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THE PRINCIPLE OF APPROPRIATE AND PROPORTIONATE REMUNERATION IN COPYRIGHT CONTRACTS AND ITS IMPLEMENTATION IN THE BALTIC STATES

Keywords: authors, performers, appropriate and proportionate remuneration, Directive 2019/790, contract

Summary

The Digital Single Market Directive 2019/790 constitutes a significant milestone in the field of copyright, especially its provisions aimed to ensure the fair remuneration for authors and performers. This publication focuses on Art. 18 of the Directive, which establishes the principle of appropriate and proportionate remuneration. This principle follows from the general understanding of authors and performers as a weaker bargaining party.

Being formulated abstractly, the principle of appropriate and proportionate remuneration leaves broad discretion for its implementation. Therefore, the article presents case studies concerning the implementation of the said principle into national laws of the three Baltic States: Estonia, Latvia, and Lithuania. The first task is to check the operation of the principle of appropriate and proportionate remuneration in the national legal acts before the implementation of the Digital Single Market Directive. The second task is to compare and assess the prepared national draft legal acts and how they implement this principle. The article concludes that all three Baltic States have chosen a "minimalist" implementation strategy and, as a consequence, the appropriate and proportionate remuneration principle most likely will have no real independent value.

Introduction

The term "authors' law" is a more precise term in continental European countries than the term "copyright".[1] This is clearly seen at the national terminology level: *Urheberrecht* in German, *droit d'auteur* in French, *derechos de autor* in Spanish, *autoriõigus* in Estonian, *autortiesības* in Latvian, *autorių teisė* in Lithuanian, and so on. This semantic aspect reflects the traditional explanation and justification of copyright law, that is, to benefit authors, rewarding them for their creative results. The same justification is used when speaking about performers and their protection. Relying on this traditional justification, authors and performers are granted exclusive rights[2], allowing them to control the use of their works/performances and – most importantly – to reap the financial profits from such use. As it is illustratively stated in WIPO Glossary of Copyright and Related Rights Terms, "[t]he right to claim remuneration [...] is an inseparable corollary of [exclusive] right".[3]

There is a generally accepted view that authors and performers, despite their central position, do not sufficiently benefit from copyright protection. The empirical studies confirm that the earnings of authors are significantly below the average[4]. It is also widely accepted in legal doctrine[5] and at political level that the reason for this mismatch is the weak bargaining power of authors and performers. This idea is directly formulated in the Recital 72 of the Digital Single Market Directive[6] (the DSM Directive): "Authors and performers tend to be in the weaker contractual position when they grant a licence or transfer their rights". These circumstances show that existing copyright law simply does not fulfil what it promises.

The latest regulatory attempt to fix this structural failure was made by the DSM Directive. In particular, Art. 18 of this Directive establishes the principle of appropriate and proportionate remuneration (the APR principle). At the same time, the APR principle should be counterbalanced against the freedom of

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1 Yet, in order to avoid multiplication and discrepancies among the legal concepts, further in this article the more traditional English concept of "copyright" is used.

2 Authors are increasingly often granted non-exclusive rights to remuneration. These rights are discussed further in the article.

3 Guide to the Copyright and Related Rights Treaties Administered by WIPO And Glossary of Copyright and Related Rights Terms. WIPO publication 891. World Intellectual Property Organization, 2004.

4 Kretschmer M., Hardwick P. Authors' Earnings from Copyright and Non-Copyright Sources: A Survey of 25,000 British and German Writers. Available: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2619649 [viewed 08.11.2021.].

5 Birštonas R. et al. Intelektinės nuosavybės teisė. Vadovėlis [Intellectual Property Law. Textbook]. Vilnius, Registrų centras, 2010, p. 187; Guibault L., Salamanca O., van Gompel S. Remuneration of authors and performers for the use of their works and the fixations of their performances. A study prepared for the European Commission. 2015. Available: http://publications.europa.eu/resource/cellar/c022cd3c-9a52-11e5-b3b7-01aa75ed71a1.0001.01/DOC_1 [viewed 08.11.2021.], p. 4

6 Directive 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC. OJ L 130, 17.05.2019, pp. 92–125.

contract and not become too burdensome for other market players. Besides, being formulated abstractly, the APR principle leaves European Union (EU) Member States with broad discretion for its transposition. Accordingly, the EU Member States may choose from the vast array of legal instruments such as the inalienability of specific authors' and performers' rights, contract interpretation rules or widening of non-voluntary collective management. This leads to the demand for comparative research of implementation of the APR principle at the national level.

