the person by whom the arrangements necessary for the creation of the work are undertaken;
- g) in the case of an original database, the individual or group of individuals who made the database; and
- h) in the case of a photograph, the photographer.

4.9.1.2 Works created under employment

Article 11(2) of the **British** Copyright Design and Patent Act states that where an employee creates a work in the course of his employment, the employer is the first owner of the copyright in the work.⁴⁴⁵ The test conducted to determine whether an employer-employee relationship exists has traditionally been to enquire whether the employer is entitled to exercise control over his employee's actions.⁴⁴⁶ Nowadays, the test used by the courts is whether the work undertaken forms an integral part of the business, whether it is integrated into the business or whether it is only an accessory to that business.⁴⁴⁷ In other words, where the work is created on the ‘employee’s’ own account, it does not arise out of the employment relationship.⁴⁴⁸ Article 11 requires the work to be made ‘in the course of employment’. Important factors to determine whether this requirement has been met, is to examine whether the work is made during business hours and whether it is the type of work which the employee might be expected to undertake for his employer.⁴⁴⁹ Parties may agree, before the work is created, that the employer is not the copyright owner.⁴⁵⁰

Similarly, article 23(1)(a) of the **Irish** Copyright and Related Rights Act states that where an employee creates a work in the course of his employment, the employer is the first owner of the copyright in the work. However, article 23(2) of the Act specifies that ‘where a work, other than a

⁴⁴⁵ Although the employer is treated as the first owner, he is not deemed to be the author. So, for example the duration of copyright is measured by reference to the life of the creator. Cornish 1995, p. 650 and Cornish 1998, p. 228.

⁴⁴⁶ Laddie a.o. 2000, p. 819, 820; Skone James a.o. 1991, p. 88; and Bentley 2000, p. 53.

⁴⁴⁷ *Stephenson Jordan v. McDonald & Everans* (1951) 69 R.P.C. 10, at 22 (Denning L.J.).

⁴⁴⁸ *Market Investigations Ltd v Minister of Social Security* (1969), 2 QB 173. See Laddie a.o. 2000, p. 819-821.

⁴⁴⁹ For examples provided by case law see Bentley 2000, p. 53, 54 (footnote 33 – 35); Skone James a.o. 1991, p. 90-91; Laddie et al. 2000, p. 823-825.

⁴⁵⁰ Laddie et al. 2000, p. 833.

computer program, is made by an author in the course of employment by the proprietor of a newspaper or periodical, the author may use the work for any purpose, other than for the purposes of making available that work to newspapers or periodicals, without infringing the copyright in the work⁷.

4.9.1.3 Works created on commission

The **United Kingdom**'s CDPA contains no special provisions relating to works created under commission.⁴⁵¹ However, under the so-called doctrine of ownership in equity, the commissioner may acquire certain the exploitation rights by way of implied transfer of rights.⁴⁵²

The **Irish** Copyright and Related Rights Act contains no provision regulating the ownership of works created on commission. One must therefore conclude that, whenever a work is created on commission, the creator doctrine applies and the actual author is recognised as having the ownership of the rights on the work thus created.

4.9.1.4 Audiovisual works

According to article 9(2)(ab) of the **United Kingdom** CDPA, the authors of a film are the producer and the principal director.⁴⁵³ The term 'producer' is defined in article 178 as 'the person by whom the arrangements for the making of the film are undertaken', with particular judicial emphasis on such aspects as the initiation of the project, its organization, and the arrangement of location.⁴⁵⁴ Films are regarded as works of joint authorship unless the producer and the principal director are the same person (article 10(1) and (1A)). According to article 93A(1), an author of a film is presumed to have assigned to the producer any rental right in relation to the film. This provision does not apply to the authors of the screenplay, the dialogue or the music (article 93A(3)). Article 191F contains a similar provisions for performers, which states that 'where an agreement concerning film production is concluded between a performer and a film producer, the performer shall be presumed, unless the agreement provides to the contrary, to have transferred to the film producer any rental right in relation to the film arising from the inclusion of a recording of his performance in the film'.

In **Ireland**, the rules of ownership of audiovisual works laid down in the Copyright and Related Rights Act essentially incorporate in Irish law the provisions of the Rental and Lending Rights Directive. Article 21(b) provides that the author of a film is the person who created it and includes the producer and the principal director. According to article 124(1) and (2) of the Irish Act, where an agreement concerning film production is concluded between an author and a film producer, the author is presumed, unless the agreement provides to the contrary, to have transferred to the film producer any rental right in relation to the film arising by virtue of the inclusion of a copy of the work of the author of the film. An identical provision has been adopted with respect to performers in article 297(1) and (2) of the Copyright Act.

⁴⁵¹ Under the CA 1911 and 1956 there were special provisions about commissioned works. Skone James a.o. 1991, p. 82; Laddie 2000, p. 827-831.

⁴⁵² For the requirements on ownership in equity see Laddie a.o. 2000, p. 842-845. For case law see Bentley 2000, p. 54 (footnote 40).

⁴⁵³ This provision is incorporated in the Copyright Design and Patent Act by Statutory Instrument 1996, no. 2967 "The Copyright and Related Rights Regulations 1996", that came into force on July 1, 1994. Prior to this date the author of a film was the person by whom the arrangements necessary for the making of the film are undertaken.

⁴⁵⁴ Bentley 2000, p. 52.

4.9.2 Forms of transfers of rights

4.9.2.1 Assignment

Under the Anglo-Saxon copyright system, which is said to follow utilitarian objectives, assignments of copyrights and related rights are clearly authorised. Pursuant to sections 90(1) of the **United Kingdom** CDPA and 120(1) of the **Irish** Copyright and Related Rights Act, a ‘copyright is transmissible by assignment, by testamentary disposition or by operation of law, as personal or moveable property’. Following the same approach, the rights granted to performers under the United Kingdom and Irish acts are freely assignable to third parties.⁴⁵⁵

4.9.2.2 Licence

Article 122(1) of the Irish Copyright and Related Rights Act defines ‘exclusive licence’ as ‘a licence in writing which is signed by or on behalf of an owner or prospective owner of the copyright which authorises the licensee, to the exclusion of all other persons, including the person granting the licence, to exercise a right which would otherwise be exercisable exclusively by the copyright owner and references to an exclusive licensee shall be construed accordingly’. An exclusive licensee has the same rights against a successor in title who is bound by the licence as he or she has against the person granting the licence.

4.9.2.3 Waiver

The **British** CDPA and the **Irish** Copyright and Related Rights Act recognise the following attributes to the author’s moral rights: the right to be identified as author of a work; the right to object to derogatory treatment of work; and the right to prevent false attribution. Sections 94 of the British CDPA and 118 of the Irish Act specify that moral rights are not assignable. However, both copyright acts expressly provide that it is not an infringement of any of the rights conferred to do any act to which the person entitled to the right has consented. Thus, an author may waive any of the attributes of the moral right defined in the Act, which are the right to attribution of authorship, the right of integrity of the work, and the right against false attribution, provided that such waiver is made by instrument in writing signed by the person giving up the right.⁴⁵⁶ The waiver may relate to a specific work, to works of a specified description or to works generally, and may relate to existing or future works. It may also be conditional or unconditional, and may be expressed to be subject to revocation. If the waiver is made in favour of the owner or prospective owner of the copyright in the work to which it relates, it is presumed to extend to his licensees and successors in title unless a contrary intention is expressed. The same rules apply to the waiver of a performer’s ‘non-property rights’.⁴⁵⁷

4.9.3 Requirements of form

The **United Kingdom**’s Copyright Design and Patent Act and the recent **Irish** Copyright and Related Rights Act contain almost identical rules regarding the form of copyright contracts. According to articles 90(3) and 191B(3) of the British CDPA and articles 120(3) and 293(3) of the Irish Act, an assignment in whole or in part of an author’s copyright or of a performers’ property rights is not effective unless it is in writing and signed by or on behalf of the assignor. Article 178 of

⁴⁵⁵ Irish Copyright Act, sect. 293; UK Copyright and Related Rights Regulations 1996, Statutory Instrument 1996, No. 2967, sect. 191B.

⁴⁵⁶ British CDPA, sec. 87(2); and Irish Copyright Act, sec. 116.

⁴⁵⁷ British CDPA, sec. 193; and Irish Copyright Act, sec. 302.

the British CDPA and article 2(1) of the Irish Act define a ‘writing’ as including ‘any form of notation or code, whether by hand or otherwise and regardless of the method by which, or medium in or on which, it is recorded’. The same rule applies to the grant of an *exclusive* license,⁴⁵⁸ as well as to the waiver of moral rights.⁴⁵⁹ Commentators generally agree that, although other types of transfers may not meet these requirements, they may nevertheless have some effect between the parties.⁴⁶⁰ Moreover, secondary evidence has been admitted under certain conditions to establish the existence and content of the writing.⁴⁶¹ In at least one case, the British Court of Appeal has upheld the validity of a publishing contract concluded over the telephone, whereby the author had engaged himself to bring corrections and improvements to a manuscript and the publisher had agreed to pay a fair royalty.⁴⁶²

4.9.4 Restrictions on transfers of rights

4.9.4.1 Limits of scope, time, and place

Neither the **British** CDPA nor the **Irish** Copyright and Related Rights Act contain any provision restricting the transfer of rights in relation to scope, time or geographical territory. The parties are thus free to determine the scope of the transfer.

4.9.4.2 Future forms of exploitation

The copyright laws of the **United Kingdom** and **Ireland** contain no general prohibition either on the transfer of rights regarding future forms of exploitation. In practice, authors and performing artists who sign contracts for the transfer of rights following the laws of Great Britain or Ireland are often asked to transfer ‘the whole of the property, copyright and interest, present or future, vested or contingent.’ This language is indeed broad enough to include any form of exploitation, including future forms of exploitation.⁴⁶³

4.9.4.3 Future works

In the **United Kingdom** and **Ireland**, agreements can be made regarding future works or future recordings of performances.⁴⁶⁴ The holder of a performer's non-property rights or recording rights may also give his consent to the transfer of rights on future performances.⁴⁶⁵ In addition, both acts expressly authorise the waiver of moral rights with respect to future works.⁴⁶⁶

However, it is worth pointing out that a court could refuse to enforce a covenant according to which the author would transfer his rights on all future works, on the ground that such covenant is in

⁴⁵⁸ British CDPA, art. 92(1) (copyright) and art. 191D (related rights); and Irish Copyright and Related Rights Act, art. 122(1) (copyright), and art. 295(1) (related rights).

⁴⁵⁹ British CDPA, art. 87(2) (copyright); and Irish Copyright and Related Rights Act, art. 116(2) (copyright), and art. 316(2) (related rights)

⁴⁶⁰ Cornish 1995, p. 652, 653; Cornish 1998, p. 234; Skone James a.o. 1991, p. 107; Pilny 1989, p. 133.

