European Commission

Remuneration of authors and performers for the use of their works and the fixations of their performances

FINAL REPORT

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Abstract

This study analyses the current situation regarding the level of remuneration paid to authors and performers in the music and audio-visual sectors. We compare, from both a legal and economic perspective, the existing national systems of remuneration for authors and performers and identify the relative advantages and disadvantages of those systems for them. We also explore the need to harmonise mechanisms affecting the remuneration of authors and performers, and to identify which ones are the best suited to achieve this. Their potential impact on distribution models and on the functioning of the Internal Market is also examined. Finally, the study outlines a series of policy recommendations based on the analysis conducted.

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Introduction

Cette étude analyse la situation actuelle concernant le niveau de rémunération versée aux auteurs et aux artistes-interprètes dans les secteurs de la musique et de l'audiovisuel. Y sont comparés tant d'un point de vue juridique que d'un point de vue 'économique, les systèmes nationaux de rémunération des auteurs et des artistes interprètes existants à l'heure actuelle, et précisés les avantages et inconvénients de ces systèmes pour les auteurs et les artistes interprètes. Nous étudions également la nécessité d'harmoniser les mécanismes affectant la rémunération des auteurs et des artistes-interprètes et la nécessité d'identifier lesquels sont les mieux adaptés pour atteindre cet objectif. Nous examinons également leur impact potentiel sur les modèles de distribution, notamment les concessions de licence multi territoriale, et sur le fonctionnement du Marché intérieur. Pour finir, l'étude contient une série de recommandations en termes de politique publique fondée sur l'analyse effectuée.

Les informations et les opinions exprimées dans ce rapport sont celles de ses auteurs et ne reflètent pas nécessairement l'opinion de la Commission. La Commission ne garantit pas l'exactitude des données comprises dans ce rapport. Ni la Commission ni une quelconque autre personne agissant pour son compte ne pourra être tenue responsable au titre de l’utilisation des informations contenues dans ce document.

Executive Summary

Europe Economics and the Institute for Information Law at the University of Amsterdam were commissioned by DG Internal Market to undertake a study of the remuneration of authors and performers (or the "creators") for the use of their works and the fixations of their performances.

The overarching objectives of this study are to analyse the current situation regarding the level of remuneration paid to authors and performers in the music and audio-visual (AV) sectors in order to compare the existing national systems of remuneration for authors and performers and identify the relative advantages and disadvantages of those systems for them. We also aim to assess the need to harmonise mechanisms affecting the remuneration of authors and performers, and to identify which ones are the best suited to achieve this. Their potential impact on distribution models and on the functioning of the Internal Market is also examined.

In doing this we focus specifically on:

- Music:
  - Authors — lyricists, composers, songwriters (lyricist and composer).
  - Performers — featured artists, session musicians.
- AV:
  - Authors — principal directors, screenwriters, composers of music for film or television.
  - Performers — TV actors, film actors.

The current legal framework

To conduct our legal analysis, we approached correspondents, a mix of scholars and practising lawyers, in each of the ten countries under study.[1] These countries were chosen to reflect differences in regulatory approaches and existing regional idiosyncrasies. The questionnaire we prepared for our correspondents focused on legal framework of each country from both a contract law (lex generalis) and copyright law (lex specialis) perspective. It also focused on the actual contractual practice in their country and whether this practice was aligned or not with the law. Further, the law and contractual practice in the United States was also examined, for the purpose of a comparative analysis.

[1] We thank our correspondents for their contributions to the study: Prof. Maurizio Borghi (UK Bournemouth University); Dr. Till Kreutzer (Germany, iRights.Law, Berlin); Dr. Brad Spitz (France, YS Avocats, Paris); Ms. Deborah de Angelis (Italy, DDA Studio Legale, Rome); Prof. Pedro Letai (Spain, Instituto de Empresa, Madrid); Dr. Tomasz Targosz (Poland, Traple Konarski Podrecki & Partners Law Firm, Kraków); Dr. Rita Matulionyte (Lithuania, Law Institute of Lithuania, Vilnius); Ms. Maria Fredenslund (Denmark, RettighedsAlliancen, Copenhagen); Dr. Aniko Grad-Gyenge (Hungary ProArt Alliance for Copyright, Budapest); Prof. Daniel Gervais (US, Vanderbilt University Law School, Nashville).

Copyright and related rights have been fairly well harmonised in European law. All ten Member States considered in this study grant authors an exclusive, transferable right of reproduction, a right of communication to the public, including the right of making available, and a distribution right in conformity with the Information Society Directive (Directive 2001/29/EC). Some differences can be observed in the national implementation of the EU *acquis*, particularly with respect to the existence or the exercise of the rights conferred on authors and performers under the Rental and Lending Rights Directive (Directive 2006/115/EC), the Satellite and Cable Directive (Directive 1993/83/EEC), as well as with respect to certain performers' rights under the Information Society Directive. Variations in legislation have occurred primarily as a result of the options left in the *acquis* for the implementation of European norms by the Member States but some differences are the result of conscious decisions on the part of the national legislator to go beyond the minimum harmonisation in the *acquis*. Further, we provided some insight into the nature and implications of exclusive rights versus the so-called remuneration rights. In addition to these differences in implementation, we also analysed the different interpretations given in the Member States to particular uses (e.g. webcasting) that may fall in a different category of rights, or cover more than a single right, depending on the Member State.

On the basis of the answers provided by the correspondents in the ten jurisdictions, it appears that the general provisions of contract law play a very limited role in granting support to authors and performers in the negotiation of exploitation agreements and the determination of the level of remuneration. General contract law may affect the way a contract is interpreted or executed, but in general it does not influence the outcome of the negotiation on the transfer of rights or on the remuneration to be paid. But because authors and performers are traditionally seen as the weaker party to contractual negotiations, some Member States, like France, Germany and Spain have implemented in their copyright legislation a number of imperative rules on the formation, execution and interpretation of authors' and performers' contracts. Between these solutions and contractual freedom many variations exist in the laws of the Member States.

Furthermore, authors and performers often organise themselves into unions (wherever permitted) or freelance associations. Many of these unions and associations negotiate model exploitation contracts with representatives of the industry. Nevertheless, trade unions and associations of authors and performers have not been set up in all Member States. Where they have, the type and the extent of collective action vary, both as regards the unions' and associations' role in the negotiation and in the enforcement of contracts.

Collective rights management organisations (CRMOs) also play a role in establishing the level of remuneration received by authors and performers, although the importance of this role differs by right holder, sector and Member State. Contrary to other exploiters, CRMOs are often not bound by the general or specific rules on authors' and performers' contracts found in the legislation of a number of Member States, on the ground that CRMOs are deemed to operate in the interest of their members, e.g. authors, performers or other rights owners.

Even though several mechanisms offered by contract or copyright law provide support to authors and performers, some show a more direct impact on the level of

remuneration paid to authors and performers than others. The principal legal elements we have identified in this respect are:

- the structure of the rights conferred by the law (i.e. the ownership and the nature of the rights – exclusive or remuneration rights);
- the existence of statutory provisions to protect authors and performers as weaker parties to a contract; and
- the use of collective bargaining and role of trade unions and associations.

Understanding payment flows

Supply chains and payment flows in the music and audio-visual industries involve a number of players and vary both across different types of authors and performers and across Member States. Their analysis provided two important insights for the determination of authors' and performers' remuneration. First, in most cases, the level of remuneration that authors and performers earn is dependent upon the contract negotiated with the publisher/producer in exchange for a transfer of their exclusive rights. Second, the complexity of supply chains and the associated payment flows can make it difficult for authors and performers (as well as others operating in the industry) to fully understand the source of and rights associated with the remuneration they receive.

Music industry

The supply chain in the music industry is particularly complex with distinctions between offline and online distribution of music, different repertoires and authors and performers.

In the offline supply chain publishers plays a central role for authors such as songwriters, who assign their rights to them. CRMOs collect royalties for several types of uses of works and distribute them between the relevant right holders. Business models in the online domain however have altered the traditional dynamic between authors, publishers and CRMOs. The role of the CRMO in the online supply of musical works is more prominent than in the offline model; with important differences between the licensing of Continental and Anglo-American repertoires. CRMOs are increasingly involved in the collection and distribution of royalties associated with the making available rights.

The record label (as a producer of phonograms) plays the central role in the supply chain for performers in the music industry both in the online and offline environment. In most cases, featured artists and session musicians transfer virtually all their rights to phonogram producers when signing a record agreement, with the exception of the right to equitable remuneration for the broadcasting and the communication to the public of commercial sound recordings, pursuant to article 8 of the Rental and Lending Rights Directive. The contracts signed by featured artists and session musicians with phonogram producers may include either a buy-out of rights with a one-off payment, an entitlement to royalties or a combination of both. The role of the CRMOs is more restricted, mainly to the collection of monies for the communication to the public and broadcasting rights.

Audio-visual industry

For authors and performers, the central player is the producer who acts as a focal point both in the film and the TV industries. The role of CRMOs is much more limited than in the music industry and it varies across the Member States.

In the vast majority of cases, the producer is (by law or by contract) the initial owner of the rights of authors and performers in the audio-visual work. Depending on the contractual agreement between the producer and the authors and performers, upfront payments in the form of salary or lump-sum payment are made as a form of compensation for their work in the production. In addition to receiving advanced payments for the actual work accomplished during the production time, arrangements for the payment of royalties flowing from the exploitation of the audio-visual works vary considerably in relation to both the determination of the level and the administration of the payment of the remuneration (either through the producer or through a CRMO). Contractual practices regarding the determination of the level of remuneration differ significantly between countries.

Producers, as the key right holders of a completed film or TV programme, are in charge of the granting of licences for the use of film products to the distributors and aggregators. CRMOs play a role in granting licences and distributing the royalties collected from the cable retransmission right.

Finally, we observed that often there is legal uncertainty arising from the lack of specification of rights covered by the presumption of transfer from the creator to the producer.

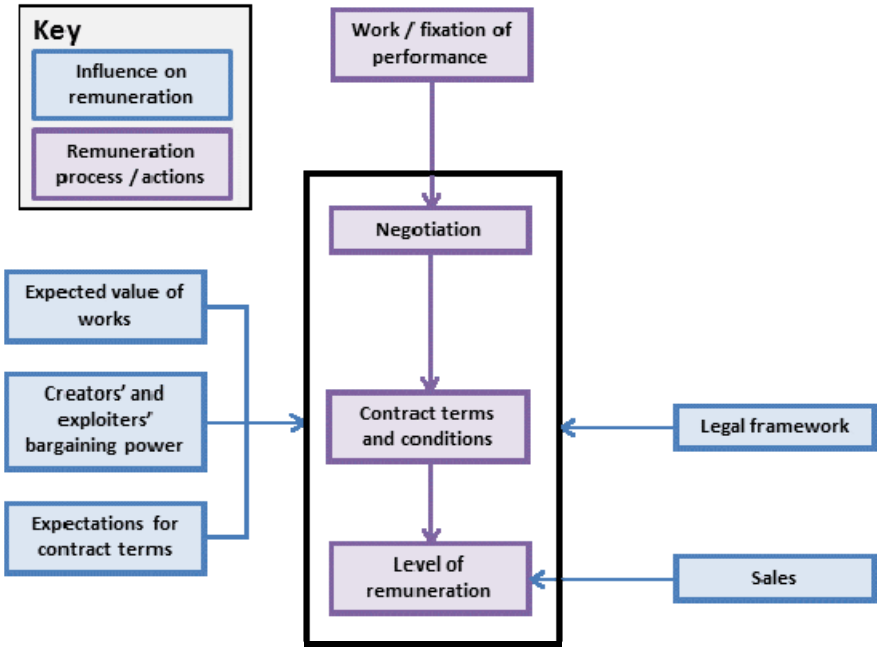
Analytical approach

There is a range of additional factors that may affect the level of remuneration of authors and performers. Together, these factors form a theoretical framework against which the data gathered through the legal review and survey of performers and authors were examined.