The current article addresses these issues, i.e., how the APR principle will be implemented in the copyright law of the three Baltic States: Estonia, Latvia and Lithuania and what similarities or differences of the application of this principle can be noticed from a comparative perspective.

To achieve this aim, firstly, international and the EU regulation of the APR principle is discussed. Secondly, the national case studies of Estonia, Latvia, and Lithuania before the DSM Directive are presented and comparatively evaluated. Thirdly, the already prepared national draft legal acts and how they implement the APR principle are compared and assessed.

1. The APR principle in the international and EU law

The structural weakness of authors and performers mentioned above was never sufficiently addressed at the international level. While it may be pointed to certain legal provisions such as *droit de suite* (Art 14ter of the Berne Convention[7]) this is more an exception than a rule. One of the explanations of this situation is found in significant national differences, leading to a very different legal philosophy. For example, common law countries traditionally are orientated not so much to authors but toward disseminating works and performances. This also explains a much greater reliance on the principle of the freedom of contract in these countries. In this international vacuum, the issue of the appropriate remuneration for authors and performers had to be addressed either at the national or regional level.

Turning to the European regulation, before the DSM Directive copyright contracts remained one of the few areas which were left outside the harmonization of copyright in the EU. As a consequence, no general provisions on the remuneration for authors and performers were provided.

It is true, notwithstanding, that several isolated and restricted solutions were provided. In particular, Art. 5 of the Rental and Lending Directive[8] granted the right to remuneration after the transfer of exclusive rental right. Such a solution

[7] Berne Convention for the Protection of Literary and Artistic Works. Signed in Berne on 09.09.1886.

[8] Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (codified version). OJ L 376, 27.12.2006, pp. 28–35.

in the legal doctrine started to be called "a residual right". It is notable that beneficiaries of this residual right were both authors and performers.

Secondly, the Directive 2001/84/EC on the resale right[9] provided remuneration for resale of original works of art and let their authors to participate in the future (rising) value of such works. This Directive protects the interest of the authors of works of graphic or plastic art.

Thirdly, supplementary remuneration for performers, if they transferred their rights for non-recurring remuneration, was established[10]. However, this right is conditioned on many additional requirements, among them, that it becomes operative only after 50 years after the transfer has passed.

Summing up, these isolated and fragmented solutions were far from satisfactory. One could consider the fact alone that residual right to remuneration after the exclusive right to rental has been transferred, due to expansion of digital dissemination of works and performances, nowadays plays minimal or no role at all.

2. National solutions in the Baltic States

Reacting to this lack of regulation at the international and EU levels, EU Member States independently created or applied a wide spectrum of mechanisms to increase the bargaining power of authors and performers. Without trying to give a comprehensive description, the following instruments can be named:

- general civil law mechanisms (e.g., invalidity of transactions, contract interpretation rules, revocation of contracts);
- specific copyright law provisions (*ex ante* and *ex post*):
- restrictions on transferability of economic rights,
- author-centred rules of contract interpretation,
- specific grounds for contract revocation (e.g., for non-use),
- specific rules on remuneration in copyright contracts,
- residual remuneration rights after the transfer of exclusive rights[11].

Turning to, in particular, the Baltic States, the co-authors of the article have composed the table, presenting the most notable protective instruments in these countries:

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[9] Directive 2001/84/EC of the European Parliament and of the Council of 27 September 2001 on the resale right for the benefit of the author of an original work of art. OJ L 272, 13.10.2001, pp. 32–36.

[10] Directive 2011/77/EU of the European Parliament and of the Council of 27 September 2011 amending Directive 2006/116/EC on the term of protection of copyright and certain related rights. OJ L 265, 11.10.2011, pp. 1–5.

[11] For a broader overview see Dusollier S. et al. Contractual Arrangements Applicable to Creators: Law and Practice of Selected Member States, 2014. Available: https://www.europarl.europa.eu/meetdocs/2009_2014/documents/juri/dv/contractualarangements_/contractualarangements_en.pdf [viewed 08.11.2021.], pp. 28–65.