⁴⁶¹ *Springsteen v. Flute International Ltd. & ors.* (1999), E.M.L.R. 180.

⁴⁶² *Malcolm v. Chancellor, Masters and Scholars of the University of Oxford*, Court of Appeal, 18 December 1990, [1991] 1 *Entertainment Law Review* p. E-9.

⁴⁶³ See *Redwood Music Ltd. V. B. Feldman & Co. Ltd. & Ors.* (1979) R.P.C. 385 at 394. Laddie a.o. 2000, p. 877, 878; Cornish 1998, p. 237; and Skone James a.o. 1991, p. 106, 107.

⁴⁶⁴ UK CDPA, art. 91(1) (copyright) and art. 191C (performances); and Irish Copyright and Related Rights Act, art. 121(4) (copyright) and art. 294(1) (performances).

⁴⁶⁵ UK CDPA, art. 193(1); and Irish Copyright and Related Rights Act, art. 302(1).

⁴⁶⁶ UK CDPA, art. 87(3)(a); and Irish Copyright and Related Rights Act, art. 116(3)(a)

restraint of trade.⁴⁶⁷ The leading authority on the application of the restraint of trade doctrine to copyright agreements is now the decision of the House of Lords in *Schroeder v. Macaulay*.⁴⁶⁸ In that case, the plaintiff, a young and unknown song-writer, entered into an exclusive five year agreement with the defendants. The plaintiff assigned the copyright for the whole world for every work created by him during the period of the agreement. The five years was extended to 10 years if the plaintiff's royalties exceeded £5,000. The defendants had no obligation to exploit any of the compositions of the plaintiff. Moreover, defendants could terminate the agreement at any time on one month's notice and could assign the benefit of it, but no such right was given to the plaintiff. The House of Lords unanimously held that the agreement imposed an unreasonable restraint on trade because the bargain made was neither fair nor reasonable.⁴⁶⁹

4.9.5 Determination of remuneration

Neither the **British** CDPA nor the **Irish** Copyright and Related Rights Act contain any provision regulating the amount of remuneration to be paid to authors or performers. The parties are thus free to determine for themselves the amount and mode of calculation of the remuneration.

4.9.6 Interpretation of contracts

Neither the **British** CDPA nor the **Irish** Copyright and Related Rights Act recognizes any special rule of interpretation of copyright contracts. In absence of specific rules, copyright contracts are therefore construed according to the general rules of interpretation of contracts applied under common law.

4.9.7 Effect of transfer in relation to third parties

4.9.7.1 Right to transfer acquired rights

By contrast, the user is regarded, in the **United Kingdom** and **Ireland**, as the full owner of the rights that are *assigned* to him. He is able to transfer those rights freely.⁴⁷⁰ The licensee, however, may not transfer exclusive licences, to third parties without the consent of the author.⁴⁷¹ The holder of a non-exclusive license is also not allowed to transfer this license.⁴⁷²

4.9.7.2 Standing to sue

In the **United Kingdom** and **Ireland**, a global assignment of rights entitles the transferee to institute proceedings in his own name against a possible infringer.⁴⁷³ An exclusive licensee may also institute proceedings. However, he only has the same rights as the author in relation to third parties. Furthermore, the licensee and the author may only institute proceedings together. This rule does not apply in case the author is dead or untraceable. The same provisions apply with respect to performers' property rights.

⁴⁶⁷ Chitty 1999, p. 875.

⁴⁶⁸ [1974] 1 Weekly Law Reports 1308 (HL). See: Bentley 2000, p. 58 (footnotes 66 – 70); Soetenhorst 1993, p. 157; Cornish 1998, p. 230 – 233; Laddie a.o. 1991, p. 896-901; Pilny 1989, p. 140-147; Cornish 1995, p. 657-661.

⁴⁶⁹ Sterling and Carpenter 1986, p. 805; and Chitty 1999, p. 877.

⁴⁷⁰ Laddie a.o. 2000, p. 894.

⁴⁷¹ Pilny 1989, p. 131.

⁴⁷² Pilny 1989, p. 132.

⁴⁷³ Pilny 1989, p. 127.

4.9.7.3 Right to pledge, secure or seize acquired rights

Neither the **British** CDPA nor the **Irish** Copyright and Related Rights Act contain any provision concerning the right of the transferee to pledge, secure or seize the acquired rights.

4.9.8 Termination of contract

Neither the **British** CDPA nor the **Irish** Copyright and Related Rights Act contain any provision regulating the termination of contracts. Parties may therefore put an end to their contractual relationship in the circumstances allowed under the general rules of common law.

Chapter 5. Private International Law

Conflicts of laws are resolved differently if the matter at hand involves a copyright contract or if it arises simply from an act of infringement. In the latter case, the applicable law is determined according to the provisions of the Berne Convention and/or national rules on conflicts of law, whereas the law applicable to an international copyright contract is established, in Europe, following the rules set by the EC Convention on the law applicable to contractual obligations.⁴⁷⁴ Moreover, although an assignment and a licence of copyright may have similar effects in practice, an important distinction must be made between the two forms of transfers of rights when determining which law is applicable to an international contract. Whereas an assignment has proprietary, contractual, and formal aspects, a license differs in that it lacks any proprietary aspect. Copyright is incorporeal property, falling under the category of property known as *jura in re propria*, in that the owner has full ownership over an immaterial good, which can thus be invoked against third parties. A copyright can only be invoked against third parties provided that the object of the assignment is unequivocal and that the assignor is competent. These questions concerning the proprietary aspects of copyright are examined in the first subsection of this chapter. Proprietary aspects differ from the sole contractual and formal aspects and have their own rules of conflict. This means that an assignment of copyright can in principle be subject to three legal regimes, although the line between the three groups are sometimes fluid. The Rome Convention contains rules relating to the contractual and the formal aspects of the assignment and the license contract. Not all commentators agree that the proprietary aspects must be subject to a separate rule of conflict, and when they do, there is no consensus about the rule of conflict that applies. Nevertheless, there is an observable tendency to apply only one law to a contract, instead of dividing the contract into small pieces that are each governed by a different law.

This chapter focuses on the private international law aspects of assignment and licence contracts, examining first the rules on proprietary aspects of transfers of rights. Next, we consider the rules on contractual and formal aspects of both an assignment and a license contract, which are determined according to the provisions of the Rome Convention. In the last subsection, we present an overview of the discussions that took place in December 2000 regarding the Proposal for a WIPO Audiovisual Performances Treaty. This unsuccessful attempt at negotiating a Treaty gives a clear illustration of the increasing importance of the rules on conflict of laws for intellectual property matters in general, and for transfers of rights in particular. In this case, the negotiations broke down because the United States and the European Union could not agree on the scope of rights to be granted to performers on their audiovisual performances and tried to solve this issue on the basis of private international law provisions.

5.1 *Proprietary aspects of a transfer of rights*

Before one can determine which law is applicable to an assignment or a licence contract, one must first establish what exactly is the subject matter of the assignment or the licence. For example, it is not uncommon in an international situation that the law that is deemed applicable to the contractual assignment does not protect the work that is the object of the assignment of copyright. Another problem may be that the assignor is not deemed the owner of the copyright, and therefore not competent to assign, according to the law which governs the contract. .

⁴⁷⁴ Signed in Rome on 19 June 1980 [hereinafter referred to as 'Rome Convention']. This Convention is not to be confused with the Rome Convention for the Protection of Performers, Phonograms, and Broadcasting Organisations of 1961.

5.1.1 The subject matter of copyright

The principle of territoriality, on which the Berne Convention and the Universal Copyright Convention are based, holds that a work is protected by the law of the country where protection is sought. This means that authors effectively own a 'bundle' of national copyrights, as many as there are Member States.⁴⁷⁵ This principle does not offer a pure rule of conflict, but it has been argued that the *lex protectionis* can be inferred from this principle.⁴⁷⁶ The *lex protectionis* is the law of the country where protection has to be effective, i.e. the law of the country *for* which protection is sought.

The question whether the subject matter is protected, can thus be answered by the *lex protectionis*, the law of the country where protection has to be effective. It follows that a work that may be protected in one country, but not necessarily in another.

5.1.2 Copyright ownership

The question of which law is applicable to determine who is the initial owner of a copyright receives no definite answer. According to Ulmer, the *lex protectionis* decides this issue.⁴⁷⁷ One advantage of the *lex protectionis* is that courts can apply their own law, in most cases.⁴⁷⁸ Other arguments in favour of this principle are that potential users of the work know exactly what is allowed and that copyright infringements within one country will be judged uniformly.

Lately however, it has been argued that the *lex originis* should be applied to decide who is the original holder of a copyright in an international situation. The *lex originis* is the law of the country where the work originates. This could be for example where the work is created or where the actual creator has his habitual residence. The most important argument for this principle is legal certainty. When the *lex protectionis* is applicable, it is not clear for the actual creator where exactly he is indeed considered the author or the holder of the right. If the actual creator wanted to assign his copyright, he would first have to determine whether he is the author in the country where he assigns his right. Article 5(4) of the Berne Convention states that the country of origin is the country where the work is published for the first time. When the work is not published, article 5(4)(c) points to the country of which the author is a citizen. A problem arises here, since this establishing authorship is exactly the question to be answered. To solve this conundrum De Boer proposes to apply a secondary connecting factor, for example the common country of residence or the country where the work was created for the largest part. If this still offers no practical solution, the *lex fori* could perhaps be applied.⁴⁷⁹

5.1.3 Works created under employment

The question of initial ownership of copyright on a work created under employment is answered differently depending on the European Member States analysed. It could be argued that ownership in such cases is best determined by applying the law of the country that governs the employment contract.⁴⁸⁰ This offers some protection against a choice of law that would not be favourable to the employee. The connection is not subject to factors that can be influenced by one of the parties,

⁴⁷⁵ Van Lingen 1998, p. 207.

⁴⁷⁶ Quaadvlieg 1997, p. 155; Lucas & Lucas 2001, p. 884.

⁴⁷⁷ Ulmer 1980a, p. 45.

⁴⁷⁸ Although not in all cases: the *lex protectionis* can differ from the *lex fori*.

⁴⁷⁹ De Boer 1977, p. 691.

⁴⁸⁰ Ulmer 1980a, p. 47; De Boer 1977, p. 692; Seignette 1990, p. 198.

since in a contract of employment a choice of law made by the parties shall not have the result of depriving the employee of the protection afforded to him by the mandatory rules of the law which would be applicable under paragraph 2 in the absence of choice. In this case, article 6 of the Rome Convention contains rules of conflict to determine the applicable law on the employment contract.