The theoretical framework was designed to be general in nature to encompass all types of authors and performers across both industries and from any Member State. Therefore, it has been simplified. This section presents an overview of the process by which the level of remuneration received by authors and performers is determined and identifies the key influences on their remuneration, such as expectations for the value of the work, bargaining power, the contractual expectations or norms, and the legal framework in place.[2]

[2] It should be noted that the legal framework will have a bearing on the nature of these influences. In terms of the role of the legal framework specifically/directly we consider: rules on the form of payment; collective bargaining; exclusive/non-exclusive nature of rights; waivable/non-waivable character of non-exclusive rights; and rules on transfers of rights (e.g. specification of modes of exploitation, limit on transfer of rights of future works, future modes of exploitation).

Figure 1: High-level process of securing remuneration



Source: Europe Economics.

We analysed and qualified the expected impact each of these factors on the level of remuneration that authors and performers achieve in their contracts.

Statistical analysis

During the study we gathered primary data on the remuneration, contract terms, and characteristics of creators in order to put the theory to work. To facilitate the gathering of these data we developed an online survey in consultation with DG Internal Market. The survey was uploaded onto the EU Survey platform and was distributed to authors and performers in the ten Member States[3] via those CRMOs and unions that offered to assist us with our research. We translated the questionnaire into the native language of the countries chosen for the study.

However, we had several concerns with the outcome of the data collection, such as the data was not representative of all authors and performers in the countries covered by this study, there was a significant scope for bias in the responses and we observed missing values and a lack of internal consistency in a number of responses. The statistical analysis of the survey data did not yield many clear patterns across different types of authors and performers and some of the patterns are to some extent counter-intuitive. While we would not necessarily expect the strength of the legal framework and collective bargaining to have identical impacts across different types of authors and performers, we would expect there to be greater consistency than is evident in the results of our analysis. This reinforces our concerns over the weakness in the data. A similar lack of consistent findings was apparent in our econometric analysis. It follows that we could not rely on the collected data when defining our policy recommendations.

[3] The Member States covered for the data gathering are Denmark, France, Germany, Hungary, Italy, Lithuania, Netherlands, Poland, Spain, and the United Kingdom.

Consequently, our recommendations are based on our findings in the legislation and contractual practices in the ten Member States, the conclusions drawn from the analysis of the payment flows in the music and the audio-visual sectors and on the analytical framework we have developed.

Key findings

The key findings of our analysis are:

- Transparency — there is a lack of transparency of the remuneration arrangements in the contracts of authors and performers in relation to the rights transferred. The payment flows in the music industry are particularly complex. Moreover, the differences in the national implementation of the cable retransmission right, the right of making available and the rental right pose noticeable cross-border transparency problems. The absence of information on which to base an estimate of likely earnings in different Member States undermines the ability of authors and performers to effectively exercise their freedom of movement across jurisdictions (non-tariff trade barrier) and has an adverse effect on the functioning of the Internal Market.
- Scope of transfer — certain groups of authors and performers, such as those new to the industry, are in a weaker bargaining position than others. Problems however arise if they get locked into long contracts with relatively unfavourable terms, in particular if they become successful. This issue is also pertinent with respect to the development of new modes of exploitation. To alleviate this problem, the laws of a number of Member States, in different ways, expressly regulate the transfer of rights relating to forms of exploitation that are unknown or unforeseeable at the time the copyright contract was concluded, as well as the transfer of rights relating to future works and performances.
- Role of trade unions and freelance associations — in some Member States collective action by trade unions and associations (and CRMOs that that fulfil similar functions) play an important role, especially for authors and performers in the audio-visual sector. Besides providing support at the time of negotiating remuneration agreements (including both direct support and the assistance provided through the union's involvement in preparing and promoting model contracts), unions and associations can also be effective at the moment of enforcing agreements. Nevertheless, unions and associations of authors and performers have not been set up in all Member States or, where they have, for all categories of authors and performers.

Policy recommendations

Based on these findings we have developed five overarching policy options for consideration. For some of the issues identified, an EU level approach may be necessary, for example where there is a specific Internal Market issue. For others, policy intervention at the national level may also be effective.

The policy options are as follows:

- Policy 1: Specify remuneration for individual modes of exploitation in the contracts of authors and performers.
- Policy 2: Improve the cross-border transparency of the national systems.
- Policy 3: Limit the scope for transferring rights for future works and performances and future modes of exploitation.
- Policy 4: Create a more conducive environment to support the role of trade unions, freelance associations and CRMOs when they fulfil similar functions.
- Policy 5: Facilitate the exercise of the right of making available. This policy option effectively represents a fall-back in the event that the other policies fail to protect authors and performers sufficiently and is broken down into three possibilities:
  - Voluntary collective management of the right of making available.
  - Unwaivable right to obtain equitable remuneration from the producer/publisher.
  - Unwaivable right to equitable remuneration administered by a CRMO.

A full impact assessment should be conducted on any policies considered to properly assess the costs and benefits of different options and the potential for unintended consequences that may distort the market. Based on our initial high-level review we recommend the following policies should be considered in more detail:

- Harmonised requirement for the specification of remuneration for individual modes of exploitation in the contracts of authors and performers — policy option one relating to the provision of written contracts with remuneration for individual rights broken down by mode of exploitation.
- Improve the cross-border transparency of the national systems — policy option two relating to the ability of authors and performers to understand whether or not they are likely to be better off by working in a different country.
- Harmonised limits on the scope for transferring rights for future works and performances and future modes of exploitation — policy option three relating to the ability of authors and performers to limit the scope of any rights transfer so as to prevent them being locked into less beneficial contracts for long periods.

With respect to options four and five we recommend conducting more detailed research to understand more fully the impact these options would have on the remuneration of authors and performers. In each case it is important to consider the relevance of any policy proposal for the different types of authors and performers and the different industries. Furthermore, consideration must be given to countries where similar practices are already in place so that the design of the policy does not entail unnecessary and potentially costly changes.

Synthèse

DG Marché Intérieur a commandé à Europe Economics et à l'Institut du droit de l'information de l'Université d'Amsterdam une étude sur la rémunération des auteurs et des artistes interprètes (ou des « créateurs ») concernant l'utilisation de leurs œuvres et les fixations de leurs prestations.

Les objectifs généraux de cette étude sont d'analyser la situation actuelle concernant le niveau de rémunération versée aux auteurs et aux artistes interprètes dans les secteurs de la musique et de l'audio-visuel afin de comparer les systèmes nationaux de rémunération existants à l'heure actuelle et d'identifier les avantages et les inconvénients de ces systèmes pour eux. L'étude a également pour objectif d'évaluer le besoin d'harmoniser les mécanismes relatifs à la rémunération des auteurs et des artistes interprètes et d'identifier les mécanismes les mieux adaptés pour atteindre cet objectif. Nous examinons également l'impact potentiel sur les modèles de distribution et sur le fonctionnement du Marché intérieur.

Pour ce faire, nous nous concentrons particulièrement sur :

- Musique :
  - Auteurs — paroliers, compositeurs.
  - Artistes interprètes — artistes vedettes, musiciens de studio.
- Audiovisuel :
  - Auteurs — réalisateurs principaux, scénaristes, compositeurs de musique de film ou de télévision.
  - Artistes interprètes — acteurs pour la télévision, acteurs pour le cinéma.

Le cadre juridique actuel

Pour effectuer notre analyse juridique, nous nous sommes adressés à des correspondants, à un éventail diversifié d'universitaires et d'avocats dans chacun des dix pays concernés par l'étude.[4] Ces pays ont été choisis pour refléter les différences dans les approches règlementaires et les particularités régionales existantes. Le questionnaire que nous avons préparé pour nos correspondants portait sur le cadre juridique de chaque pays, tant du point de vue du droit des contrats (lex generalis) que du point de vue du droit d'auteur (lex specialis). Il visait également à déterminer

[4] Nous remercions nos correspondants pour leurs contributions à l'étude: Prof. Maurizio Borghi (Royaume-Uni, Bournemouth University); Dr. Till Kreutzer (Allemagne, iRights.Law, Berlin); Dr. Brad Spitz (France, YS Avocats, Paris); Ms. Deborah de Angelis (Italie, DDA Studio Legale, Rome); Prof. Pedro Letai (Espagne, Instituto de Empresa, Madrid); Dr. Tomasz Targosz (Pologne, Traple Konarski Podrecki & Partners Law Firm, Kraków); Dr. Rita Matulionyte (Lituanie, Law Institute of Lithuania, Vilnius); Ms. Maria Fredenslund (Danemark, Rettigheds Alliancen, Copenhague); Dr. Aniko Grad-Gyenge (Hongrie, ProArt Alliance for Copyright, Budapest); Prof. Daniel Gervais (États-Unis, Vanderbilt University Law School, Nashville).

les pratiques contractuelles réelles en cours dans les pays ainsi que leur conformité ou non avec la loi. La loi et les pratiques contractuelles aux États-Unis ont également été étudiées, dans le but de fournir une analyse comparative.

Les droits d'auteur et droits voisins ont été largement harmonisés par le droit européen. L'ensemble des dix États membres couverts par cette étude accordent aux auteurs un droit exclusif et cessible de reproduction, de communication au public, notamment le droit de mise à disposition, et de distribution en conformité avec la Directive InfoSoc (Directive 2001/29/EC). Il est possible d'observer certaines différences dans la mise en œuvre nationale de l'acquis, particulièrement en ce qui concerne l'existence ou l'exercice des droits conférés aux auteurs et aux artistes interprètes en vertu de la Directive relative au droit de location et de prêt (Directive 2006/115/EC), de la Directive relative à la radiodiffusion par satellite et la retransmission par câble (Directive 1993/83/EEC), de même que par rapport à certains droits des artistes interprètes dans le cadre de la Directive InfoSoc. Les variations dans la législation tiennent principalement aux choix laissés dans l'acquis pour la mise en œuvre des normes européennes par les États membres. Certaines différences sont aussi le résultat de choix délibérés de la part des législateurs nationaux d'aller au-delà du minimum d'harmonisation requis par l'*acquis.* En prenant note de ces différences, nous avons fourni un aperçu de la nature et l'implication des droits exclusifs par rapport aux droits dits de rémunération. Par ailleurs, en plus de ces différences dans la mise en œuvre de la directive, nous analysons les différentes interprétations données dans les États membres à des utilisations particulières (par ex. le webcasting ou la diffusion sur la toile) qui peuvent tomber dans une catégorie de droits différente, ou couvrir plus d'un seul droit, selon l'État membre.

Sur la base des réponses fournies par les correspondants dans les dix pays, il apparaît que le droit commun des contrats apporte une protection limitée aux auteurs et artistes interprètes en ce qui concerne la négociation des accords d'exploitation et la détermination de leur niveau de rémunération. Certaines dispositions peuvent affecter la façon dont un contrat est interprété ou exécuté, mais en général, elles n'ont pas d'influence sur le résultat de la négociation portant sur le transfert des droits ou sur la rémunération à verser. Parce que les auteurs et les artistes interprètes sont traditionnellement vus comme la partie qui a le moins de pouvoir de négociation dans le cadre de la signature de leurs contrats, certains États membres comme la France, l'Allemagne et l'Espagne ont prévu dans leur législation sur le droit d'auteur certaines règles impératives portant sur la formation, l'exécution et l'interprétation des contrats des auteurs et des artistes interprètes. Entre ces options et une liberté contractuelle totale, toutes les situations sont possibles dans les législations des États membres.

En plus des mesures législatives, les auteurs et les artistes interprètes s'organisent souvent en syndicats (lorsque cela est permis) ou en associations indépendantes par le biais desquels ils tentent de négocier des contrats d'exploitation types avec les représentants du secteur. Néanmoins, les syndicats d'auteurs et d'artistes interprètes n'ont pas été mis en place dans tous les États membres. Dans les pays où ils le sont, l'étendue de l'action collective varie, que ce soit au stade de la négociation des accords ou au stade de leur exécution.