Table 1. Legal provisions aimed at ensuring the fair remuneration for authors and performers in Lithuania, Latvia and Estonia

Measure	Lithuania	Latvia	Estonia
Specific provisions concerning the amount of remuneration	None, with the only exception to the subsequent editions (royalty not less than 5 per cent of the publisher's revenues)	None	None
Remuneration for every transferred exclusive right	No general rule, but in specific cases only (audiovisual authors and performers)	No general rule, but in one specific case (audiovisual performers)	None
Special interpretation rules on copyright contracts	Yes	Yes, but only one with regard to the license agreement scope, restricted by the purpose-limited exploitation rule	None
Residual remuneration rights (except the rental right)	None	None	Yes, for authors who transferred rights to audiovisual producer

As can be seen, while all three Baltic States have implemented certain provisions to strengthen the position of authors and performers, the particular arrangements in each country differ significantly. Not a singular measure can be found identically formulated in all three states. Presumably, the most protective regulation is in Lithuania, which provides for the most extensive interpretation rules, also have some specific, albeit narrow, provisions regarding the amount of the remuneration and requirement to have separate remuneration for each transferred right. On the other end of the spectrum stands Estonia, which is relying mostly on the contractual freedom, while Latvia falls somewhere in between. However, it is important to note, that in Estonia residual remuneration rights are set for authors who transferred rights to audiovisual producer. Such provision is absent both in Lithuania and Latvia, while in practice the mechanism employed in Estonia is considered among the most efficient ones.

It should be added that all three countries have transposed the instruments, mentioned in Chapter 1 of this article, that is, residual right to remuneration for a transferred rental right, resale right and supplementary payment for performers.

3. The principle of appropriate and proportionate remuneration in the DSM Directive

With the enactment of the DSM Directive, the question of fair remuneration for authors and performers took a significant turn. Interesting to note that the original Directive's proposal[12] was more modest and suggested introducing only transparency obligation, contract adjustment mechanism and dispute resolution mechanism. The principle itself was not separately mentioned, except that the title of the then third chapter was "Fair remuneration in contracts of authors and performers".

During the negotiation stage, the proposal was significantly changed and the final adopted version contains Art. 18(1), which provides for a general APR principle:

> *Member States shall ensure that where authors and performers license or transfer their exclusive rights for the exploitation of their works or other subject matter, they are entitled to receive appropriate and proportionate remuneration.*

But it is also important to notice that in Art. 18(2) Member States are empowered to choose the particular and different mechanisms to implement this principle and, by doing this, they should take into account the principle of contractual freedom and a fair balance of rights and interests. This provision leaves Member States with a wide discretion and at the same time opens ambiguity as to the interpretation of the newly created concept of appropriate and proportionate remuneration. Recitals of the DSM Directive are not informative either, naming only collective bargaining as the possible mechanism (Recital 73 of the DSM Directive). Besides, it is made clear that the APR principle is compatible with a lump-sum payment, albeit it should not be the rule, or the authorization to use works and performances for free (Recital 73 and 82 of the DSM Directive).

The APR principle is further supported by the special mechanisms: transparency obligation, contract adjustment mechanism, alternative dispute resolution procedure and right of revocation (Art. 19–23 of the DSM Directive), which are provided in a much more detailed manner.

4. Implementation of the APR principle in the Baltic States

It should be started with an observation that despite the deadline for the implementation of the DSM Directive was 7 June 2021, none of the Baltic States managed to do that up to the time of preparation of this article (November, 2021).

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[12] Proposal for a directive of the European Parliament and of the Council on copyright in the Digital Single Market COM(2016) 593 final.

Estonia[13] and Lithuania[14] have prepared the draft laws, which are still under discussion in these countries. In contrast, in Latvia even a draft law was not officially available, although the basic decision regarding the APR principle seems already taken.

Based on the national reports received from each jurisdiction, the national solutions can be summarized in the following table.

Table 2. The implementation of the APR principle in Lithuania, Latvia and Estonia

Lithuania	Latvia	Estonia
The already existing general provisions concerning authors' right to remuneration for the use of their works is supplemented by the expression that this remuneration should be "appropriate and proportionate to the actual or potential economic value of the licensed or transferred rights" (Art. 5 of the Lithuanian draft Copyright Law Amendment Act). The same rule provided with respect to performers contracts and contracts between authors of audiovisual work and producers (Art. 22 and 11 respectively).	Unclear, but, presumably, the already existing provisions concerning authors and performers' right to remuneration for the use of their works and performances will be supplemented by the expression "appropriate and proportionate".	The already existing provisions concerning authors' right to remuneration for the use of their works is supplemented by the expression "appropriate and proportionate" (Art. 14(1) of Estonian draft Copyright Amendment Act). The same is done for performers, as well (Art. 68(1)).
No specific provisions	Presumably, no specific provisions	No specific provisions

As can be seen, Lithuania and Estonia have taken identical approach and implemented the APR principle by its literal transposition and without additional provisions. Latvia, arguably, will follow the same pattern.