The application of the *lex originis* rule raises the problem with respect to unpublished works that the country of origin of cannot be determined without determining the nationality of the actual creator. With respect to published works, in general, the law of the country where publication took place is applicable. Since the employer most often determines the country of publication of the work, there is a risk that the employer might choose a country known for its lower level of protection for employees, which would lead to undesirable results.⁴⁸¹ The principle of functional allocation, on which article 6 of the Rome Convention is based, would contradict this result insofar as it would deprive the actual creator of the protection he would get under the law of the country in which he habitually carries out his work or in which his employer has his place of business.

5.1.4 Assignment or license

Whenever it is unclear whether a contract must be qualified as an assignment or a license, the most important factor to consider is whether the contract operates against third parties. De Boer suggests that, in international situations, the law that would decide upon the proprietary aspects if the contract were an assignment of rights would be best suited to answer this question. This would be the *lex protectionis*.⁴⁸²

5.2 Contractual aspects of transfer of rights

5.2.1 Convention on the law applicable to contractual obligations

On June 19, 1980, the Convention on the law applicable to contractual obligations was signed in Rome. On April 1, 1991, the Rome Convention entered into effect in Belgium, Germany, Denmark, France, Greece, Luxembourg, Italy, and the United Kingdom. In the Netherlands, the Rome Convention entered into effect on September 1, 1991 and in Ireland on January 1, 1992. In the Dutch Antilles and Aruba, it entered into effect on January 1, 1993. Spain and Portugal signed a treaty that held implementation of the Rome Convention on September 1, 1993. This treaty entered into effect in Spain on September 1, 1993 and in Portugal on September 1, 1994.⁴⁸³ When the Convention was signed on 29 November 1996 by Austria, Finland, and Sweden, a consolidated version was drawn up and published in the Official Journal in 1998.⁴⁸⁴

Article 2 of the Rome Convention states that it is universal in scope, which means that any law specified by the Convention shall be applied whether or not it is the law of a Member State.⁴⁸⁵

5.2.2 Freedom of choice

The parties' freedom of choice is codified in Article 3 of the Convention. Before the Rome Convention took effect, the principle of autonomy of the parties was already a common principle in some areas of private international law, in Member States of the European Union as well as in

⁴⁸¹ De Boer 1977, p. 691

⁴⁸² De Boer 1977, p. 709.

⁴⁸³ Bertrams & van der Velden 1999, p. 5.

⁴⁸⁴ Official Journal C 027/34, 26 January 1998.

⁴⁸⁵ Bertrams & van der Velden 1999, p. 13.

numerous other countries. The principle of autonomy of the parties can also be found in other treaties, such as the Hague Convention of 14 March 1978 on the law applicable to agency.⁴⁸⁶

Article 3 reads as follows:

‘A contract shall be governed by the law chosen by the parties. The choice must be expressed or demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case. By their choice the parties can select the law applicable to the whole or a part only of the contract.’

It follows from Article 2 that parties face no restrictions in choosing the applicable law. The parties can also choose a law that does not have any connections with the case. The last sentence of the first paragraph of Article 3 provides that parties are free to choose the applicable law for the whole of the contract or to only part thereof. Neither the text of Article 3, nor legal doctrine states whether severability is allowed.⁴⁸⁷ Against severability, it has been argued that the parties can deny rules of mandatory law. On the other hand, it has also been argued that Article 7 of the Rome Convention – that lays down the principle of mandatory rules – can meet this objection.⁴⁸⁸

According to the second paragraph of Article 3, the parties may at any time agree to subject the contract to a law other than that which previously governed it, whether as a result of an earlier choice under this Article or of other provisions of this Convention. Any variation by the parties of the law to be applied made after the conclusion of the contract shall not prejudice its formal validity under Article 9 or adversely affect the rights of third parties.⁴⁸⁹

The third paragraph of Article 3 states that the choice of foreign law shall not, where all other elements relevant to the situation at the time of the choice are connected with one country only, prejudice the application of mandatory rules of the law of that country. At the time of negotiations, there was fear in some countries that this provision would limit the freedom to choose too severely, especially in cases where the choice of law is made in good faith.⁴⁹⁰

The existence and validity of the consent of the parties as to the choice of the applicable law is determined in accordance with the provisions of Articles 8, 9 and 11 of the Convention. Article 8(1) of the Convention provides that the law, which would govern it under the Convention if the contract or term were valid, determines the existence and validity of a contract or of any term of a contract. Nevertheless, a party may rely upon the law of the country in which he has his habitual residence to establish that he did not consent if it appears from the circumstances that it would not be reasonable to determine the effect of his conduct in accordance with the law specified in the preceding paragraph. Similarly, article 9(1) provides that a contract concluded between persons who are in the same country is formally valid if it satisfies the formal requirements of the law, which governs it under the Convention or of the law of the country where it is concluded.

⁴⁸⁶ Article 5 provides that “the internal law chosen by the principal and the agent is to govern the agency relationship between them.”

⁴⁸⁷ Severability means that different aspects of the contract are subject to different law. The question here whether this is allowed only sees on the *choice* for several systems of law that are applicable on the contract. As a result of article 6 for example, severability could also occur.

⁴⁸⁸ Giuliano & Lagarde 1980, p. 17.

⁴⁸⁹ Id., p. 18.

⁴⁹⁰ Id., p. 18-19.

5.2.3 Applicable law in the absence of a choice

In absence of a choice of law, the applicable law is determined by article 4 of the Rome Convention. The first paragraph of article 4 sets as applicable the law of the country to which the contract is most closely connected. Article 4(2) provides that the contract is presumed to have the closest connection with the country in which the party who is to perform the obligation, which is characteristic of the contract has his habitual residence at the time when the contract is concluded. In the case of a body corporate or un-incorporate, the country in which it has its central administration. If the contract is concluded in the course of that party's trade or profession, that country shall be the country in which the principal place of business is situated or, where under the terms of the contract the performance is to be effected through a place of business other than the principal place of business, the country in which that other place of business is situated. The application of the fifth paragraph of Article 4 can set aside the presumption of the second paragraph.

The characteristic performance is not always clear, for example in bilateral contracts where the performance of one party does not take the form of money. When the characteristic performance cannot be determined, according to the fifth paragraph, the second paragraph does not apply. In this case, the first paragraph applies and the law of the country to which the contract is most closely connected will govern the contract. Although the relevant factors cannot be identified in advance, Wadlow mentions some factors that are likely to be relevant in relation to intellectual property contracts: the domicile, residence or nationality of parties, the *situs* of the principal or only right involved, the place and manner of execution, the language of the agreement and any special legal terminology, the presence of terms meaningful only under a particular system of law, the specified currency and place of payment of any moneys which are to be paid, any specified place of jurisdiction or arbitration, the proper law of any related agreement, and the place of performance of the contract if one can be identified.⁴⁹¹

The structure of the article raises questions of interpretation, more particularly how paragraph 1 and 2 interact with one another. Is the doctrine of the characteristic performance an exception to the entirely open-ended rule of the first paragraph or is paragraph two the general rule to which the first paragraph can make an exception?⁴⁹² The latter is the generally accepted opinion. Only when paragraph 5 applies, attention should be paid to paragraph 1.⁴⁹³ The Dutch Supreme Court explicitly accepted the second method of interpretation. In the *Balenpers* case, the Supreme Court decided that paragraph 2 can be considered as the basic rule, to which paragraph 1 makes an exception. One is only allowed to deviate from the basic rule when, depending on the facts of the case, the place of habitual residence of the party who is to perform the obligation, which is characteristic of the contract, does not have actual connecting value.⁴⁹⁴

Paragraph 5 of Article 4 establishes that, besides the rule that when the characteristic performance cannot be determined the second paragraph does not apply, the presumptions of the second, third and fourth paragraph can be set aside when the circumstances show that the contract is more closely connected to another country. When this occurs, the law of that other country applies. The question of whether such circumstances exist is left for the most part to the judge's discretion.⁴⁹⁵

⁴⁹¹ Wadlow 1998, p. 436.

⁴⁹² Strikwerda 2000, p. 165.

⁴⁹³ Fawcett & Torremans 1998, p. 572.

⁴⁹⁴ HR 25 September 1992, NJ 1992, 750 (*Balenpers*)

⁴⁹⁵ Giuliano & Lagarde 1980, p. 24.

Article 4 (3) provides that the presumption laid down in paragraph 2 does not operate to the extent that the subject of the contract is a right in immovable property or a right to use immovable property.

5.2.4 Provisions for certain consumer contracts and individual employment contracts

Article 5 establishes a specific conflict rule for certain contracts made by consumers. Article 6 does the same for individual employment contracts. Both articles reflect the lawmakers' intention to provide for a more appropriate arrangement in matters where contracting parties have diverging interests, and at the same time to secure a more adequate protection for the party who, from a socio-economic point of view, is regarded as the weaker party in the contractual relationship.⁴⁹⁶ In the framework of this study however, Article 5 is not of much interest.

Based on the principle of functional allocation, the connecting factor in Article 6 is determined by the person to be protected.⁴⁹⁷ The first paragraph limits the freedom of choice:

Notwithstanding the provisions of Article 3, in a contract of employment a choice of law made by the parties shall not have the result of depriving the employee of the protection afforded to him by the mandatory rules of the law which would be applicable under paragraph 2 in the absence of choice.'

The second paragraph states that the employment contract, in the absence of a choice of law and notwithstanding Article 4, is governed by the law of the country in which the employee habitually carries out his work in performance of the contract, even if he is temporarily employed in another country. If the employee does not habitually carry out his work in any one country, the law of the country in which the place of business through which he was engaged is situated, is applicable.

This does not mean that when the law applicable on the ground of the second paragraph is more protective than the chosen law, the choice loses effect. In principle, the chosen law is applicable. This rule only steps back when the provisions of the law that is applicable pursuant to paragraph 2 give employees better protection than the chosen law. The rule in Article 6 also covers the case of invalid contracts and *de facto* employment relationships.⁴⁹⁸ Article 6, however, does not apply to collective agreements.

5.2.5 Mandatory rules

Article 7 contains provisions concerning mandatory rules. This term is used by the Rome Convention to describe rules of law which are intended to override the contractual freedom of the parties and which are capable in at least some circumstances of taking effect irrespective of the parties' choice of applicable law.⁴⁹⁹ In the French, German, and Dutch text, these rules are respectively called '*lois de police*', '*zwingende Vorschriften*' and '*bepalingen van bijzonder dwingend recht*'. Mandatory rules are the same as what is called in France '*lois d'application immédiate*', in Germany '*Eingriffsnormen*', in the Netherlands '*voorrangsregels*' and in Italy '*leggi di applicazione necessaria*'.⁵⁰⁰ Wadlow argues that the term 'internationally mandatory rules' is preferable over 'mandatory rules'. The norms contemplated under articles 7(1) and 7(2) are those that are not only mandatory in the sense of overriding the parties' agreement, but also in the stronger sense that they are intended to apply

⁴⁹⁶ Giuliano & Lagarde 1980, p. 27.