Les *Collective Right Management Organisations* (ou Organismes de gestion collective des droits en français) (CRMO) jouent également un rôle majeur dans l'établissement

du niveau de rémunération perçue par les auteurs et les artistes interprètes, bien que l'importance de ce rôle diffère en fonction de la catégorie de détenteur de droit, du secteur et même de l'État membre. Contrairement à d'autres exploitants, les CRMOs ne sont souvent pas liées par les règles générales ou spécifiques relatives aux contrats d'auteurs et d'artistes interprètes prévues par la législation de certains États membres, au motif que les CRMOs sont réputées fonctionner dans l'intérêt de leurs membres, par ex. les auteurs, les artistes interprètes ou les autres titulaires de droits.

Bien que plusieurs mécanismes offerts par la législation sur les contrats ou les droits d'auteur fournissent un soutien aux auteurs et aux artistes interprètes, certains montrent un impact plus direct que d'autres sur le niveau de rémunération versée aux auteurs et aux artistes interprètes. Les principaux éléments juridiques que nous avons identifiés à cet égard sont :

- la structure des droits conférés par la loi (i.e. la propriété et nature des droits – droit exclusif ou de rémunération);
- l'existence des dispositions légales visant à protéger les auteurs et les artistes interprètes en tant que partie qui a le moins de pouvoir de négociation dans le cadre de la signature d'un contrat ; et
- l'utilisation de la négociation collective et le rôle des syndicats et associations indépendantes.

Comprendre les flux de paiement

Les chaînes d'approvisionnement et les flux de paiement dans les secteurs de la musique et de l'audiovisuel impliquent un certain nombre d'acteurs et varient à la fois entre les différents types d'auteurs et d'artistes interprètes et entre les États membres. Leur analyse livre deux éléments de compréhension importants pour la détermination de la rémunération des auteurs et des artistes interprètes. Tout d'abord, dans la plupart des cas, le niveau de rémunération que les auteurs et les artistes interprètes obtiennent repose sur le contrat négocié avec l'éditeur/le producteur pour la cession du transfert de leurs droits exclusifs. Ensuite, la complexité des chaînes d'approvisionnement et des flux de paiement associés font qu'il peut être difficile pour les auteurs et les artistes interprètes (de même que pour d'autres personnes exerçant dans le secteur) de comprendre totalement l'origine et les droits associés à la rémunération qu'ils reçoivent.

Le secteur de la musique

La chaîne d'approvisionnement du secteur de la musique est particulièrement complexe et varie selon que l'on considère la musique en ligne ou la musique hors ligne, les différents répertoires et la situation des auteurs ou des artistes interprètes.

Dans les chaînes d'approvisionnement hors ligne grand public l'éditeur joue un rôle très important pour les auteurs tels que les paroliers et compositeurs. Les auteurs cèdent en effet leurs droits à l'éditeur. Les CRMOs sont également très importantes dans la chaîne d'approvisionnement car elles collectent les rémunérations pour plusieurs types d'usages des œuvres et les distribuent entre les titulaires des droits concernés. La gamme de modèles d'affaires dans le domaine de la musique en ligne a

modifié la dynamique traditionnelle entre les auteurs, leurs éditeurs et leurs CRMOs. Le rôle du CRMO dans la fourniture d'œuvres musicales en ligne est plus important que dans le modèle hors ligne, avec des différences importantes dans l'octroi de licence des répertoires entre les pays d'Europe continentale et anglo-saxons. Dans le modèle en ligne, les CRMOs sont de plus en plus impliqués dans la collecte des rémunérations associées aux droits de mise à disposition.

Contrairement à ce qui se passe pour les auteurs, la maison de disques (en tant que producteur de phonogrammes) est un acteur clé s'agissant des artistes interprètes à la fois dans le monde en ligne et hors ligne. Dans la plupart des cas, les artistes vedette et les musiciens de studio transfèrent pratiquement tous leurs droits aux producteurs de phonogrammes lors de la signature d'un accord d'enregistrement, à l'exception du droit à rémunération équitable pour la radiodiffusion et la communication au public de phonogrammes du commerce, conformément à l'article 8 de la Directive relative au droit de location et de prêt. Les contrats signés par des artistes vedette et les musiciens de studio avec les producteurs de phonogrammes peuvent inclure soit un rachat des droits avec un paiement unique, un droit à royalties ou une combinaison des deux.

Le rôle des CRMO est plus limité, principalement à la perception des frais au titre de la communication au public et des droits de diffusion.

Le secteur de l'audiovisuel

Dans le secteur de l'audiovisuel le principal acteur est généralement le producteur qui joue un rôle central à la fois dans les films et pour la télévision. Le rôle des CRMOs est beaucoup plus limité et il varie d'un État membre à un autre.

Dans la grande majorité des cas, le producteur est (par la loi ou par contrat) le propriétaire initial des droits des auteurs et artistes interprètes sur l'œuvre audiovisuelle. Selon l'accord contractuel entre le producteur et les auteurs et les artistes interprètes, des paiements initiaux sous forme de salaire ou de paiement forfaitaire sont faits à titre de compensation pour le travail de ces derniers dans le cadre de la production. En plus des paiements initiaux faits pour le travail accompli dans le cadre de la production, les dispositions contractuelles relatives au paiement des royalties découlant de l'exploitation des œuvres audiovisuelles varient considérablement en ce qui concerne à la fois la détermination du niveau et de l'administration du paiement de la rémunération (soit par le producteur ou par une CRMO). Les pratiques contractuelles relatives à la détermination du niveau de rémunération varient significativement d'un pays à l'autre.

Les producteurs, en tant que principaux détenteurs des droits d'un film ou d'un programme télévisé terminé, sont ceux qui concèdent les licences sur les films auprès des distributeurs et agrégateurs. Les CRMO jouent un rôle dans la distribution aux producteurs et autres ayants droit des rémunérations provenant de la diffusion par câble et satellite.

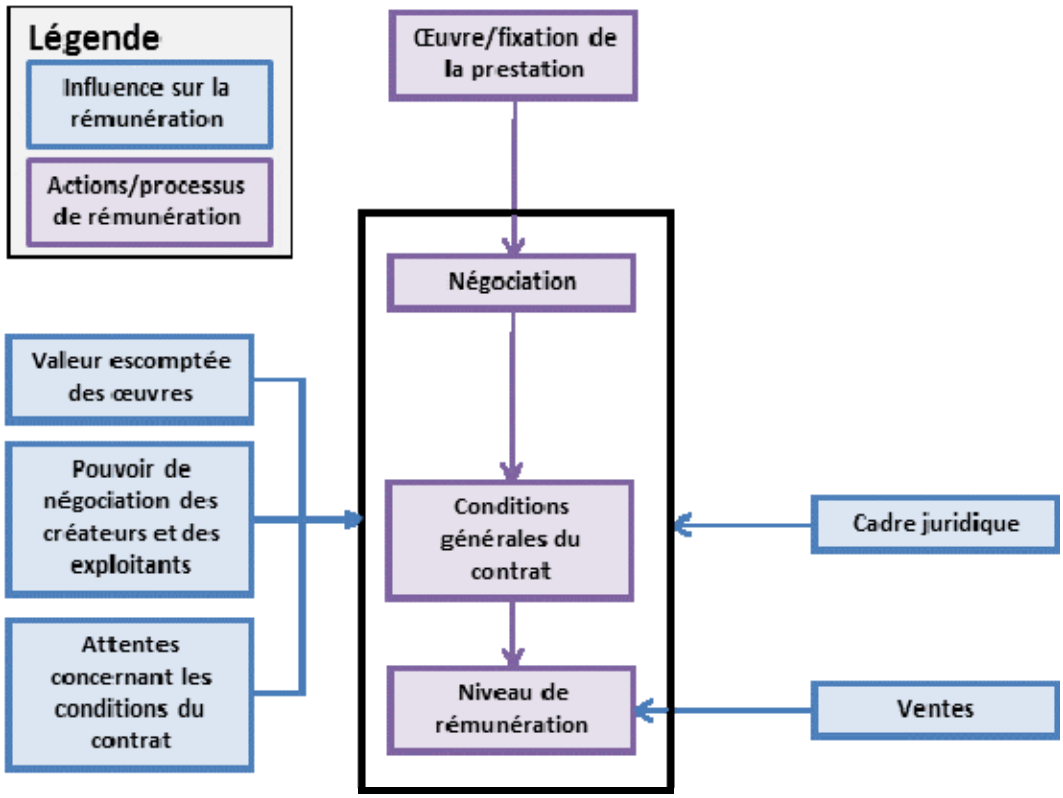
Il existe souvent des incertitudes juridiques liées à l'absence de précision des droits couverts par la présomption de cession des droits du créateur au producteur.

Approche analytique

Beaucoup de facteurs sont susceptibles d'avoir un effet sur le niveau de rémunération des auteurs et artistes interprètes. Pris globalement, ces facteurs constituent le cadre théorique auquel nous confrontons les données recueillies dans le cadre de l'analyse juridique et l'étude menée auprès créateurs. .

Le cadre théorique est conçu pour être général et applicable à tous types d'auteurs et d'interprètes dans les deux secteurs, et ce à l'intérieur de n'importe quel État membre. Pour atteindre cet objectif et réaliser ce cadre théorique, il a été nécessaire d'apporter certaines simplifications à la réalité. La section consacrée à l'approche analytique fait une présentation générale du processus en vertu duquel est déterminé le niveau de rémunération reçue par les auteurs et les artistes interprètes et identifie les principales influences sur leurs rémunérations, comme les espérances de chacune des parties quant à la valeur de l'œuvre, le pouvoir de négociation de chaque partie, les espérances ou pratiques contractuelles et le cadre juridique applicable.[5]

Figure 1: Processus simplifié de fixation des rémunérations



Source : Europe Economics.

[5] Il convient de noter que le cadre juridique aura une incidence sur la nature de ces influences. En ce qui concerne ce rôle du cadre juridique de manière spécifique/directe, nous considérons les éléments suivants: les règles sur la forme de paiement ; les négociations collectives ; la nature exclusive/non exclusive des droits ; la possibilité de renoncer ou non à la rémunération découlant des droits à rémunération équitable; et les règles sur les transferts de droits (p.ex. la spécification des modes d'exploitation, la limite sur la cession des droits des œuvres futures, les futurs modes d'exploitation).

Nous analysons et qualifions l'impact attendu de chacun de ces facteurs dans la détermination du niveau de rémunération que les auteurs et les artistes interprètes obtiennent dans leurs contrats.

L'analyse statistique

Au cours de l'étude, nous avons recueilli des données primaires sur la rémunération, les conditions contractuelles et les caractéristiques des créateurs afin de tester la théorie. Pour faciliter le regroupement de ces données, nous avons mis au point un sondage en ligne après consultation de la DG Marché Intérieur. Le sondage a été mis en ligne sur la plateforme EU Survey (Sondages de l'UE) et a été distribué aux auteurs et aux artistes interprètes dans un échantillon d'États membres,[6] via les CRMOs et les syndicats et associations qui nous ont proposé leur soutien dans notre recherche. Nous avons fait traduire le questionnaire dans les langues des pays choisis pour l'étude.

Il existe d'importantes réserves relatives aux résultats de la collecte de données, en particulier le fait que les données sur lesquelles l'analyse est fondée ne sont pas représentatives de tous les auteurs et artistes interprètes dans les pays couverts par cette étude ; il y a suffisamment de place pour la partialité dans les réponses, celles-ci comportaient de nombreuses valeurs manquantes et il n'y avait pas de cohérence interne dans certaines d'entre elles. L'analyse statistique des données du sondage n'a pas permis de mettre en évidence des modèles clairs entre les différents types d'auteurs et d'artistes interprètes, et certains des modèles identifiés sont, dans une certaine mesure, contre-intuitifs. Bien que nous ne nous attendions pas nécessairement à ce que le cadre juridique et la négociation collective aient des impacts identiques sur les différents types d'auteurs et d'artistes interprètes dans les différents pays, nous nous attendions cependant à ce qu'il y ait une plus grande cohérence entre les résultats de notre analyse. Cela renforce notre impression d'une faiblesse des données sur lesquelles l'analyse est basée. La même absence de conclusions cohérentes était évidente dans notre analyse économétrique. Il découle de ce qui précède que nous ne prenons pas en compte les résultats des analyses statistique et économétrique dans la définition de nos recommandations et options politiques.