The vagueness of the APR principle was reflected during the implementation process both in Estonia and Lithuania. According to the Explanatory memorandum to the Estonian Copyright Amendment Act the APR principle is, by its nature,

[13] Autoriõiguse seaduse muutmise seaduse eelnõu [Estonian draft Copyright Amendment Law Act]. Available: https://www.riigikogu.ee/tegevus/eelnoud/eelnou/d3d07943-9d1c-4ebe-94a4-8ae1ebdf7a68/Autori%C3%B5iguse%20seaduse%20muutmise%20seadus%20(autori%C3%B5iguse%20direktiivide%20%C3%BClev%C3%B5tmine [viewed 07.11.2021.].

[14] Autorių teisių ir gretutinių teisių įstatymo Nr. VIII-1185 2, 3, 5, 11, 15, 21, 22, 23, 25, 32, 46, 48, 51, 53, 56, 58, 59, 63, 65, 7213, 7230, 75, 89, 91, 93, 96 straipsnių, 3 priedo pakeitimo ir papildymo 151, 152, 211, 221, 222, 401, 402, 403, 571, 651 straipsniais, VIII ir IX skyriais įstatymas [Lithuanian draft Copyright Law Amendment Act]. Available: https://e-seimas.lrs.lt/portal/legalAct/lt/TAP/c0973cc1a25c11ebb458f88c56e2040c?positionInSearchResults=2&searchModelUUID=b2bafd6b-1da3-4bb5-aeeb-cda6b95b99d5 [viewed 07.11.2021.].

declaratory compared to, e.g., the equitable remuneration guaranteed by Article 5 of the Rental and Lending Directive.[15] The question is how authors and performers can efficiently enforce the remuneration principle as the other party can always claim that the remuneration is fair and proportionate.

In Lithuania, the implementation of the APR principle turned to be the most controversial in the entire implementation process of the DSM Directive. Lithuanian collective management organizations put forward several proposals how to implement this principle into Lithuanian copyright law. The most notable and uniting solution in these proposals was based on the three elements: firstly, radical expansion of remunerations rights, which survives the transfer of authors and performers' exclusive rights, based on the model of the equitable remuneration introduced by Art. 5 of the Rental and Lending Directive; secondly, these new remuneration rights are non-transferable; thirdly, remuneration rights are mandatory managed by the collective management organizations. Despite the heated debates, the current Lithuanian draft have not included this solution and stick to the verbatim formulation of the APR principle.

Finally, transparency obligation, contract adjustment mechanism, alternative dispute resolution procedure and right of revocation, which are directly connected to the APR principle, are quite literally implemented in the national draft laws in Estonia and Lithuania.

Conclusion

The conducted research shows that all three Baltic States have chosen a "minimalist" approach, meaning that the implementation of the APR principle is restricted to the literal repetition of the said principle in the national draft statutes, but no moves beyond this literal transposition have been made. Such choice leads to the question of whether this implementation strategy has been correct, because the practical application of the principle requires more than a statement in the black letters of the law. Being too abstract and without a more detailed support, the implementation of the APR principle is left for the courts that will shape its practical application on a case-by-case basis.

This is not to say that authors' and performers' interests in concluding copyright contracts in the Baltic States are left unprotected. Some protective mechanisms (with significant variations) were applied even before implementing the DSM Directive, and their further application will continue. Besides, of a greater importance are more concrete norms transposed from the DSM Directive, which aim to protect authors and performers against the other contractual party (such

[15] Autoriõiguse seaduse muutmise seaduse (autoriõiguse direktiivide ülevõtmine) eelnõu seletuskiri [Explanatory memorandum to the Estonian Copyright Amendment Act]. Available: https://www.riigikogu.ee/tegevus/eelnoud/eelnou/d3d07943-9d1c-4ebe-94a4-8ae1ebdf7a68/Autori%C3%B5iguse%20seaduse%20muutmise%20seadus%20(autori%C3%B5iguse%20direktiivide%20%C3%BClev%C3%B5tmine [viewed 07.11.2021.], p. 12.

as contract adjustment mechanism or right to revocation). This leads to the final conclusion that just a literal transposition of the APR principle most likely will have no real independent value.

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