⁴⁹⁷ Strikwerda 2000, p. 38.

⁴⁹⁸ Giuliano & Lagarde 1980, p. 28.

⁴⁹⁹ Wadlow 1998, p. 455.

⁵⁰⁰ Strikwerda 1995, p. 102.

irrespective of the applicable law of the contract and perhaps the presence of substantial connecting factors with a foreign legal system.⁵⁰¹

Article 7 codifies principles that were already part of the legal system of several Member States and other countries. For example, the Dutch Supreme Court, before the Convention took effect, recognized the principle of mandatory law in the *Alnati* case.⁵⁰² The Court stated that although the law applicable to contracts of an international character is that, as a matter of principle, which the parties themselves have chosen:

'it may be that, for a foreign State, the observance of certain of its rules, even outside its own territory, is of such importance that the courts must take account of them, and hence apply them in preference to the law of another State which may have been chosen by the parties to govern their contract.'

The first paragraph of Article 7 provides that when applying the law of a country under the Convention:

'effect may be given to the mandatory rules of the law of another country with which the situation has a close connection, if and in so far as, under the law of the latter country, those rules must be applied whatever the law applicable to the contract. In considering whether to give effect to these mandatory rules, regard shall be had to their nature and purpose and to the consequences of their application or non-application.'

There must be a genuine connection for the requirement to be fulfilled. A merely vague connection is not sufficient. A case is closely connected to a certain country when for example a contract has to be executed in that other country or when a party has its place of business in that country. The contract should be connected as a whole to a country other than the one to which the contract is submitted. When interpreting the requirement of connection, the nature and the purpose of the rule must be taken into account, as well as the consequences of application or non-application.⁵⁰³

The second paragraph of the article gives precedence to the mandatory rules of the *lex fori*:

'Nothing in this Convention shall restrict the application of the rules of the law of the forum in a situation where they are mandatory irrespective of the law otherwise applicable to the contract.'

Certain delegations were concerned they would not be able to safeguard the rules of the law of the forum, without this provision. Mandatory rules of the *lex fori* are subject to less strict requirements than mandatory rules of third countries, as covered by the first paragraph. *Lex fori* mandatory rules are already applicable when they are binding in a case.⁵⁰⁴

Article 7 pertains to mandatory rules of special significance. It is clear that this group consists of rules that have some special importance for a country to avoid uncertainty that could arise if, for example, courts were to ignore the provisions of a chosen law too easily by applying other mandatory rules. However, it is not clear which rules have this mandatory character and which do not have it. It has been argued that provisions that serve a public interest, such as regulations concerning social and economic life, meet this test.⁵⁰⁵

⁵⁰¹ Wadlow 1998, p. 456.

⁵⁰² HR 13 May 1966, NJ 1966, 3 (*Alnati*)

⁵⁰³ Giuliano & Lagarde 1980, p. 30.

⁵⁰⁴ Strikwerda 2000, p. 70.

⁵⁰⁵ Bertrams & van der Velden 1999, p. 51.

Mandatory rules are generally accepted as an important means to redress unequal bargaining power and to promote the social or economic policies of the state in question. In dealing with mandatory rules affecting the ownership of intellectual property rights, the first reason for adoption of mandatory rules seems to weigh more than the second. In the *droit d'auteur* countries, copyright is not seen as a pure economic right but can also have important social and cultural implications which might be subject to mandatory rules in the general public interest.⁵⁰⁶

Article 22 of the Convention offers the possibility for Member States to make a reservation to this article. Germany, Ireland, Luxembourg, United Kingdom, and Portugal have made such reservations.

5.2.6 Rome Convention and copyright contracts

As stated above, the Rome Convention only provides rules for the contractual and the formal aspects of a contract. This means that it does not establish rules for the proprietary aspects of the assignment of rights, as described above.

When a choice of law in a contract concerning a transfer of copyright is made, generally few difficulties arise. In the absence of a choice of law, Article 4 applies. In the case of an assignment of copyright, it might not always be obvious what is to be regarded as the characteristic performance. In the simplest contracts, the assignee of the right does nothing more than pay the agreed sum of money, which cannot be regarded as the characteristic performance.⁵⁰⁷ According to Ulmer, this changes when the assignee of the rights commits himself to exploit the work or to manage the right. When an exclusive right to exploit the work is being granted, this can be different as well.⁵⁰⁸ When the person who obtains the right commits himself to exploit the work, the centre of gravity is the place of business of the corporation as being the centre of exploitation.⁵⁰⁹ An example is the contract between an author and a publisher. The publisher commits himself to reproduce the work and to distribute it.⁵¹⁰ This is also true for contracts that do not hold an explicit obligation to exploit, but where it can be inferred that this obligation exists. When an implied agreement is possible, the judge who has to decide the case has to treat the question of whether an obligation to exploit exists, as a preliminary question and apply the *lex fori*, according to Ulmer.⁵¹¹

Ulmer argues that when the author assigns an exclusive right to exploit the work, the place of business of the assignee is decisive. An example is the contract to assign copyright to a collective rights organisation. The organisation supplies the characteristic performance, by exploiting and enforcing the copyright.⁵¹² Refraining from exercising the exclusive right can have a blocking effect for the author. The centre of gravity lies in this case with the assignee, being the centre of the exploitation acts.⁵¹³

When works of several authors are published, the reference to the place of business of the publisher might be desirable, in that it results in only one applicable law.⁵¹⁴ One could argue that this is not a consequent interpretation of the Rome Convention, since the Convention explicitly states that the

⁵⁰⁶ Wadlow 1998, p. 456.

⁵⁰⁷ Fawcett & Torremans 1998, p. 573.

⁵⁰⁸ Ulmer 1980a, p. 59.

⁵⁰⁹ Ulmer 1980a, p. 59.

⁵¹⁰ Fawcett & Torremans 1998, p. 573.

⁵¹¹ Ulmer 1980a, p. 52.

⁵¹² Fawcett & Torremans 1998, p. 573.

⁵¹³ Ulmer 1980a, p. 59-60.

⁵¹⁴ Ulmer 1980a, p. 60.

second paragraph is not applicable when the characteristic performance cannot be determined. In a situation as stated above, it is possible to determine the characteristic performance (namely: the authors/assignors), but the result is not favourable (several applicable systems of law). When paragraph 1 applies through paragraph 5, the rule is the law of the country to which the contract is most closely connected. This does not have to be the law of the country where the publisher has its normal place of business, but this can also be the law of the country for which the right is being assigned, the *lex protectionis*.⁵¹⁵

However, not too much weight should be attached to the question of whose performance is the characteristic one, since this doctrine only applies as a presumption. If, in an international situation, it is impossible to determine the characteristic performance, paragraph 5 of Article 4 refers back to paragraph 1.

Even if a contract were governed by a law that is determined either by the parties' choice or by Article 4, it is still possible that a court would favour a rule that protects the author, giving it the status of a mandatory rule as in Article 7. There is no case law confirming this possibility nor is there much literature on this subject. Ulmer writes that Article 7(1) is applicable to copyright contracts, and specifically to contracts where a choice is made for a law that differs substantially in its level of protection from the law of the country that is most closely connected to the contract.⁵¹⁶ Katzenberger is of the opinion that Articles 5 and 6 codify a general principle that can also be applied to copyright contracts. Authors can be compared to consumers and employees in their need for protection.⁵¹⁷

5.3 *Formal aspects of transfer of rights*

Article 9 of the Rome Convention lays down the rule concerning the formal aspects of contracts and acts intended to have legal effect. This last group consists of acts intended to have legal effect that are connected with already concluded contracts (for example termination of a contract), as well as acts relating to the pre-contractual phase, for example the offer and acceptance of the offer. A definition of formal aspects cannot be found in Article 9. The Giuliano-Lagarde Report gives a possible definition:

*“Every external manifestation required on the part of a person expressing the will to be legally bound, and in the absence of which such expression of will would not be regarded as fully effective.”*⁵¹⁸

Article 9 distinguishes contracts concluded between parties located in the same country and contracts concluded between parties that are located in different countries. Paragraph 1 states that the first group of contracts is formally valid when the formal requirements of alternatively the *lex causae*⁵¹⁹ or the *lex loci actus*⁵²⁰ are met. The second paragraph lays down the rule for contracts concluded by parties in different countries. For this group there are three possibilities: the *lex causae* or the law of the country in which one of the parties resides. The fourth paragraph provides that an act intended to have legal effect relating to an existing or contemplated contract is formally valid if it satisfies the formal requirements of the *lex causae* or the law of the country where the act was done. Paragraph 5 and 6 contain special provisions for consumer contracts and contracts the subject matter of which is a right in immovable property or a right to use immovable property. No

⁵¹⁵ Fawcett & Torremans 1998, p. 574.

⁵¹⁶ Ulmer 1980, p. 62

⁵¹⁷ Katzenberger 1988, p. 739.

⁵¹⁸ Giuliano & Lagarde 1980, p. 32-33.

⁵¹⁹ The *lex causae* is the law that applies on the material part of the contract.

⁵²⁰ The *lex loci actus* is the law of the country in which the contract is concluded.

exception is made for the employment contract. The reason for this is that Article 6 is more flexible than the article concerning consumer contracts. If the *lex causae* were to determine the formal validity, in numerous cases, it would not be clear at the time of conclusion of the contract, which law applies to the form of that contract. The Giuliano-Lagarde Report does state that, thanks to Article 7, mandatory rules regarding formal validity laid down by the law of the country where the work is to be carried out can apply.⁵²¹

If more than one law is applicable, for example in the case of a choice for different systems of law, determining the applicable law for the form of the contract can be complicated. Giuliano and Lagarde point out that in such a case it might be preferable to apply the law that governs the part of the contract with which the litigious formal aspect is most closely connected to.⁵²² When the contract is concluded between parties that are located in different countries, difficulty arises as well. Article 9(2) states that when a contract is concluded between persons in different countries, it is formally valid if it satisfies the requirements as to form laid down by the law of one of those countries or of the law governing the substance of the contract. Paragraph 3 indicates that when a contract is concluded through the offices of one or more agents, the place to be taken in consideration is where the agents are acting at the time when the contract is concluded. When the agents agree to meet in a third country to conclude the contract, the first paragraph applies. Similarly, if the agents are in different countries at the time when they conclude the contract, this contract is considered, within the meaning of paragraph 2, to be concluded between persons in different countries even if both the parties represented were in the same country at the time.