Par conséquent, nos recommandations sont basées sur nos constatations à propos de la législation et des pratiques contractuelles dans les dix États membres, les conclusions tirées de l'analyse des flux de paiement dans les secteurs de la musique et de l'audiovisuel et sur le cadre analytique que nous avons développé.

Les principales conclusions

Les principales conclusions de notre analyse sont :

[6] Les États membres couverts lors du recueil des données sont le Danemark, la France, l'Allemagne, la Hongrie, l'Italie, la Lituanie, les Pays-Bas, la Pologne, l'Espagne et le Royaume-Uni.

- La transparence — il existe un manque de transparence sur la façon dont les auteurs et les artistes interprètes sont rémunérés en contrepartie des droits cédés. La chaîne d'approvisionnement du secteur de la musique est particulièrement complexe. En outre, les différences dans la mise en œuvre nationale du droit de retransmission par câble, du droit de mise à disposition et du droit de location posent des problèmes de transparence dans une perspective transfrontalière. L'absence d'informations sur lesquelles fonder une estimation des revenus probables dans les différents États membres limite la possibilité des auteurs et des artistes interprètes d'exercer efficacement leur liberté de mouvement à travers les États membres (barrières commerciales non tarifaires). Cela a un effet négatif sur le fonctionnement du Marché intérieur.
- Périmètre de la cession — certains groupes d'auteurs et d'artistes interprètes, tels que des nouveaux entrants dans l'industrie, jouissent d'un pouvoir de négociation moindre que d'autres groupes. Des problèmes surgissent si ces personnes se retrouvent liées par des contrats de longue durée conclus à des conditions défavorables, en particulier lorsqu'ils commencent à avoir du succès commercial. Cette question est également pertinente par rapport au développement de nouveaux modes d'exploitation. Pour remédier à ce problème, les législations d'un certain nombre d'États membres réglementent expressément, mais de différentes manières, la cession des droits relatifs aux formes d'exploitation qui sont inconnues ou imprévisibles au moment où le contrat des droits d'auteur est conclu, de même que la cession des droits sur des œuvres et interprétations futures.
- Le rôle des syndicats et des associations indépendantes — dans certains États membres, les syndicats et des associations d'auteurs et d'artistes interprètes (et les CRMOs qui remplissent des fonctions similaires) jouent un rôle important, particulièrement en ce qui concerne les auteurs et les artistes interprètes exerçant dans le secteur de l'audiovisuel. En plus de fournir un soutien lors de la négociation des contrats portant sur la rémunération (notamment à la fois le soutien direct et l'assistance apportée par le biais de l'implication des syndicats et associations dans la préparation et la promotion des contrats types), les syndicats et associations peuvent aussi jouer un rôle lors de l'exécution des contrats. Néanmoins, les syndicats et les associations d'auteurs et d'artistes interprètes n'ont pas été mis en place dans tous les États membres et, là où ils l'ont été, pas pour toutes les catégories d'auteurs et d'artistes interprètes.

Recommandations en matière de politique publique

Sur la base de ces conclusions, nous avons développé cinq options de politiques globales pour fins d'examen. Pour certaines des questions identifiées, une approche au niveau de l'UE peut être nécessaire, par exemple lorsqu'il existe une question spécifique au Marché intérieur. Pour les autres, l'intervention politique au niveau national peut aussi être efficace.

Les options sont les suivantes :

- Politique 1 : Prévoir une rémunération pour chaque mode d'exploitation individuel dans les contrats des auteurs et les contrats d'artistes interprètes individuels.

- Politique 2 : Amélioration de la transparence transfrontalière des systèmes nationaux.
- Politique 3 : Limitation du champ possible des cessions de droits sur des œuvres et interprétations futures et de futurs modes d'exploitation.
- Politique 4 : Création d'un environnement plus propice au rôle des syndicats, des associations indépendantes et des CRMOs qui remplissent des fonctions similaires.
- Politique 5 : Faciliter l'exercice du droit de mise à disposition du public. Cette option est une solution par défaut pour le cas où les autres politiques échoueraient à protéger suffisamment les auteurs et les artistes interprètes; elle peut être décomposée en trois possibilités :
  - la gestion collective volontaire du droit de mise à disposition;
  - un droit inaliénable à obtenir une rémunération équitable du producteur / éditeur; et
  - un droit inaliénable à une rémunération équitable administrée par une CRMO.

Une étude d'impact complète devra être menée sur les politiques envisagées afin d'évaluer correctement les coûts et les avantages des différentes options et la possibilité de conséquences imprévues pouvant fausser le marché. En nous basant sur un survol initial, nous recommandons que les politiques suivantes soient envisagées plus en détail :

- Harmonisation des exigences concernant la spécification de rémunérations pour chaque mode individuel d'exploitation — option Politique 1 relative à l'utilisation de contrats écrits portant sur la rémunération des droits individuels répartis par mode d'exploitation.
- Amélioration de la transparence transfrontalière des systèmes nationaux — option Politique 2 relative à la capacité des auteurs et des artistes interprètes à comprendre si oui ou non ils sont susceptibles d'être dans une meilleure situation en travaillant dans un pays différent.
- Harmonisation des limites sur le champ possible de la cession des droits sur des œuvres et interprétations futures et de la cession sur des futurs modes d'exploitation — option Politique 3 relative à la capacité des auteurs et des artistes interprètes à limiter le champ d'application de la cession des droits afin de les empêcher d'être bloqués dans des contrats moins avantageux pendant de longues périodes.

En ce qui concerne les options quatre et cinq, nous recommandons de mener une recherche plus détaillée afin de comprendre de manière plus complète l'impact que ces options auraient sur la rémunération des auteurs et des artistes interprètes. Dans chaque cas, il est important de tenir compte de la pertinence des propositions politiques par catégorie d'auteurs et d'artistes interprètes et pour les différents secteurs. De plus, il faut tenir compte des pays où des pratiques semblables sont déjà en place afin que toute élaboration de politique publique n'entraîne pas de changements inutiles et potentiellement coûteux.

1 Introduction

Europe Economics and the Institute for Information Law at the University of Amsterdam were commissioned by DG Internal Market to undertake a study of the remuneration of authors and performers (or the "creators") for the use of their works and the fixations of their performances (henceforth "performance").[7]

Before delving into the detail of our research and analysis of these issues, it is necessary to describe the context in which the study is undertaken and thereby to identify the motivation for, and key aspects of, this study.

1.1 Context and motivation for the study

With the emergence of digital technology and the increase in telecommunication bandwidth, the production and distribution of music and audio-visual content is rapidly shifting from the physical to the online domain. In addition to the traditional channels of distribution of works, phonograms (sound recordings) and films (such as live performances, CDs, DVDs, as well as broadcasting in different forms), content is now offered digitally via a plethora of different business models. An end to the innovation and development in the music and audio-visual sectors is not yet in sight. Thanks to the development of technology, in general, and the internet, in particular, content is currently distributed through 'on-demand' streaming, 'near-on-demand', for download-to-own, download-to-rent, webcasting, diverse online radio offerings and many more.

These emerging modes of content distribution pose novel and serious challenges to the rights of authors and performers to receive adequate or fair remuneration for the use (exploitation) of their creative endeavours. While the Court of Justice of the EU (CJEU) has acknowledged that this right falls within the ambit of the fundamental right protected under Article 17 of the EU Charter,[8] effectively securing fair remuneration is becoming increasingly problematic in a highly dynamic creative economy where new business models constantly emerge, where traditional and new media tend to converge, where changes in the 'value chain' have made rights allocation by operation of the law or contract ambiguous, where content users operating on multiple platforms increasingly insist on 'all rights' transfers, where mandates of collective rights management organisations (CRMOs) are regularly called

[7] We thank our correspondents for their contributions to the study: Prof. Maurizio Borghi (UK Bournemouth University); Dr. Till Kreutzer (Germany, iRights.Law, Berlin); Dr. Brad Spitz (France, YS Avocats, Paris); Ms. Deborah de Angelis (Italy, DDA Studio Legale, Rome); Prof. Pedro Letai (Spain, Instituto de Empresa, Madrid); Dr. Tomasz Targosz (Poland, Traple Konarski Podrecki & Partners Law Firm, Kraków); Dr. Rita Matulionyte (Lithuania, Law Institute of Lithuania, Vilnius); Ms. Maria Fredenslund (Denmark, RettighedsAlliancen, Copenhagen); Dr. Aniko Grad-Gyenge (Hungary ProArt Alliance for Copyright, Budapest); Prof. Daniel Gervais (US, Vanderbilt University Law School, Nashville).

[8] CJEU decision, Case C-277/10 Martin Luksan v. Petrus van der Let, 9 February 2012, European Court Reports 2012 -00000, Celex No. 610CJ0277.

into question, and where authors and performers individually may have very limited bargaining power.

In this context, a recurrent question is whether authors and performers receive their fair share from the exploitation of works and performances. The responses given to the consultation round initiated by the 2011 Green Paper on the online distribution of audio-visual works suggest that the answer is far from clear and highly depends on the point of view of the stakeholder concerned.[9]

The fairness of an author's or performer's remuneration depends on several factors, not least on the prevailing market structure and the existing legal framework.[10] While copyright and related rights have been fairly well harmonised in the *acquis*, notably through the adoption of the Rental and Lending Rights Directive[11], the Term Directive[12] and the Information Society Directive[13], their implementation differs across the Member States. Moreover, so far the exercise of these rights has been left to be regulated at national level. Laws relating to the scope of transfer and the remuneration to be paid to authors and performers by those using or selling their work or performance (henceforth "exploiters") therefore vary considerably from one Member State to the next.

Because authors and performers are traditionally seen as the weaker party to contractual negotiations, these mechanisms of transfer of rights are subject to various forms of regulation. Such measures of protection range from the usual rules of contract law, such as in the United Kingdom, to the imperative rules for the protection of authors and performers, such as in France, Germany and Spain. Between these two extremes all variations are possible in the laws of the Member States.

Not relying solely on legislative measures to strengthen their bargaining position, authors and performers often organise themselves into unions (wherever permitted) or freelance associations through which they attempt to negotiate model exploitation contracts with representatives of the industry. Unions try to achieve better conditions for their members than those that would be attainable on an individual basis.

CRMOs also play a major role in establishing the level of remuneration received by authors and performers, although the importance of this role differs by right holder, sector and even Member State. The role of CRMOs can be limited to the mere

[9] European Commission (2011), "Green paper on the online distribution of audiovisual works in the European Union: opportunities and challenges towards a digital single market".

[10] A key issue when examining fairness is also the way in which "fairness" as a concept is interpreted. We might think about fairness in the following ways: fairness as equality - fair treatment is equal treatment; fairness as proportionality - a fair obligation (say of a tax obligation) is a proportionate obligation (say, proportionate to the ability to pay); and fairness as proportionality to action (desert) - a fair reward is in proportion to the type of work undertaken.

[11] 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, OJ 2006 L376/28.

[12] 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.

[13] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society.

collection of remuneration or can include collection as well as the actual exercise and enforcement of the rights. In general terms, the exercise of exclusive rights can be individual or collective (either voluntary or compulsory), whereas the collection of the monies due for the remuneration rights almost by definition takes place on a collective basis. Several rights are administered through CRMOs either on a voluntary basis (e.g. the author's exclusive right to perform his musical work in public), on a compulsory basis (e.g. the author's exclusive right to cable retransmission of broadcast works) or as a result of a statutory rule regarding the collective administration of remuneration rights (e.g. the performer's remuneration right for the broadcasting of a commercial phonogram embodying his performance).

Contrary to other exploiters, CRMOs are often, generally as the result of contractual practice, not bound by the general or specific rules on authors' or performers' contracts found in the legislation of a number of Member States, on the ground that CRMOs are deemed to operate in the interest of their members, e.g. authors, performers or other rights owners. The rationale for this is that, by not being tied to limitations on the scope of transfer (e.g. future works, future modes of exploitation) or to best-seller clauses, CRMOs should be able to negotiate better deals with powerful users (e.g. broadcasting organisations, internet platforms etc.), on behalf of the authors or performers they represent.

This does not of course imply that the distribution of monies collected by CRMOs is necessarily fair towards the authors or performers. Difficulties may arise, for instance, from the fact that many CRMOs represent both individual authors or performers, and publishers or because of the use of the collections for cultural funds. Directive 2014/26/EU on Collective Rights Management does not contain rules on the determination of what constitutes fair remuneration for authors and performers, but it establishes obligations of transparency and accountability on the part of CRMOs.[14] Moreover, Article 16 of the Directive states:

"Right holders shall receive appropriate remuneration for the use of their rights. Tariffs for exclusive rights and rights to remuneration shall be reasonable in relation to, inter alia, the economic value of the use of the rights in trade, taking into account the nature and scope of the use of the work and other subject-matter, as well as in relation to the economic value of the service provided by the collective management organisation. Collective management organisations shall inform the user concerned of the criteria used for the setting of those tariffs."

1.2 Objectives and scope

The overarching objectives of this study are to analyse the current situation regarding the level of remuneration paid to authors and performers in the music and audio-visual sectors in order to compare the existing national systems of remuneration for authors and performers and identify the relative advantages and disadvantages of

[14] Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market.

those systems for authors and performers. We also aim to assess the need to harmonise mechanisms affecting the remuneration of authors and performers, and to identify which ones are the best suited to achieve this. Their potential impact on distribution models and on the functioning of the Internal Market is also examined.

In doing this we focus specifically on:

- Music:
  - Authors — lyricists, composers, songwriters (lyricist and composer).
  - Performers — featured artists, session musicians.
- AV:
  - Authors — principal directors, screenwriters, composers of music for film or television.
  - Performers — TV actors, film actors.

In conducting the study, we consider the following questions:

- Do the protective provisions contained in the Member States' legislation, whether specific to certain sectors of the copyright industry or generally applicable to all exploitation contracts, (still) offer sufficient protection to authors and performers so as to guarantee appropriate remuneration for the exploitation online and off-line of their works or performances?
- How have the contractual practices and the levels of remuneration evolved with the gradual implementation of online business models?
- How do these compare with the contractual practices dealing with more traditional forms of exploitation, like broadcasting, cable retransmission etc.?
- Is there a need to harmonise mechanisms affecting the remuneration of authors and performers, and what mechanisms would be best suited to achieve this?

We approach these issues by assessing the different national approaches and mechanisms to ensure remuneration for authors and performers for the exploitation of their works and performances in the music and audio-visual sectors in ten Member States[15] and in the US. We use this to explore whether, and to what extent, the differences that exist among the Member States affect levels of remuneration. Based on a thorough economic and legal analysis, we identify the parameters for policy makers to decide whether the legal framework should be adapted, and if so, how.

1.3 Structure of the report

The report is structured as follows:

- Section 2: Current legal framework — this section sets out the key findings from our survey of legal experts in each of the countries included in the study (see Appendix 3 for list of these legal experts).
- Section 3: Understanding payment flows — this section identifies the key players in the music and audio-visual markets and how they interact in order to explore payment flows to authors and performers.

[15] The EU Member States covered by the study are: Denmark, France, Germany, Hungary, Italy, Lithuania, the Netherlands, Poland, Spain and the UK.

- Section 4: Analytical approach — this section sets out the approach we have adopted for the analysis of the remuneration of authors and performers.
- Section 5: Approach to statistical analysis – this section describes our approach to analysing the data gathered through a survey of authors and performers and provides a summary of the statistical and econometric analysis.
- Section 6: Policy recommendations – this section outlines our key findings and a set of policy options to consider.
- Appendices:
  - Appendix 1: Music industry — this section offers a more detailed review of the music industry and the interactions of the key participants.
  - Appendix 2: Audio-visual industry — this section offers a more detailed review of the audio-visual industry and the interactions of the key participants.
  - Appendix 3: Legal correspondents — this section provides a list of the legal experts who provided information on the national legal frameworks.
  - Appendix 4: Questionnaire — this section presents the questionnaire that was circulated to authors and performers to gather information on their remuneration.
  - Appendix 5: Distributors of questionnaire — a list of the organisations that have distributed the questionnaire to their members.
  - Appendix 6: Results of statistical analysis — this section offers a detailed description of the data collected via the survey of authors and performers.
  - Appendix 7: Technical appendix — this section contains the model specifications used in the econometric analysis and the detailed econometric results.

2 The Current Legal Framework

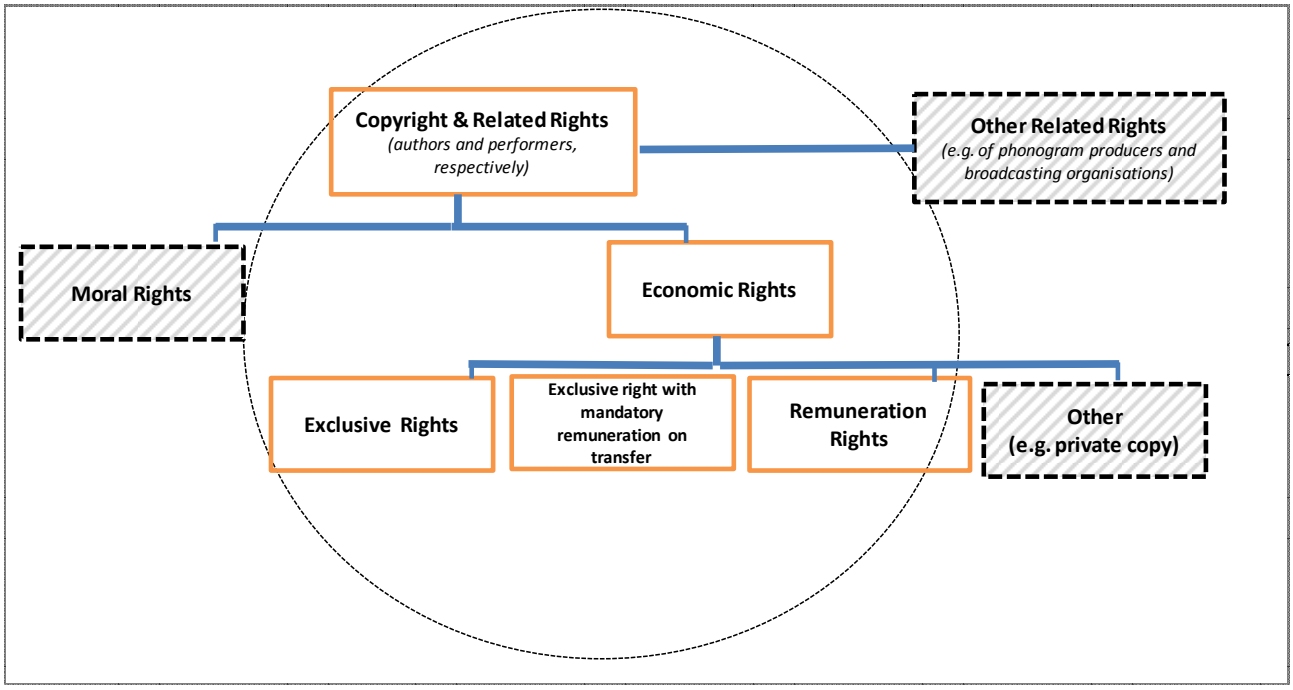
2.1 Legal framework under the European acquis: overview on the nature of the rights

Copyright and related rights are often characterised as a bundle of rights "(…) applicable to various types of use and defined by their technical nature, such as making copies (reproduction), performing in public, communicating (by wire or wireless means), renting, displaying etc.".[16]

The law grants exclusive rights to authors and performers that allow their owners to authorise or prohibit particular uses with respect to the works or other subject matter to which they pertain. Exclusive rights can usually be transferred, assigned, licensed or otherwise alienated in favour of a third party. Sometimes the law, instead of exclusive rights, confers on authors and performers a right to receive remuneration for the use of works or other subject matter by a third party. In such circumstances, the use can take place without the prior authorisation of the author or performer, provided that remuneration for the use is paid. These so-called remuneration rights are usually not transferable or assignable, but depending on the wording of the law, they can be waived. In addition, EU law also provides an in-between model in the exercise of copyright and related rights, whereby the transfer of an exclusive right is coupled with a right of remuneration, which will be explained in more detail below.

[16] D Gervais, 'Collective Management of Copyright: Theory and Practice in the Digital Age', in *Collective Management of Copyrights and Related Rights* (Ed. by Prof Dr D Gervais), Kluwer Law International, 2nd Edition (2010, the Netherlands) p2.

Figure 2.1: (Legal) source of remuneration for authors and performers in the music and audiovisual industry



Source: UVA.

Whereas copyright is granted to those considered 'authors' under the relevant national legislation, related (or neighbouring) rights are conferred upon performers, phonogram producers, film producers and broadcasting organisations pursuant to the Rental and Lending Rights Directive and the Information Society Directive. Our study only focuses on those related rights granted to performers. Other related rights, as depicted in the chart above and which includes the rights of phonogram producers, film producers and broadcasting organisations are, therefore, excluded from the scope of the study, as are moral rights and forms of compensation that derive from particular exceptions and limitations established by the law, such as the compensation for private copying or the reprography levies.

The fragmentation of rights carries at least three layers of complexity in the transfer and exercise of copyright and related rights:

- Each right in the bundle can be shared by co-authors and it can be divided contractually by territory, language, means of distribution etc. This means that, for a single use of copyrighted work, a user might need several authorisations.
- The actual uses whereby copyright is exploited do not always strictly correspond to a particular right within the bundle of rights. In other words, it is open to interpretation if a particular single use of the work would technically require clearance of more than one right (e.g. online download-to-own of a particular piece of music would technically be covering reproduction and making available).[17]

[17] For example, the uncertainties in assessing this have been explained by M. van Eechoud in Chapter 3. Exclusive Rights and Limitations' p. 90 in M van Eechoud et al., *Harmonizing European Copyright Law. The Challenges of Better Lawmaking*; Kluwer Law International (2009). It has also led, among others, to the 2014 'Study on the making available right and its relationship with the reproduction right in cross-border digital transmissions', by De Wolf

- Depending on interpretation by Member States, a particular use (e.g. webcasting) might fall into different categories of rights or cover more than one right in different Member States[18].

2.1.1 Economic rights in the European copyright acquis

Four EU Directives deal directly with the rights of authors and performers in the music and audiovisual sectors: the Rental and Lending Rights Directive, the Cable and Satellite Directive[19] the Information Society Directive, and the Term Directive. The rights granted under these directives are examined below, first as they apply to both authors and performers and second, as they apply differently to each group.

The Rental and Lending Rights Directive governs the exclusive rental and lending rights granted to authors and performers. With respect to the rental right, the Directive provides that when performers, individually or collectively, conclude a contract concerning film production with a film producer, they shall be presumed to have transferred their rental right, subject to contractual clauses to the contrary (art. 3(4)). Member States *may* provide for a similar presumption with respect to authors. In such a case, authors and/or performers retain an unwaivable right of remuneration for the rental of a musical recording or audiovisual work (art. 5). In other words, the right of remuneration for the rental applies only in instances where the performers' or authors' right to make their work available to the public through rental has been transferred to a producer. With respect to the lending right, Member States can

& Partners on behalf of the European Commission. In the words of the authors, ''(…) *The Study identified the existence of different acts of reproduction – upstream and downstream – in the process of the act of making available, that may complicate the licensing of works for online use and have an impact in terms of conflicts of laws in case of infringement. However, the Study observed that the InfoSoc Directive does not regulate the relation between the making available right and the reproduction right. Both rights are autonomous and can apply cumulatively, so that a single technical act may simultaneously fall under the making available and the right of reproduction, even if those rights are managed separately"*.