A national court can, by applying Article 7, set aside the alternatives of Article 9, the *lex causae* and the *lex loci actus*. Certain formal requirements of a country to which the contract is closely connected, can be of such a mandatory nature that they can be applied even though the law of that country is not one of those which would normally determine formal validity under Article 9. The Giuliano-Lagarde Report gives the example of the requirement that a non-competition clause should be in writing, even though the oral form is permitted by the law of the place where the contract was concluded or under the law chosen by the parties.⁵²³

5.4 *WIPO Audiovisual Performances Treaty*

During the 1996 WIPO Conference, as described in Chapter 3.1.1.4, no consensus could be reached on the protection of performers in audiovisual productions. A resolution was accepted that held that the 'WIPO Performances and Phonograms Treaty' (WPPT) would be supplemented with a Protocol about the protection of performing artists of audiovisual works. Late 2000, a new conference was held in Geneva aimed at the adoption of a treaty for the protection of performing artists concerning their contributions to audiovisual productions. Beforehand, some scepticism existed about the result to be reached: the interests of the European Union and the United States would lie in different directions.⁵²⁴ Although agreement could be reached on several subjects,⁵²⁵ the assignment of rights and the law applicable thereto turned out to be crucial obstacles for adoption of the treaty.

The assignment of the performing artist's rights was discussed in the context of Article 12 of the Treaty. The general opinion on the subject in the United States differed greatly from the view

⁵²¹ Giuliano & Lagarde 1980, p. 36

⁵²² Id., p. 34.

⁵²³ Id., p. 35.

⁵²⁴ Cohen Jehoram 2000, p. 352-355.

⁵²⁵ Among these, sensitive subjects as the granting of exploitation rights and moral rights. In fact, on 19 out of 20 articles agreement was reached.

prevailing in continental-Europe. The United States argued for the transfer *ex lege* of the performer's rights to the producers, whereby actors would share in the exploitation proceeds of a motion picture under collective agreements between actors (represented by the Screen Actors Guild) and film producers. Europe, except for the United Kingdom, was strongly opposed to such a transfer of rights.⁵²⁶ This became clear already from the opening speech on behalf of the European Union:

"The protection of producers is not the target of this Protocol. Its objective is and should be the protection of performers, balanced, of course, against the legitimate interests of producers. In this context, a mandatory transfer of performers' rights at international level would be just as unacceptable as a rule which would provide for the extra-territorial application of a Contracting Party's national law."

The United States argued for the transfer provisions of the country where the motion picture is produced to have extraterritorial application. This could have led to the application of the doctrine of 'work made for hire' to American motion pictures marketed in the European Union.

The Basic Proposal contained four alternative proposals for article 12:

Alternative E - Transfer *Once a performer has consented to the incorporation of his performance in an audiovisual fixation, he shall be deemed to have transferred all exclusive rights of authorization provided for in this Treaty with respect to that particular fixation to its producer, subject to written contractual clauses to the contrary.*

Alternative F - Entitlement to Exercise Rights *In the absence of written contractual clauses to the contrary, once the performer has consented to the audiovisual fixation of his performance, the producer shall be deemed to be entitled to exercise the exclusive rights of authorization provided for in this Treaty with respect to that particular fixation.*

Alternative G - Law Applicable to Transfers

(1) *In the absence of any contractual clauses to the contrary, a transfer to the producer of an audiovisual fixation of a performance, by agreement or operation of law, of any of the exclusive rights of authorization granted under this Treaty, shall be governed by the law of the country most closely connected with the particular audiovisual fixation.*

(2) *The country most closely connected with a particular audiovisual fixation shall be*
(i) *the Contracting Party in which the producer of the fixation has his headquarters or habitual residence; or*
(ii) *where the producer does not have his headquarters or habitual residence in a Contracting Party, or where there is more than one producer, the Contracting Party of which the majority of performers are nationals; or*
(iii) *where the producer does not have his headquarters or habitual residence in a Contracting Party, or where there is more than one producer, and where there is no single Contracting Party of which a majority of the performers are nationals, the principal Contracting Party in which the photography takes place.*

Alternative H

[No such provision]

Alternative E provided for a rebuttable presumption of transfer of rights. Alternative G contained a rule of conflict that, in the absence of written agreements to the contrary, appointed the law of the

⁵²⁶ Heevel 2001, p. 61

country most closely connected with the fixation. Alternative H embodied a proposal not to regulate the transfer and the applicable law at all.

The European Commission appeared willing to include a provision that would make transfer possible. To this provision, an Agreed Statement would have been added stating that the applicable law would be determined by existing rules of conflict, without prejudice to the mandatory rules of the country where protection was sought. Mandatory rules that would preclude a transfer, would therefore still apply. The text of the Agreed Statement did not give a definite answer on the question whether this would be the *lex fori* or the *lex protectionis*.⁵²⁷

Article 12 Transfer *Contracting Parties may provide that exclusive rights of authorization provided for in this Agreement are transferred, with respect to a particular audiovisual fixation, from the performer to the producer of that particular fixation.*

Agreed statement concerning the law applicable to a transfer by agreement *Without prejudice to international obligations, the understanding is hereby confirmed that a transfer by agreement of exclusive rights of authorization granted under this Agreement shall be governed by the law of the country chosen by the parties or, to the extent that the law applicable to the contract has not been chosen, by the law of the country most closely connected with it, without prejudice to any mandatory rules, including on inalienability and unwaivability of rights, in the law of the country where protection is sought.*

The wording of the Agreed Statement is unclear as to whether the term ‘mandatory rules’ refers to mandatory rules in the sense of Article 7 of the Rome Convention. Note that in other languages than English, mandatory rules in the sense of Article 7 are indicated with a different term than mandatory rules in general.⁵²⁸

The United States did not agree with the European Union’s proposal . The proposal of the United States stated a rule of conflict that would have extended to both the transfer of rights and the power to exercise the rights transferred:

Article 12 Transfer and Exercise of Exclusive Rights of Authorization

(1) *Contracting Parties may provide that exclusive rights of authorization provided for in this Treaty are transferred from the performer to the producer of an audiovisual fixation, or may be exercised by the producer with the consent of the performer to the fixation.*

(2) *Without prejudice to international obligations and to public or private international law a transfer by agreement of exclusive rights of authorization granted under this Treaty, or [an agreement to exercise such rights] [an entitlement to exercise such rights based on the consent of the performer to the fixation], shall be governed by the law of the country chosen by the parties or, to the extent that the law applicable to the agreement between the performer and the producer has not been chosen, by the law of the country with which the agreement is most closely connected.*

Agreed statement concerning Article 12 *It is understood that Article 12 applies only to exclusive rights of authorization, consequently it does not apply to moral rights and rights of equitable remuneration.*

This proposal was unacceptable for the European Union and from this point on the negotiations reached an impasse; the negotiations effectively broke down on Article 12. In September 2001,

⁵²⁷ Like article 5(2) of the Berne Convention, it is not clear whether the passage should be read as ‘for which protection is sought’ which would mean that the *lex protectionis* would apply, instead the *lex fori*.

⁵²⁸ In Dutch for example, the ‘article 7 rules’ are called ‘bepaling van bijzonder dwingend recht’.

another WIPO assembly was held, but without result. A new meeting of the WIPO assemblies, where this topic will be discussed again, is scheduled for September 2002.

Chapter 6. Legislative Differences and their Impact on the Internal Market

In this study, we have first examined the current international framework, only to discover that it has little to offer in terms of copyright contract law. We have also seen the same is true at the European level. Although several directives in the area of copyright and neighbouring rights contain a few rules and references relating to contractual practices, an *acquis communautaire* in this field hardly exists. Subsequently, we have looked at the general principles of contract law that are relevant to copyright contracts, including such old favourites as the doctrines of good faith, imprecision, and fairness and equity. The core of this study, Chapter 4, then provided a detailed country-by-country review of specific rules relating to copyright contracts. As we have seen, these provisions can be divided into several distinct categories: rules on ownership of rights, forms of transfer (i.e. assignment, licence, and waiver), rules governing formalities, restrictions on transfers, rules regarding remuneration, rules of interpretation (scope) of contracts, rules governing the effect of transfer in relation to third parties, and rules on termination of contracts.

6.1 Summary of legislative differences

A first glance at the provisions in force in the fifteen Member States of the European Union concerning copyright contracts reveals a picture full of contrasts. In six countries, **France, Belgium, Italy, Luxembourg, Spain, and Portugal**, the copyright act contains extensive measures of protection, which, in addition to a number of principles of general application, lay down specific rules of form and content relating to publishing contracts, public performance contracts, advertising contracts, and contracts for the production of audiovisual works. In another three countries, **Germany, Austria, and Greece**, the measures of protection are limited to a number of general principles of interpretation of copyright contracts. In the remaining six Member States, the **United Kingdom, Ireland, the Netherlands, and the Nordic** countries, the copyright acts contain only scarce measures apart from the few provisions flowing from the implementation of European Directives or from the general principles of law. Nevertheless, as will be apparent from the following summary, the differences observed in the legislation of the Member States regarding copyright contracts may not be as significant as one might tend to believe.

Ownership of rights

All Copyright Acts in force in the Member States provide that, in principle, the initial owner of copyright in a work is the natural person who created it. A few Copyright Acts designate a natural or legal person other than the natural person who created the work as the author of that work, for example in the case of anonymous, pseudonymous, collective, or derivative works. In the remaining Member States however, the copyright law merely establishes in these circumstances a presumption of ownership in favour of a natural or legal person other than the natural person who created the work. Similarly, the copyright acts of only five of the fifteen Member States contain a general and express presumption of ownership in favour of the employer for works created in the course of an employee's functions. In some of the Member States, the courts have read in the employment contract an implicit transfer of rights in favour of the employer. Even in countries where the creator doctrine is strictly applied, courts have accepted the employer has at least the right to exercise certain powers over the work created under his employment but only to the extent necessary for the exercise of his customary business activities.

The copyright acts of most European Member States⁵²⁹ are silent on the issue of the ownership of works created on commission. In the absence of any legislative provision on the subject, courts generally conclude that the owner of the rights in a work created on commission is the physical person who created it. However, in several Member States, courts have accepted the argument that, despite the silence of the law, the commissioner should be able to use the works within the limits of the object and purpose of the contract.

With the implementation of the provisions of the Rental and Lending Rights Directive, the copyright acts of – almost – all Member States designate at least the principal director of the audiovisual work as one of the authors of the work. Several legislators have taken advantage of the possibility to designate other persons as co-authors of an audiovisual work, including in certain cases the film producer. However, the legal provisions relating to the transfer of ownership of rights in a cinematographic work differ widely between Member States. In the Copyright Acts of about half of the Member States, a rebuttable presumption of transfer of the performer's and, in some cases, the co-author's rights in an audiovisual work is established in favour of the producer, under the condition that an unwaivable and equitable remuneration be paid. The Copyright Acts of the remaining Member States only provide that if the author transfers his rights, he is entitled to an unwaivable and equitable remuneration.

Forms of transfer of rights

Even when authors and performers are considered to be the first owners of the rights on the subject matter they created, they must nevertheless agree to some form of transfer of rights for the commercial exploitation of their creation. In most Member States, copyrights may be subject to an assignment. **Germany** and **Austria** are the two exceptions, where the Copyright Acts allow authors to grant licences to use their works, but do not permit the transfer of ownership, except by testamentary disposition. In all European Member States, authors and performers may grant exploiters a licence for the use of their work or other subject matter, licence which may be exclusive or not. In addition, while the global renunciation of the creator's moral rights would generally be deemed invalid, the Copyright and Related Rights Acts of most Member States do allow that in particular circumstances authors and performers waive certain attributes of their moral rights. Finally, except with respect to the authors' and performers' remuneration right for the rental of audiovisual works, the national legislation of the European Member States regarding the imperative character of the remuneration rights has not been harmonised. As a result, authors and performers may waive their remuneration right in some countries but not in others, and may waive their rights with respect to one act but not to another.

Requirements of form

The legislation of almost all Member States requires the existence of a written contract for the transfer of copyright and related rights. This requirement is generally a formality *ad probationem*, not *ad substantiam*, i.e. it serves as a rule of evidence in the hands of the author or performer to prove the existence and scope of the transfer, rather than as a condition of validity of the transfer of rights. When the obligation to put the contract in writing constitutes a condition of validity of the contract, the failure to comply with this requirement can only be invoked by the author or the performer and is generally met with the relative nullity of the contract. Only the laws of **Austria** and the **Nordic** countries do not expressly require the use of a written instrument for the validity or the evidence of a transfer of rights.

⁵²⁹ Austria, Denmark, Finland, Greece, Germany, Ireland, Italy, Luxembourg, Spain, Sweden, and United Kingdom.

Scope of transfer

The Copyright Acts of ten of the fifteen Member States impose certain obligations on the contracting parties regarding the scope of the transfer of rights. Thus, a number of Copyright Acts require that a contract pertaining to the assignment or the licence of rights specify the duration, place of exercise and, where payment is involved, the amount of remuneration, for each of the rights transferred. On the other hand, while they impose no specific obligations regarding the scope of the transfer of rights, other Copyright Acts do put an express time limit on the fulfilment of the producer's obligation to exploit the work.

More than half of the European Member States expressly regulate the transfer of rights relating to forms of exploitation that are not known or foreseeable at the time the copyright contract was concluded. The laws of six Member States, i.e. **Belgium, Germany, Greece, Italy, and Spain**, contain an explicit prohibition on the transfer of rights in respect of forms of exploitation unknown at the time the contract is concluded. In **Austria** and the **Netherlands**, the copyright and related rights legislation contains no explicit rule restricting the transfer of rights in future forms of exploitation. However, the courts have held such transfers of rights in future forms of exploitation invalid on the basis of the general rules of copyright law. In **France** and **Luxembourg**, a transfer of rights in future forms of exploitation is allowed provided that the contract foresees the payment of a separate remuneration for these forms of exploitation.

Like in the case of the transfer of rights in future forms of exploitation, the national legislation of the Member States varies quite a lot with respect to the possibility to transfer rights on future works. The Copyright Act of two Member States, **Ireland** and the **United Kingdom**, expressly allows such transfers to take place without any restriction. The legislation of five Member States makes no reference to the transfer of rights in future works, which leads us to believe that the transfer of rights in future works could take probably place. The Copyright Acts of five other Member States allow authors and performing artists to transfer rights in works or other subject matter that are not created at the moment the contract is concluded, under certain conditions. In most cases, such transfer is possible subject to a limitation in time. Finally, three countries, **France, Greece, and Spain**, strictly prohibit the transfer of rights in future works, however, non-compliance with this rule usually leads only to relative nullity. A valid agreement transferring rights in 'future' works is presumed to exist unless the author raises the irregularity of the contract.

Determination of remuneration

Rules on (equitable, proportional or lump-sum) remuneration vary from one Member State to the next. In the **Nordic** countries, **Ireland** and the **United Kingdom**, no such rule exists at all. The law of only six Member States, namely of **France, Belgium, Greece, Italy, Spain, and Portugal**, specifically grant authors and/or performing artists the right to receive a proportional remuneration for the use of their works or other subject matter. In most cases, the proportional remuneration paid for the public performance of a work is based on the price, exclusive of tax, paid by the public to enjoy the work. In the case of publishing contracts or of any contract that involves the production of copies, the remuneration is then based on the sales price of each copy. When the law requires that authors and performing artists receive proportional remuneration, it usually also puts an obligation on the exploiter to render accounts on the receipts generated from the exploitation of the work. The provisions that authorise the payment of a lump sum are generally formulated as an exception to the basic right of the author to receive proportional remuneration, that is when such proportional remuneration is impossible to calculate or not justifiable in view of the nature of the contribution. In other words, the regulation of lump sum remuneration is usually paired in the

national legislation with the regulation of proportional remuneration, and can therefore be found in the laws of **France, Belgium, Greece, Italy, Spain, and Portugal**. Except for Greece, the copyright acts of these Member States expressly allow authors to ask for a modification of the contract, if the remuneration agreed upon is disproportionate to the income generated from the use of the work. The circumstances under which this right may be invoked differ per country. However, such a revision is generally permitted only with regards to the payment of a lump sum. In other countries, the author or performer who is disadvantaged by a grossly disproportionate remuneration may find some remedy in the general principles of law, such as the principle of good faith, of public order and good morals, or unfairness.

Apart from the measures implementing the provisions of the Rental and Lending Directive, which grants authors and/or performers an unwaivable right to equitable remuneration for the rental of phonograms and films, the option of an equitable remuneration in exchange for the transfer of rights is retained only in very specific and limited instances. The recent modifications to the **German** Copyright Act constitute a significant exception to the noticeable reluctance of European legislators to rely on the principle of 'fair compensation' instead of proportional remuneration or lump sum payments. When the law does specify that an equitable remuneration or fair compensation should be paid to the author or the performer, it generally also provides that, if the contracting parties cannot agree on an equitable remuneration, the level of such remuneration will be established by a mediator or competent authority. In most cases, the law provides no definition of what is to be considered an 'equitable' or fair remuneration in the circumstances. In this respect, the legal community of every Member State awaits the forthcoming decision of the European Court of Justice in *SENA v. NOS* case with much anticipation, hoping that the Court will give some indication as to the meaning of 'equitable remuneration' and as to the proper method of calculation of such remuneration.

Interpretation of contracts

According to the Copyright Act of eleven of the fifteen European Member States, the courts must strictly interpret clauses in copyright contracts that provide for the transfer of rights from an author or performing artist to an exploiter. The legislation of some Member States give the courts the express or implied instruction to interpret grants of rights as encompassing only those rights that are required by the purpose pursued by the contracting parties. This rule of interpretation is also known as the '*Zweckübertragungslehre*'. Under the legislation of several other Member States, a written document must mention the duration, place of exercise, and the amount of remuneration for each of the rights transferred. On the basis of this provision, the courts generally consider that, when in doubt, a contract must be interpreted in favour of the author or the performer, according to the maxim *in dubio pro auctore*. Thus, if the contract does not enumerate each right individually, any right that does not appear in the list, is not covered by the transfer. In the four countries where the Copyright Act contains no express provision on the interpretation of copyright contracts, the obligation to give a restrictive interpretation may nevertheless derive from the general principles of interpretation that are applicable to civil law matters.

Effect of transfer with respect to third parties

In almost all European Member States, the law provides that the transferee is only entitled to transfer the rights he acquired to a third party, provided that the author has given his consent to the transfer. One exception to this general rule is the transfer of rights that occurs as part of the sale of the whole or part of the exploiter's business. In this case, the prior consent of the author or performing artist is usually not required. The question of whether the exploiter has standing to sue for copyright infringement is regulated in less than half of the Member States. In general, the

assignee is permitted to sue for copyright infringement in his own name. By contrast, the holder of a non-exclusive license is not entitled to institute proceedings without the consent of the author. In the absence of any legislative provision on this issue, it is difficult to give a definite answer to the question of whether the assignee and/or the licensee have standing to institute proceedings in copyright infringement cases. The Copyright Acts of about half of the fifteen Member States contain express provisions concerning the right of the transferee to pledge, secure, or seize the acquired rights. However, the rules are far from uniform: in some countries, the right may be offered as a security, and in others not.

Termination of contract

It is generally accepted in contract law that, unless the parties have stipulated otherwise, contracts that are concluded for a fixed period of time may only be terminated at the end of their term. However, a party is entitled to ask for the termination of the agreement if the other party has substantially violated or failed to fulfil his obligations under the contract. The majority of the copyright laws of the European Member States – all but **Ireland**, the **Netherlands** and the **United Kingdom** – give the author the express right to terminate the contract in the event that the exploiter does not exploit the transferred rights within a specified timeframe, since this is the exploiter's main obligation under the contract. More than half of the Member States have expressly admitted the exploiter's bankruptcy, judicial liquidation, or declaration of insolvency as a ground for the resiliation [juiste term?] of the transfer of rights. However, the conditions under which termination may be invoked by the author vary from one Member State to the other.

6.2 Impact of differences on the Internal Market

It is impossible, without conducting an economic survey among the stakeholders, to assert with any certainty whether the existing differences in the law of copyright contracts in the Member States of the European Union affect the functioning of the Internal Market. The limited time and means to produce the present study did not allow for such an assessment. Intuitively, we would tend to believe that the disparities we found may not be so important as to affect the efficient functioning of the Internal Market. A first indication that the impact on the Internal Market may be somewhat limited is that, to our knowledge, neither the European Court of Justice nor the national courts have had to decide a case where the application of the rules on copyright contracts of one Member State raised problems in another Member State. A second indication comes from the fact that there appears to be a general consensus among Member States on a number of important issues. For example, the requirement of form of a transfer of right should cause no problem, since all but two Member States require formalities of some sort (usually a written deed) for assignments or licenses to be valid, or validly proven. With respect to the substance of the contract, contracting parties can also rely on the fact that a majority of States only permit the subsequent transfers of rights to third parties, if the author has given his consent, unless such subsequent transfer is part of the sale of the whole or part of the exploiter's business. A majority of Member States allow for the termination of contracts in case the transferred right is not used within a certain period. All countries also permit the waiver of certain attributes of the authors' or the performers' moral rights in the context of copyright contracts, subject to certain conditions and restrictions. In most Member States, even those of the copyright tradition, courts are instructed or inclined to interpret transfers of right in a restrictive manner. The restrictive interpretation of copyright contract may be based on an express provision laying down the *in dubio pro auctore* principle or the 'purpose-of-transfer' rule, or on the general principles of contract law, such as *bona fides* (good faith), fairness and equity, or the generally accepted notion that the law has a duty to protect the weaker party.