[18] This appears to be the case e.g. in Spain. The AIE, the Spanish CRMO for music performers, calls for a clear delimitation of those (digital) acts of exploitation that fall under the communication to the public right ('non interactive') versus those that fall under the making available right ('interactive'). The importance for performers is considerable, because under the communication to the public right, performers have, regardless of contractual arrangements, a remuneration right, subject to collective management, and recognised by EU and international legislation. In the words of AIE*: '(…) some interested stakeholders would try to license all internet services individually (in fact, it is already happening), aiming to subvert the nature of certain acts of exploitation of phonograms which contain artistic performances, such as "non-interactive webcasting" services, trying to exclude them from being deemed as acts of communication acts and bringing such services to the scope of the making available right (excluding performers for obtaining fair remuneration for these acts consequently)*'.

[19] Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission, *OJ L 248, 6.10.1993, p15–21*.

choose to implement this right as an exclusive public lending right or as a right of remuneration (art. 6).[20]

Article 9(1) of the Satellite and Cable Directive confers authors and performers the right to grant or refuse authorization to a cable operator for a cable retransmission may be exercised only through a CRMO. Under the terms of this Directive, cable retransmission implies the 're-broadcasting' of programmes that have been initially broadcast by another organisation. Cable retransmission organisations 'capture' the broadcast signals in order to reach their own, separate audience, different from the 'primary' communication, which must be intended for reception by the public and can occur either over the air or by wire. The cable retransmission therefore qualifies as an act of 'secondary' communication to the public and is thus regulated as a separate right.[21]

Authors

Pursuant to the Information Society Directive, all *authors* enjoy the exclusive, transferable, rights of reproduction (art. 2a), of communication to the public by wire and wireless means, including the making available to the public of their works (art. 3.1) and of distribution (art. 4.1). The right of reproduction is very broad and encompasses the right to authorise or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part. The right of making available is defined as 'the right to authorise or prohibit the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them)'. This exclusive right encompasses all forms of interactive Internet distribution, video-on-demand, webcasting, streaming etc. In most cases these exclusive rights are transferred in exchange for a monetary consideration.

[20] Article 6 states that '(…) Member States may derogate from the exclusive right provided for in Article 1 in respect of public lending, provided that at least authors obtain a remuneration for such lending (..) 2. Where Member States do not apply the exclusive lending right provided for in Article 1 as regards phonograms, films and computer programs, they shall introduce, at least for authors, a remuneration. 3. Member States may exempt certain categories of establishments from the payment of the remuneration referred to in paragraphs 1 and 2. Or be waived by authors or performers'.

[21] P. B. Hugenholtz, 'SatCab Revisited: The Past, Present and Future of the Satellite and Cable Directive', European Audiovisual Observatory (2009), Issue 2009-8 of the series IRIS plus, entitled 'Convergence, Copyrights and Transfontier Television', p12.

Figure 2.2: Authors

		Legal source of income per right			
		Exclusive Right	Exclusive right with mandatory equitable remuneration upon transfer	Remuneration Right (**)	Compensation under exception or limitation
Reproduction Right	Reproduction	✓			
Communication to the public	Communication to the public (*)	✓			
	Making available	✓			
	Cable	✓			
Physical Distribution	Sale	✓			
	Rental	✓	✓ *(non-waivable)*		
	Public Lending	✓		✓	
Exceptions & Limitations	Private Copy (***)				✓

(*) Communication to the public includes: (i) Communication to the public in (public) establishments/Public performance (theatre plays etc); (ii)Broadcasting (TV, Radio, Satellite, Internet). Excludes cable (which is regulated by the Satellite and Cable Directive) and (iii) Live performances (only for music authors)

(**) Remuneration rights cannot be negotiated as such by the author/performer. They can only be waived in negotiation, if the law provides the possibility.

(***) Not included in the scope of this study.

Performers

All *performers* enjoy an exclusive right of reproduction (art. 2b) and an exclusive right of making available of the fixations of their performances (art. 3.2a), pursuant to the Information Society Directive. In addition, performers have an exclusive right over the (first) fixation of their performance (art 7 of the Rental and Lending Rights Directive), and the distribution of the fixations of their performances or copies thereof (art. 9).

In the music sector, especially in the licensing practice, it is common to refer to mechanical reproduction rights or just 'mechanical rights'. These rights correspond to the mechanical reproduction of a piece of music, traditionally on physical sound carriers but nowadays also online (in general, the making available of copyright-protected works online cannot technically take place without making a reproduction). Hence, mechanical rights licensing and the corresponding royalties are paid to the music author/publisher when music is reproduced on physical sound carriers or in the process of online uses. Reproduction rights are broader than mechanical rights and encompass any 'direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part'. On the basis of Article 9 of the Rental and Lending Rights Directive, performers also enjoy the exclusive right to make available to the public, by sale or otherwise, the fixations of their performances including copies thereof.

Music performers also hold the exclusive rights of broadcasting and communication to the public of their unfixed and un-broadcast performances (as per art 8.1 of the Rental and Lending Rights Directive). The latter rights refer to the exclusive rights of performers over their live performances. In other words, the performer can allow or prohibit the live transmission (e.g. by means of broadcasting or simply over loudspeakers) of his live (and therefore still unfixed) performance.[22] In addition, music performers have an explicitly regulated right to remuneration for the broadcasting or communication to the public of commercial phonograms (i.e. the fixed performance) as per art 8.2 of the Rental and Lending Rights Directive.

[22] Interpretation of art 8.1 is in line with the commentary provided by M. Walter and S. von Lewinski, *European Copyright Law. A Commentary*; Oxford University Press (Oxford, 2010) pp320-321.

The rationale behind the adoption of this provision originates from a historical compromise struck between authors and performers at the time when performers' rights were being recognised at the international level: authors could not concede to the protection of performers' rights if this allowed performers to authorise or prohibit the use of their recorded performances.[23] As it concerned performances of their musical works, this could obstruct the exercise of their exclusive rights. Accordingly, they could only accept the introduction of a remuneration right, which would allow performers to receive remuneration without them being legally capable of vetoing the exercise of the exclusive right of communication to the public held by the authors of musical works.

Art 8.2 of the Rental and Lending Rights Directive is not applicable to the making available of a fixation of a performance, which is governed by article 3(2) of the Information Society Directive as an exclusive right. EU law is silent on whether the remuneration right for the communication to the public of a commercial phonogram is waivable or not. The role of CRMOs is limited to the collection and distribution of what is, in practice, functions in most Member States as 'a claim' to obtain a payment from a use rather than a licence negotiated on the basis of a right to authorise or prohibit. Tariffs (setting the remuneration) are normally negotiated between users and CRMOs (in some instances subject to approval/supervision).

The Term Directive introduced the following provision to the benefit of performers of musical works: 50 years after the phonogram was lawfully published, the performer has an unwaivable right to terminate the contract by which the performer had transferred or assigned his rights in the fixation of his performance to a phonogram producer. Also, if the performer was initially paid a lump sum under the contract, he has an unwaivable right to obtain an annual supplementary remuneration from the phonogram producer for each full year immediately following the 50th year after the phonogram was lawfully published or communicated to the public. The amount of the annual supplementary remuneration must correspond to 20 per cent of the revenue generated from the exploitation of the performance.

[23] M. Walter and S. von Lewinski, in analysing the right holders of the Rental and Lending Rights Directive, explain that, contrary to the stance taken by some Member States, the EU Commission agreed that performers' did make notable contributions in the music and film industries. As such, the Commission dismissed any potential problems arising from the existence of 'parallel rights' held by several groups of rights' holders (supra. pp273-275).

Figure 2.3: Music Performer

		Legal source of income per right			
		Exclusive Right	Exclusive right with mandatory equitable remuneration upon transfer	Remuneration Right (**)	Compensation under exception or limitation
Reproduction Right	Reproduction	✓			
Communication to the public	Live performances (*)	✓			
	Communication to the public of commercial phonograms			✓	
	Making available	✓			
	Cable	✓			
Physical Distribution	Sale	✓			
	Rental	✓	✓ *(non-waivable)*		
	Public Lending	✓			
Exceptions & Limitations	Private Copy (***)				✓

(*) The exclusive right covers broadcasting and communication to the public of the personal performance that has not (yet) been broadcast or fixed (recorded).

(**) Remuneration rights cannot be negotiated as such by the author/performer. They can only be waived in negotiation, if the law provides the possibility.

(***) Not included in the scope of this study.

Audiovisual performers have the right of broadcasting and communication to the public in respect of *unfixed* (live) performances and non-broadcasted performances (art 8.1). This right is fully transferable. No equivalent right exists in respect of performances *fixed* in audiovisual works. Further, EU law does not entitle them to a remuneration right for the broadcasting and communication to the public, as it does with music performers. Performers in audiovisual works do enjoy an exclusive right of making available a first fixation of their performance pursuant to the Information Society Directive.

Figure 2.4: Audiovisual performer

		Legal source of income per right			
		Exclusive Right	Exclusive right with mandatory equitable remuneration upon transfer	Remuneration Right (**)	Compensation under exception or limitation
Reproduction Right	Reproduction	✓			
Communication to the public	Live performances (*)	✓			
	Communication to the public of commercial *AV recordings*				
	Making available	✓			
	Cable	✓			
Physical Distribution	Sale	✓			
	Rental	✓	✓ *(non-waivable)*		
	Public Lending	✓			
Exceptions & Limitations	Private Copy (***)				✓

(*) The exclusive right covers broadcasting and communication to the public of the personal performance that has not (yet) been broadcast or fixed (recorded).

(**) Remuneration rights cannot be negotiated as such by the author/performer. They can only be waived in negotiation, if the law provides the possibility.

(***) Not included in the scope of this study.

To summarise, EU Directives establish the guidelines and minimum levels of protection regarding the following:

- What rights exist and who owns them, depending on the use.
- Nature of the right (exclusive, remuneration etc.).
- Possibility to transfer or relinquish the right (i.e. 'waivability' of the right).

- Type of exercise and collection (of the resulting remuneration).

Some of these provisions are mandatory; others are left for the Member States to decide.

2.1.2 National implementation of the European copyright *acquis*

All ten Member States considered in this study grant *authors* an exclusive, transferable right of reproduction, communication to the public, including the right of making available, and of distribution in conformity with the Information Society Directive. Some differences can be observed in the national implementation of the *acquis*, particularly with respect to the existence or the exercise of the rights conferred on authors and performers under the Rental and Lending Rights Directive, the Satellite and Cable Directive, as well as with respect to certain *performers'* rights under the Information Society Directive. Variations in legislation have occurred primarily as a result of the choices left in the *acquis* for the implementation of European norms by the Member States. However, some differences are the result of conscious decisions on the part of the national legislator to go beyond the minimum harmonisation in the *acquis*. The main national distinctions are highlighted below.