The greatest uncertainty that contracting parties may have to face in the context of cross-border activities arises from differences in rules on the ownership of rights on works created under employment, rules on the scope of the transfer and the ability of transferring right in future works or unknown modes of exploitation, and rules on remuneration. Uncertainty may also arise from the fact that, in some instances, author-protective measures constitute mandatory rules that may not be set aside by contract, while in other countries, they are merely default rules. To illustrate this point, the British Music Rights Society, which represents British composers, songwriters, music publishers, and their collecting societies, has given the following example:

'UK law requires the assignment/ exclusive licence to be in writing (ss 90 (3) and 92 (1) CDPA respectively). In contrast, under German law it is not possible to assign copyrights (§ 29 UrbG), and a licence cannot encompass any form of exploitation not in existence at time of the granting of the licence (§ 31 (4) UrbG). This example shows the difficulty in harmonising this aspect of contract law, regardless of the complex nature and finesse of copyright law. Additionally, in our experience there has been no evidence of problems caused by this difference in law'.⁵³⁰

The lack of legal certainty due to disparities in national laws may to some extent be compensated by the fact that parties have the freedom to choose the law applicable to copyright contracts. This freedom, however, may not – and perhaps should not – be without limitation. As explained in Chapter 5, the Rome Convention of 1980 governs most aspects relating to copyright contracts, except clearly non-contractual issues such as the determination of authorship and ownership. We have also seen that the freedom to choose the law applicable to contracts is central to the Convention, albeit subject to certain limitations: rules of mandatory law may not be circumvented; priority rules prevail. Whether and to what extent national rules on copyright contracts qualify as such is debatable. In the end, this is for the courts to decide.

A third indication of the limited impact on the Internal Market of legislative differences in the area of copyright contract law could be inferred from the discussions that have recently taken place concerning the need for European Action in the area of general contract law.⁵³¹ Several documents originating from governmental bodies, businesses, and consumer groups were submitted in response to the European Commission's Communication on European Contract Law.⁵³² Generally speaking, the governmental bodies dealing with the implications for the internal market of diversities of contract law affirmed that there are problems, or at least that there may be. However, only a minority of contributions mentioned specific problems. Among the potential problems that might arise are the information costs resulting from different national contract laws, which create an obstacle to cross-border transactions, and the difficulties associated with the institution of cross-border litigation. It has also been suggested that the complexity of the current legal situation and the problem of the applicable law cause substantial obstacles. One government accepted that the internal market may not be functioning perfectly, but considered that the extent of any such problems would vary from sector to sector. However, other governmental bodies were of the opinion that the co-existence of different national contract laws was not in itself necessarily inimical to the functioning of an internal market.

The responses submitted by businesses differ from one sector to the other. One of the problems mentioned by representatives of the media industry who took part in the consultation was said to

⁵³⁰ British Music Rights Response to the Communication from the Commission to the Council and the European Parliament On European Contract Law, London, 24 October 2001, p. 2.

⁵³¹ Communication from the Commission to the Council and the European Parliament on European Contract Law, (COM(2001) 398 final), Brussels, 11 July 2001.

⁵³² See: European Commission, Summary of the responses to the Commission's Communication on European contract law (COM(2001) 398 final), Brussels, 29 April 2002.

arise as a result of the diversities in the implementation of directives and the different applicable laws and jurisdictions, which can prove to be a very real hindrance to cross-border trade. A specific example of these problems concerns the definition of terms: ‘equitable remuneration’ is, they say, a meaningless term in the UK legislation implementing the directive on rental, lending and other rights relating to copyright.⁵³³ This problem is neither specific to UK legislation nor specific to the implementation of the Rental and Lending Rights Directive. For example, the meaning of the expression ‘equitable remuneration’ raises problems in all Member States, where reference is made to the notion of ‘equitable remuneration’, as the *SENA v. NOS* case illustrates so blatantly. Moreover, the implementation of most if not all directives leads to some discrepancies between the Member States. Indeed, such discrepancies are almost unavoidable, for Member States are in principle free to implement European directives as they see fit. Interestingly, the need for harmonising existing rules on copyright contracts was not mentioned at all during the consultations.

6.3 *Scope for harmonisation*

Considering the rather limited impact that the legislative differences in the area of copyright contract law are suspected to have on the Internal Market, there may be little scope for harmonisation of the rules on copyright contract across the European Member States at this stage. The harmonisation of this body of rules may be unnecessary and even undesirable for two additional reasons. First, any harmonising measure in the field of copyright contract law must rest on a solid bedrock of harmonised substantive copyright law. Although the European legislature has been successful in approximating important aspects of the law of copyright and related rights, most recently by adopting of the Directive on the harmonisation of copyright and neighbouring rights in the Information Society, important areas of the law remain un-harmonised. This is particularly true for two main pillars of copyright that are particularly relevant, and in fact, directly related to the field of copyright contracting: initial ownership of rights and moral rights. It is hard if not impossible, to imagine harmonisation of copyright contract law without prior, or simultaneous, approximation of rules on moral rights and ownership, which have not been harmonised at the European level, with the exception of the rules of ownership on audiovisual works. The collective administration of rights constitutes another aspect of the exploitation of copyright that is yet to be addressed at the European level. It is a known fact that the nature and scope of the agreements signed between members and collective societies vary considerably from one society to the next and from one country to the next.⁵³⁴ In other words, to effectively address the issue of copyright contracts, the European legislator would have to intervene in copyright law on a very broad scale, or run the risk of adopting piece-meal and less satisfactory measures. In addition, any further harmonisation of the rules on copyright would risk leading to similar inconsistencies of implementation at the national level as the ones previously observed, whereby the expected level of harmonisation would fail to be achieved.

Second, the principle of subsidiarity provides a strong argument against harmonisation. Most aspects of copyright contract law fall indeed within the exclusive competence of the national legislatures. Copyright contract law is, strictly speaking, part of the law of contracts, in general. In addition, the legal protection granted to authors and performing artists derives, in many jurisdictions, from labour and social law. Moreover, many aspects of copyright contract law are predicated, at least in part, upon cultural considerations, such as the desire to protect independent authorship against increasingly dominant media and entertainment conglomerates. At present, apart from a few areas of special European concern, such as consumer law, commercial agency, and electronic

⁵³³ Id., p. 10.

⁵³⁴ See: Guibault 1997, p. 84.

commerce, contract law firmly remains a matter of the national legislatures.⁵³⁵ Whereas the principle of subsidiarity is a central element in matters of pure contract law, it is particularly compelling in matters of social and cultural policy. In view of the fact that there seems to be no real indication that the functioning of the common market urgently requires the approximation of the laws of Member States in this area, it is therefore questionable whether an action from the European legislator towards the harmonisation of the rules on copyright contracts would be consistent with article 5 of the Treaty establishing the European Community.

The discussions that have recently taken place concerning the need for European Action in the area of general contract law give additional support to our last argument against harmonisation. In its Communication to the Council and the European Parliament on European Contract Law, the European Commission proposed four different courses of action:

1. No Community action;
2. To promote the development of common contract law principles leading to more convergence of national laws;
3. To improve the quality of legislation already in place; or
4. To adopt new comprehensive legislation at Community level.⁵³⁶

In the few responses submitted by industries in the media sector, Option 1 found broad support. Generally, contributors from the media opposed Option 2, where the development of guidelines, codes of conduct or standard contracts by the European institutions were considered not to be the best approach, especially if such instruments were likely to become binding and represent a limitation on freedom of contract. Such instruments should be promoted only by economic operators. There was a diversity of opinion in the media sector on Option 3. Some contributors supported comprehensive legislative improvement consisting in the removal of inconsistencies while others thought that an analysis of existing directives must be conducted on a case-by-case basis and improvement should be achieved by legislation targeting discrete areas of law rather than complete harmonisation. Regarding Option 4, most of the contributors from the media do not see any need for intervention by the Commission by way of a new instrument. Some associations are opposed to any fixed contract conditions for business contracts because at the present time there is no need for the creation of a European civil code.

In sum, we believe that issues of copyright contract law are best addressed at the national level, since the national legislator is in the best position to reconcile the principles of copyright law, with those of contract law, labour law, and social law, while taking account of the relevant cultural considerations. In our opinion, the demand expressed within some Member States for a more adequate protection for creators against abusive contractual practices may indeed be quite justified. Nevertheless, we wish to emphasise the fact that the conclusion of collective agreements between representatives of authors or performers on the one hand and publishers, broadcasters or producers on the other, tends to provide the most satisfactory solution for all parties involved. Recent experience shows that satisfactory collective agreements are often reached in the absence of any author-protective measure, like in the **Netherlands**,⁵³⁷ but also sometimes despite the very existence of elaborate author-protective measures, like in **France**.⁵³⁸ Finally, it should be stressed that, in

⁵³⁵ See Communication from the Commission to the Council and the European Parliament on European Contract Law, Brussels, 11 July 2001, COM(2001) 398 final. Annex I of the Communication provides an overview of the Community *acquis* in the field of contract law.

⁵³⁶ Communication from the Commission to the Council and the European Parliament on European contract law 2001/C 255/01).

⁵³⁷ See for example: 'Modelcontract voor auteurs vernieuwd', *NRC Handelsblad*, 21 May 2002.

⁵³⁸ Vercken 2001, p. 149.

deference to the principle of freedom of contract, the most sensitive and crucial issue in a copyright contract should always remain exempt from any type of legislative intervention: the actual amount of remuneration paid to the author or performer. Consequently, collective bargaining offers perhaps the only guarantee that the interests of authors and performing artists will be duly taken into account when the time comes to determine the level of remuneration.

Chapter 7. Conclusions and Recommendations

If this study has demonstrated anything, it is that the law pertaining to copyright contracts does not constitute a coherent body of law. Instead, the law of copyright contracts is an amalgam of rules found in general contract law, copyright law, and special laws. By the same token, the rationales of copyright contract law are a *mixtum compositum* of arguments based primarily on social welfare (protect the weaker party) and economic efficiency (concentrate rights in the exploiter, promote legal security).

The question, which is central to this study, is whether disparities in the national laws of the Member States exist to such a degree that a Community initiative would be justified. To this end, we have examined in detail the law currently in force in the Member States as it relates specifically to contracts concluded by authors or performers on the one hand and publishers, broadcasters or producers on the other.

Recommendation 1:

In light of our findings and for the various reasons mentioned in subsections 6.2 and 6.3 above, a Community initiative on the harmonisation of the rules on copyright contracts may be, at the present stage, wholly premature.

Of course, a Community initiative in this field need not necessarily be of a legislative nature. As the European Commission has indicated in its Communication on European Contract Law, various forms of 'soft' harmonisation, including the development of industry codes or standards, may present viable alternatives to legislation. In many Member States model or standard contracts negotiated bilaterally, and fairly, between representatives of authors or performers on the one hand and publishers, broadcasters or producers on the other, have effectively made statutory laws on copyright contracting redundant. In the Nordic countries and the Netherlands for example, the conclusion of collective agreements between associations of authors and performers on the one hand and associations of exploiters on the other hand, constitutes an important element for the protection of the interests of authors and performing artists, even if the law provides little or no express measure in this sense. Collective agreements play an important role in the protection of authors and performing artists even in countries where copyrights contracts are extensively regulated, like France and Germany. The new provisions of the German Copyright Act offer an interesting illustration of this point. While the new Act contains several measures regarding individual exploitation contracts, it also encourages parties to negotiate collective bargaining agreements, by establishing a legal presumption according to which the compensation agreed to in a collective agreement is fair. The legislative measures concerning the composition and procedure of the arbitration committee constitute a guarantee in this sense. Admittedly, the success of the new provisions of the German Copyright Act depends for a large part on the willingness of all contracting parties to enter into collective agreements.⁵³⁹ In any case, the main advantage of this form of (self)regulation is that it respects the parties' freedom of contract, while providing specifically tailored solutions for the different sectors of the copyright industry, in which authors and performers are working.

⁵³⁹ Schippan 2002, p. 174; and Lenselink 2002, p. 37.

Recommendation 2:

It is strongly recommended that the European Commission promote, at the Community level, the conclusion of model contracts between representatives of authors or performers on the one hand and publishers, broadcasters or producers on the other.

Moreover, assuming that the rules on copyright contracting will, in most cases, not qualify as either mandatory or priority rules according to the rules of private international law, the parties to a copyright contract remain free to choose the law they wish to apply. In the light of the structural imbalance in bargaining power between author or performer, on the one hand, and publishers, broadcasters, or producers on the other, this freedom may result in a choice of the law of a country (within or outside the EC) that offers little or no contractual protection to authors or performers. The Rome Convention of 1980 leaves open the possibility of totally circumventing the well-established body of author-protective copyright contract law in nearly all Member States. Interestingly, the Rome Convention does provide for special protective rules for certain classes of structurally weaker parties, such as consumers and employees. Both categories are guaranteed protection according to their 'own' (i.e. national) mandatory law, even if foreign laws are chosen to apply. Arguably, a similar rule benefiting authors and performers in contractual relationships would deserve serious consideration.

Recommendation 3:

The future incorporation of the norms of the Rome Convention into a Community Regulation would present the perfect opportunity of introducing a set of rules of private international law specifically relating to copyright contracts.

Comparative Table of Legislation

	Initial Ownership			Audiovisual works				Transfer of rights		
	<i>Creator doctrine</i>	<i>Employer</i>	<i>Commissioner</i>	<i>Rights vest in author</i>	<i>General cessio legis to producer</i>	<i>Cessio legis -rental & lending</i>	<i>Right remuneration to</i>	<i>Assignment</i>	<i>License</i>	<i>Waiver (attr. moral right)</i>
Austria	10(1)	40(b)	n/a	38(1)	69(1)	n/a	16(a)	23(3), 67(2), 74(2)	24(1)	40(1)
Belgium	6(1)	3(3)(1) 35(3)(1)	3(3)(2) 35(3)(2)	14	18, 36(1)	n/a	24	3	3(1)	1(2)
Denmark	1	59	n/a	1	58	65(3)	58(a)	53(1)	53(1)	3
Finland	1	40(b)	n/a	1	39	45	n/a	27	27	3
France	113-1	111-1 113-9	132-3(1)	113-7	132-24 212-4	n/a	n/a	122-7	132-8	121-4, 212-2
Germany	7	69(b)	n/a	7	89(1), 92(1)	n/a	27	29, 78	31	39, 62, 93
Greece	1(1), 6(1)	8	n/a	9	34	n/a	34(4)	13(1)	13(2)	16, 50
Ireland	21, 23(1)	23(1)(a)	n/a	21(b)	n/a	124(1), 297(1)	125(1), 298(1)	120(1), 293	122, 295	118, 302
Italy	6	12 <i>bis</i>	88	44	45, 84(1)	18 <i>bis</i> , 84(1)	46 <i>bis</i> , 84(2)	107	119, 136	22
Luxembourg	7	32(2)	n/a	21	24, 51	52	64	12	12	11
The Netherlands	1	7; 3 RRA ⁵⁴⁰	6	45(a)(2)	45(d); 4 RRA	45(d); 4 RRA	45(d)(3); 4 RRA	2(1)	2(1)	25, 45; 5(3) RRA
Portugal	19	14(1), 165, 174	13	22	125(2)	n/a	131	40	41(1), 128(1)	56
Spain	8	51(1)-(3)	110	87	88	109	90(1), 109(2)	48	48, 50(1)	14
Sweden	1	40(a)	n/a	1	39	45	n/a	27	30	3
United Kingdom	11(1)	11(2)	n/a	9(2)(ab)	n/a	93A(1), 191F	93B, 191G	90(1), 191B	92, 191D	94, 193

⁵⁴⁰ RRA = Dutch Related Rights Act.

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	Written instrument	Limitations on transfer			Remuneration			
		<i>Scope, time, place</i>	<i>Future forms</i>	<i>Future works</i>	<i>Proportional</i>	<i>Equitable</i>	<i>Lump sum</i>	<i>Best-seller clause</i>
Austria	n/a	n/a	n/a	31(1)	n/a	86	n/a	n/a
Belgium	3(1)(2), 35(2)	3(1)(4)	3(1)(6) 35(2)(4)	3(2), 35(2)(5)	17, 19, 26(2)(1), 36(3)	n/a	26(2)(2)	26(2)(2), 32(2)
Denmark	n/a	n/a	n/a	n/a	n/a	58a	n/a	n/a
Finland	n/a	30	n/a	n/a	n/a	n/a	n/a	n/a
France	131-2, 212-3	131-3(1)	131-6	131-1	131-4, 132-5, 132-25, 212-4 to 8	n/a	122-11, 131-4, 132-5, 132-6, 214-1, 311-3	131-5
Germany	40	31(1)	31(4)	40	n/a	32, 32a, 36, 36a, 86	n/a	32a
Greece	14	15, 34(2)	13(5)	13(5)	32-37	18(3), 34(4), 46(3), 49	32(1), 33(2)	n/a
Ireland	120(3), 293(3)	n/a	n/a	121(4), 294(1)	n/a	n/a	n/a	n/a
Italy	110	119, 122	119	120	46, 130	46bis, 88	130	n/a
Luxembourg	12, 49(1)	15, 19	13	n/a	n/a	n/a	n/a	n/a
The Netherlands	2(2), 45(d); 9 RRA	n/a	2(2), 45(d); 4 RRA ²	n/a	n/a	45(d); 4, 7 RRA	n/a	n/a
Portugal	41, 43, 44, 109	43(3)	n/a	48, 104	14(4), 91, 131	76(1)(b), 144, 150, 165(3)	91, 110(1), 131	49(1)
Spain	45, 51(1), 106	43(1)	43(5)	43(3),(4)	46(1), 90(1), 108(2)	25(1), 33(1), 90(2), 108(3), 109(3), 116(2), 122(2)	46(2), 52, 90(2)	47
Sweden	n/a	30	n/a	n/a	n/a	n/a	n/a	n/a
United Kingdom	90(3), 191B(3)	n/a	n/a	91(1), 191C	n/a	6A(1), 93B	n/a	n/a

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	Interpretation Of contract		Rights vis-à-vis third parties			Termination		
	<i>Zweckübertragungslehre</i>	<i>in dubio pro auctore</i>	<i>Right to transfer</i>	<i>Standing to sue</i>	<i>Right to secure, pledge, or seize</i>	<i>Non-use of rights</i>	<i>Bankruptcy</i>	<i>Other</i>
Austria	n/a	33(2)	27(2), 40(2)	n/a	n/a	28, 29, 37, 40, 74(7)	32	n/a
Belgium	n/a	3(1)(3), 35(2)(2)	26(3), 31(3)	n/a	n/a	3(1)(5), 26(1), 31(2)	20(1), 30(1)	29(1)
Denmark	n/a	53(3)	56(2)	n/a	n/a	54, 55, 65(4)	n/a	n/a
Finland	n/a	n/a	28	n/a	42	33, 34	n/a	33
France	n/a	122-7	132-16, 132-19	n/a	132-34	132-17, 132-19	132-15, 132-30	132-17
Germany	31(5), 75(4)	n/a	33, 34	9(2) PA ⁵⁴¹	n/a	40, 45 CA; 17, 32, 45 PA ²	36(3) PA	42 CA; 18, 30, 31 PA
Greece	15(4), 34(2)	n/a	13(6), 35(2)	13(3)	n/a	13(1), 15(5)	n/a	4(1)(e) and (2)
Ireland	n/a	n/a	n/a	122	n/a	n/a	n/a	n/a
Italy	n/a	119(5)	132	n/a	111	39, 50, 124, 127, 128, 139, 140	135	134
Luxembourg	n/a	12, 49	18, 19(3)	n/a	n/a	15	17, 25	n/a
The Netherlands	n/a	2(2)	n/a	27(1), 27a(2), 28(7); 16(2), 17(4) RRA	2(3)	n/a	43 CA; 21(1) BA ⁵⁴²	n/a
Portugal	n/a	41(1), 88(1)	40, 100(1), 118, 145	n/a	46, 47	43(5), 136	102(1),	100, 104(5), 106, 120, 139(1), 140, 147(1), 156(1)
Spain	43(2)	43	48, 49, 50(1)	48	53(1)	68(1), 81(1)	68(1)(f)	45, 68(1), 81(3), 86(1)
Sweden	n/a	n/a	28	n/a	42	33, 34	n/a	33
United Kingdom	n/a	n/a	n/a	101, 102	n/a	n/a	n/a	n/a

⁵⁴¹ PA= German Publishing Act; CA= Copyright Act, when no mention is made then the reference is made to the Copyright Act.

⁵⁴² BA=Bankruptcy Act.

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