Cable retransmission right

Some Member States have witnessed important technological developments with respect to the cable retransmission right: broadcasting companies in these Member States explain that contrary to the wording of article 1(3) of the Satellite and Cable Directive, they no longer directly deliver their content to viewers via analogue terrestrial television. Today viewers receive the content indirectly via distributors (e.g. cable, telephone, and satellite TV companies) with whom they have a contractual relationship.[24] This phenomenon is known as 'direct injection'. Since no retransmission of signals initially broadcast by another organisation occurs anymore, broadcasting and cable companies in some Member States (e.g. Netherlands) argue that they are no longer engaged in 'secondary' communication, but rather in 'primary' communication. Consequently the rules of the Satellite and Cable Directive on mandatory collective administration would not apply. In view of the legal uncertainty around this issue, the Court of Appeal of Brussels referred a question for a preliminary ruling to the CJEU:

> Does a broadcasting organisation which transmits its programmes exclusively via the technique of direct injection — that is to say, a two-step process in which it transmits its programme-carrying signals in an encrypted form via satellite, a fibre-optic connection or another means of transmission to distributors (satellite, cable or xDSL-line), without the signals being accessible to the public during or as a result of that transmission, and in which the distributors then send the signals to their subscribers so that the latter may view the programmes — make a

[24] EU Law Radar, 'Case C-325/14, SBS Belgium – broadcasting via third parties', available at: http://eulawradar.com/case-c-32514-sbs-belgium-broadcasting-via-third-parties/.

communication to the public within the meaning of Article 3 of InfoSoc Directive?[25]

This request for a preliminary ruling from the CJEU will hopefully shed some light on the question of whether the activities of the cable operators qualify as cable retransmission under the Satellite and Cable Directive or as an act of communication to the public under the Information Society Directive. But it will unfortunately not clarify the future role of CRMOs in the administration of broadcasting rights, let alone the question of who (the producer or the CRMO) has obtained a transfer of rights from the authors or performers. The answer to this last question may have a big impact on the remuneration of authors and performers: if the producer is deemed to have acquired the rights, the remuneration for these rights is more susceptible of being part of a buy-out, along with all other rights transferred to the producer, than if the rights are deemed transferred to the CRMO.

Rental and lending rights

The rental right is generally granted to authors and performers on an exclusive basis. The variations between Member States relate to the existence in most Member States, but not in all, of an obligation to exercise this right through mandatory collective management. By contrast, the rental right has not been expressly implemented in France, on the ground that the rental right foreseen in the Directive is covered by the doctrine of *droit de destination*. This doctrine states that authors have the power to prohibit any contracting party or subsequent acquirer of the work one or more specific forms of use of copies of the work. This includes the possibility to determine not only the forms of commercial exploitation, but also to restrict certain uses made by subsequent acquirers or holders.[26] This right is, in fact, broader than the distribution right, but it does not implement the remuneration modalities provided for the rental right in the Directive.

Due to the leeway left by the Directive, the lending right is not exercised collectively in Spain, Denmark, Lithuania, or the UK, where authors and performers in these countries can exercise their rights individually. At the same time, in Lithuania and the UK, remuneration is due only in the case of public lending of books and similar publications.[27]

Making available right

The right of making available has generally been implemented as an exclusive right for authors and performers across the Member States. Two countries have diverging systems for music performers: Spain and France. In Spain, since the adoption of Law 23/2006, performers enjoy an unwaivable right of equitable remuneration once the right of making available to the public is assigned to a producer of sound recordings or a film producer.[28] This provision is so far unique in Europe**.** In France, the Supreme

[25] C-325/14, Application filed on 29 August 2014 (SBS Belgium/SABAM).

[26] A. Lucas, H.-J. Lucas, A. Lucas-Schloetter, Traité de la propriété littéraire et artistique, Paris, LexisNexis, 2012, para265.

[27] Republic of Lithuania Government decision concerning the payment of remuneration for the lending of books and other publications libraries, 14 August 2007, No905.

[28] 'See: Art. 108(5) Royal Legislative Decree 1/1996 of April 12, approving the revised text of the Copyright Act is passed, regulating, clarifying and harmonizing the applicable statutory

Court recognised in September 2013 that the written authorisation granted by performers for the communication to the public of their commercial phonograms (whether or not in a tangible support) should also extend to those uses under the making available right. Moreover, this decision applies even to those recordings made before the existence of the internet. The decision therefore appears to curtail the flexibility of performers in exploiting their economic rights separately as it implies that the commercial uses under the making available right are already covered by the distribution and communication to the public right and do not require a separate authorisation.[29] Generally speaking, however, the respective boundaries of the right of communication to the public and of the right of making available, e.g. between acts that are purely interactive and those that are solely analogue or mixed, give rise to interpretation in almost all Member States, especially in view of the rapidly changing technology.

2.2 Member State regulation of exploitation contracts

The content of exploitation contracts and the level of remuneration paid to authors and performers have not been subject to comprehensive regulation at the European level.[30] This gives rise to a very diverse landscape in the legislation of the Member States. Some have adopted protective measures to the benefit of authors and performers with respect to the scope of transfer of rights or the formation, execution, and interpretation of contracts concluded with broadcasters, publishers and other producers. Other Member States essentially leave it to the contracting parties, in accordance with the principle of freedom of contract, to negotiate the content of their agreement and the level of remuneration of authors and performers. In a number of Member States, authors and performers have regrouped in trade unions or are able to count on CRMOs to provide support in the negotiation of contracts or the fixation of the level of remuneration.[31]

provisions on the subject, which reads as follows: '5. Los usuarios de las grabaciones audiovisuales que se utilicen para los actos de comunicación pública previstos en el artículo 20.2.f) y g) tienen obligación de pagar a los artistas intérpretes o ejecutantes y a los productores de grabaciones audiovisuales la remuneración que proceda, de acuerdo con las tarifas generales establecidas por la correspondiente entidad de gestión. Los usuarios de grabaciones audiovisuales que se utilicen para cualquier acto de comunicación al público, distinto de los señalados en el párrafo anterior y de la puesta a disposición del público prevista en el apartado 1.b), tienen asimismo la obligación de pagar una remuneración equitativa a los artistas intérpretes o ejecutantes, sin perjuicio de lo establecido en el apartado 3.'

29 Cour de Cassation– 1ére Chambre Civile, 11 September 2013, SPEDIDAM C/ SARL ITUNES & A., N° de pourvoi: 12-17794.

30 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, p38.

31 S. Dusollier et al., Contractual Arrangements Applicable to Creators: Law and Practice of Selected Member States, study prepared for the European Parliament, Committee on Legal and Parliamentary Affairs, PE 493.041, European Union, 2014.

2.2.1 Ownership of rights

No author or performer can transfer more rights that 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.

Most often, the initial ownership of the copyright is conferred on the natural person who created the work, who can be considered the author following a principle known as the 'creator doctrine'. In some jurisdictions, the initial ownership of rights may also be conferred on the legal person who invested in its production, like an employer or a film producer. In a number of countries, instead of conferring the initial ownership of rights on a legal person, the law will operate a rebuttable presumption of transfer in favour of the legal person who invested in the production of the work. The distinction between granting initial ownership or presumption of transfer is important, for in the latter case the legal person is not endowed with the moral rights on the work (as would a natural person) and the presumption can be reversed by evidence or expressly set aside by contract.

The rules of initial ownership of copyright and related rights vary depending on the category of work or performance involved.

Music

In the case of musical works, the laws of nine out of ten Member States recognise the natural author(s) of the work as the initial owner of the rights on the composition or lyrics. The same rule applies in the case of the natural performer of a musical work. The only exception is the UK, where the composer and lyricist are also recognised as the natural authors of the musical work, but where the producer is the 'author' of and hence first owner of any copyright in the sound recording. The law in the UK further provides that where a performer has authorised a person to make a copy of the recording of the performance, the first owner of any rights is that person.

Important to note is the fact that Italian Copyright Law is not clear about the status of session musicians. In specifying who a performer is and therefore if the norms related to the related rights apply, art. 82 of Law n. 633/1941 recognises the status of 'artist performer' only to the performers that play a significant artistic part, even if in a supporting role. As a matter of fact, it is difficult and subjective to define "a significant artistic part". So, without the evaluation of a judge, it is customary in the music sector to recognise the role of the session musician as playing a significant artistic part only if his name is included in the credits. Therefore, only if the phonogram producer recognises the artistic role of a session musician on the label credits will related rights be conferred on him.

Audiovisual

The situation with respect to the initial ownership of rights on audiovisual works is very fragmented and complex, both from the perspective of the author and the performer. The copyright acts of Denmark, Germany, France, Hungary, Italy, Poland,

and Spain provide that unless proved otherwise, the following persons are presumed to be the joint authors of an audiovisual work made in collaboration: 1) author of the script; 2) author of the dialogue; 3) author of the musical compositions, with or without words, specially composed for the work; 4) director. In France and Spain, the author of the adaptation is also identified as one of the authors of an audiovisual work. This is not only important for the calculation of the duration of protection (which lasts until seventy years after the death of the longest living of these authors), but also for the determination of who is entitled to remuneration as 'film author'. Rather than referring to the four categories of authors, art. 45d of the Dutch Copyright Act defines the makers of a film work as the natural persons who have made a contribution of a creative nature to the creation of the film work. This may therefore include the cartoonist or computer animator.

Nevertheless, the laws of France, Italy, Lithuania, Netherlands, Poland and Spain also provide that unless otherwise stipulated, there exists a presumption of transfer of the exclusive exploitation rights on the audiovisual work to the producer. The law of the United Kingdom grants *ab initio* ownership of the rights to the producer and director of the work, unless the work is created in the course of employment in which case the employer is deemed to be the initial owner. Moreover, the laws of Denmark, Lithuania (with a limit of five years), and Poland establish a presumption of ownership of rights in favour of the employer in the case of a work created by an employee in the course of his employment.

The situation is roughly similar with respect to the ownership of rights on performances of actors in audiovisual works. Spanish law grants in favour of the employer or lessee a rebuttable presumption of exercise of the exclusive rights of reproduction and communication to the public.

The table below summarises the rules of ownership of copyright and related rights on audiovisual works. In the countries indicated the producer is granted ownership by presumption of transfer, unless the performances were made in the course of employment.

Table 2.1: Ownership rules

	Ownership of *copyrights* on AV works	**Ownership of *related rights* on AV works**
Author/Actor	DK*, DE, HU	DK*, DE, HU, UK*
Producer	FR, IT, LT, NL, PL, SP, UK*	FR, IT, LT, NL, PL,
Employer	DK, LT(max 5y), NL, PL, UK	DK, LT(max 5y), NL, PL, SP, UK

* Except if work is made in the course of employment.

In this context, the CJEU ruling in the Luksan case should be highlighted. On the one hand, the Court ruled that European Union law must be interpreted as allowing the Member States the option of laying down a presumption of transfer, in favour of the producer of a cinematographic work, of rights to exploit the cinematographic work such as those at issue in the main proceedings (satellite broadcasting right, reproduction right and any other right of communication to the public through the making available to the public), provided that such a presumption is not an irrebuttable one precluding the principal director of that work from agreeing otherwise. On the other hand, the CJEU considered that the right to fair compensation

arising from the private copying exception implemented under the Information Society Directive should not be waivable under domestic legislation.[32]

Under United States' law, ownership in the audiovisual sector is key, as the majority of works produced in this sector fall under the definition of works-made-for-hire. This translates into a very producer-centric system in the United States and the audiovisual CRMOs negotiate collective agreements on behalf of their members in order to protect the rights of the performers they represent. For example, the Writers Guild of America (WGA) negotiates on behalf of its members with the Alliance of Motion Picture and Television Producers regarding rights to screen credits. Screen credit rights are crucial in the audiovisual sector because they determine who gets paid and how much. These rights also provide an opportunity for circumventing the strictures of the works-made-for-hire doctrine by setting up a payment structure that recognises separate rights in original contributions by an author (regardless of being an employee) to the audiovisual work. The designation of separate rights comes in the form of a designation of "Written by" or an equivalent in the screen credits.[33]

2.2.2 Scope of transfer of rights

Exclusive rights of authors and performers can in principle be assigned, licensed or transferred in other ways determined by law. Remuneration rights may be waivable or unwaivable. From a legal perspective, no correlation exists between the type of right and the level of remuneration due or collected. The level of remuneration depends not only on private contractual negotiations, but also on how the rights (and remuneration) have been implemented and interpreted nationally by the Member States. Further insight on the implementation of the Directives by the different Member States is part of the study and the contractual practice in each of those countries will be provided later in the report.

The general rules of contract law of most countries do not regulate the scope of transfer of rights, except for France where the Civil Code provides that perpetual transfers are considered null and void. Generally speaking, *future forms of exploitation* can be transferred under general contract law provided they are sufficiently detailed in the agreement *(*Denmark, Netherlands*).* In the United Kingdom, in *Hospital for Sick Children v Walt Disney Productions*[34] it was held that a licence granted at the times of silent films to use a literary work for the cinema does not authorise its use for sound films. Courts tend to construe implied terms of a licence narrowly, as covering only acts that are necessary to give business efficacy to the agreement.[35] In this respect, it is unlikely that an implied licence can cover new forms of exploitation.

[32] See: C-277/10, Decision of the Court of Justice of the European Union, 9 February 2012 (Martin Luksan v Petrus van der Let).
[33] See A. Porcin, 'Of Guilds and Men: Copyright Workarounds in the Cinematographic Industry', (2012) 35 Hastings Comm. & Ent L.J. 1-33, at 13-17.
[34] [1966] 1 WLR 1055.
[35] Ray v Classic FM plc [1998] F.S.R. 622; Barrett v Universal-Island Records Ltd [2006] EWHC 1009 (Ch).

Formalities

General contract law provides that agreements are concluded at the moment the parties exchange consent to be bound by the terms of the contract. In all countries examined, the general contract law provides that consent can be manifested in any form. 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. Generally recognised exceptions to the absence of formalities are of little consequence for copyright and related rights contracts. France is one exception where the Civil Code states that any agreement with a value exceeding €1,500 must be entered into in writing. However, this is an evidentiary rule. The author or the performer will be able to prove the existence of the agreement by any means, since in copyright and related rights' agreements the assignee will be considered to be a merchant under commercial law.[36] In addition, the assignee (publisher or producer) will be able to bring evidence of the existence of the agreement where a 'commencement of proof in writing' exists, such as a letter or an email sent by the author.

In many instances, full transfers and exclusive licences are subject to the accomplishment of formalities. Actually, only two Member States, Denmark and the United Kingdom, impose absolutely no formal requirements to copyright and related rights-based contracts. In France, the performer's *written authorisation* is required for any fixation of his performance, its reproduction and its communication to the public. Copyright contracts regarding the assignment of rights, license of rights or work commissioning should be concluded in writing. Similarly in other Member States, a full transfer of rights will need to be done in writing (Italy, Hungary, Netherlands, Poland and Spain). In Lithuania, the copyright contract has to include the following: title of the work (except for licences granted by the CRMOs), description of the work (type of work, title, main requirements for the work), rights that are assigned or licensed (modes of exploitation), type of licence (exclusive or non-exclusive), territory for which the assignment or licence is valid, the amount of remuneration, mode and terms of payment, dispute resolution mechanisms and liability, other conditions. In Germany formal requirements only exist in relation to agreements concerning *future works* and *future forms of exploitation*.

Specification of scope of transfer

An important measure 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*. 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. Some copyright or related rights 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. Stricter requirements are established by France and Spain. Other countries, such as Denmark,

[36] Art. L.110-3 of the Commercial Code states: 'With regard to merchants, commercial instruments may be proven by any means unless the law specifies otherwise'. This rule was applied in Cass. civ. 1, 12 April 1976, 74-12149.

Hungary, Lithuania and Poland, also impose a limitation on the scope of transfer yet are often more lax as regards rules on the forms of payment.

Under the copyright law of most EU Member States, the courts give a restrictive interpretation to clauses in copyright contracts that operate the transfer of rights from an author or performer to an 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. The laws of Germany and Netherlands give the courts the express instruction to interpret a grant of rights as encompassing only those rights that are required by the purpose pursued in the transfer at issue. 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.

In Italy, for example, the law clarifies that 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. By contrast in Poland, the '*in dubio pro auctore*'[37] principle seems to be generally accepted in the whole area of copyright law, including copyright contract law. It does not have a clear legal footing though (no legal provision explicitly pronounces it). Some authors conclude that although this principle permeates copyright contract law it must be applied reasonably and in certain situations, if more arguments speak against extending the author's rights, it is the reasonable interpretation that must take precedence.

Rights on future forms of exploitation

The laws of France, Germany, Hungary, Italy, Lithuania, Poland and Spain expressly regulate the transfer of rights relating to forms of exploitation that are *unknown* or *unforeseeable* at the time the copyright contract was concluded. These acts regulate the transfer of rights on future works by either strictly prohibiting (like Poland) or by allowing such transfers to take place yet allowing the scope for renegotiation (e.g. under the obligation to pay additional remuneration). The German Copyright Act states that a contract concerning future modes of exploitation (i.e. a separable and independent use that was economically and technically unknown at the time the contract was concluded, in German "unbekannte Nutzungsart") has to be concluded in writing. The author has a right to an additional remuneration if the exploiter commences a new form of exploitation (sec. 32c UrhG). Alternatively, the author may revoke the right to use the work in future forms. To do so, he has to inform the exploiter within three months after the exploiter has sent information that a new mode of use will be commenced[38]. Obviously, the revocation right is not applicable if the parties have already agreed on an additional remuneration.

In the Netherlands, art 45d Copyright Act provides that the producer of an audiovisual work has to pay an equitable remuneration to the authors if he effects exploitation in

[37] This Latin maxime means 'when in doubt, the contract should be interpreted in favour of the author'.

[38] One of many flaws of this rule is, that the deadline to revoke the rights does not start when the exploiter's information was received but after it was sent off.

a form that did not exist or was not reasonably foreseeable at a time referred to in art. 45c or if he gives the rights to effect such exploitation to a third party. Art. 4 of the Dutch Related Rights Act provides a similar right for performers in the audiovisual work.

Rights on future works or performances

Future works can be transferred under general contract law provided they are sufficiently detailed in the agreement. The Supreme Court of the Netherlands recently ruled that the transfer of rights from individual performers of all their broadcasting rights relating to their past and future performances to the relevant CRMO was not precise enough in this case and therefore not valid under Dutch civil law. The requirement of sufficient determination in the sense of the Dutch Civil Code applies in case of transfer of future goods, including the transfer of related rights. This requirement is generally met if the instrument of transfer contains sufficient information to determine what the good is.[39] By contrast, on the basis of the general rules of contract law and article 2(2) of the Copyright Act, Dutch courts commonly uphold the validity of contracts for the transfer of all rights on modes of exploitation now known or to be discovered in the future.[40]

As in the case of the transfer of rights in future forms of exploitation, many national copyright acts are silent on this issue. However, the laws of France, Hungary, Lithuania, Poland, and Spain do regulate the transfer of rights on *future works* by expressly prohibiting general transfers of future works. Other countries allow it, albeit with a mandatory time limit (Germany or Italy).

In Italy, if a contract has as its object *future works* it is void if it covers all the works or a category of works that the author can create without any limitation in time. 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 time within which such work must be delivered has not been determined, the publisher may at any time request the court to fix such term. In the case that a term has been set, the court may extend it.

Transfer of rights to third parties

It is not uncommon for assignees of copyrights and related rights to further transfer the rights acquired down a chain of holders. What does contract law have to say about such subsequent transfers? Is the consent of the author required? Is it a cause of termination of the original contract? According to the answers submitted, the doctrine of *intuitu personae* recognised in some Member States (France, Italy) prevents the assignment of agreements (i.e. entered into in consideration of the contracting party) to a third party without the authorisation of the contractor. In the case of an assignment of an *intuitu personae* agreement without the prior authorisation of the contractor, the latter may request the termination of the agreement. However, the agreement can provide that it may be assigned by one of the parties, and agreements between producers and performers often do. In all other countries, the issue is not

[39] Dutch Supreme Court, IEPT20140328 (Norma v NL Kabel) referring to Art. 3:84(2) of the Dutch Civil Code; HR 20 september 2002, ECLI:NL:HR:2002:AE3381, NJ 2002/610.
[40] District Court of The Hague, 12 April 2006, ECLI:NL:RBSGR:2006:BA8452 (Nedfilm).

covered by general contract law and turns out to be problematic to authors and performers in practice (Lithuania), as it makes it difficult to keep track of who owns the rights on their works.

In almost all Member States, the transferee is entitled to transfer the rights he acquired to a third party. In Spain and Germany, the exclusive transferee is responsible for the payment under the conditions established in the transmission contract. If the transferee transfers his right to a third party without the consent of the author, the transferor and the third party will be jointly and severally liable. Similarly, the Danish copyright act states that 'Assignment of copyright does not give the assignee any right to reassign copyright unless the reassignment is usual or obviously presumed. The assignor remains liable for the performance of the agreement with the author'.

2.2.3 Provisions on remuneration

There are numerous ways to calculate the amount of remuneration to be paid to the author or performer for the use of his work or performance. The payment of remuneration generally takes either one of three forms: it can be a lump sum (ex ante), a proportional remuneration related to the exploitation, or a combination of the two. Proportional remuneration is linked to the actual commercial success of a work or performance, since it is usually based on the revenues generated from the exploitation of that work or performance. Meanwhile lump sum payments will generally be dependent upon the expected success and anticipated revenues.

The majority of national copyright acts have left the form of remuneration to be paid to the author or performer to be determined by the contracting parties.[41] However, France, Germany, Poland and Spain do provide some measures in this respect.

In Spain for example, the copyright act provides for a mandatory rule, under art. 46 (1), that the author will receive a "proportional share of the proceeds of exploitation" and the parties may agree on the percentage they want of such income. This provision is however not absolute as the following paragraph (art. 46 (2)) argues that, under some circumstances, the payment of a lump sum is justified. These circumstances include those in which it becomes manifestly difficult to individualise or determine the payment due.

French law also establishes a general rule of proportional remuneration in the first paragraph of art. L 131-4 whereby an assignment shall comprise a proportional participation by the author in the revenue from sale or exploitation of the work.

The rules that authorise the payment of lump sum under the French Intellectual Property Code are also 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. For music publishing contracts, the provision (art. L. 131-4) lays down that the author's remuneration may be calculated as a lump sum in the following cases:

[41] Dusollier et al. 2014, p36.

1. the basis for calculating the proportional participation cannot be practically determined;

2. the means of supervising the participation are lacking;

3. the cost of the calculation and supervising operations would be out of proportion with the expected results;

4. the nature or conditions of exploitation make application of the rule of proportional remuneration impossible, either because the author's contribution does not constitute one of the essential elements of the intellectual creation of the work or because the use of the work is only of an accessory nature in relation to the subject matter exploited;

5. assignment of rights in software; and

6. in the other cases laid down in the Code.

Conversion, at the author's request, between the parties of the rights under existing contracts to lump sum annuities for periods to be determined between the parties shall also be lawful.

For audiovisual contracts, the provision (art. L. 132-25) reads:

Remuneration shall be due to the authors for each exploitation mode.

Subject to art. L. 131-4, where the public pays a price to receive communication of a given, individually identifiable audiovisual work, remuneration shall be proportional to such price, subject to any decreasing tariffs afforded by the distributor to the operator; the remuneration shall be paid to the authors by the producer.

As regards performers, the French code states that agreements can provide for a proportional remuneration, a lump sum, or a combination of both. Nevertheless, specific collective bargaining agreements, some of which have been extended (and imposed) by decree to the relevant sectors, do provide for the payment of specific remunerations in the form of a lump sum and/or proportional remuneration, in addition to the salary that the actors receive.

Under Polish law, the rules on the payment of remuneration are rather vague. Article 43 or the Copyright Act provides that, if the contract does not indicate whether the transfer of the author's economic rights or the granting of licence was free of charge, the author shall have the right to remuneration.

Moreover, if the contract does not specify the author's remuneration, such remuneration shall be set taking into account the scope of the right granted and the benefits resulting from the use of the work. The Polish Copyright Act further states that if the remuneration is based on proceeds, then the author has a right to receive information and to have access, as necessary, to the documentation being essential to determine such remuneration.

However, in the context of the audiovisual sector, art. 70 (2) of the Polish Copyright Act becomes more specific and states that the co-authors of an audiovisual work and performers are entitled to:

- remuneration proportionate to the receipts from cinema screening of an audiovisual work;
- appropriate remuneration for rental of copies of an audiovisual work and their communication to the public; and
- appropriate remuneration for broadcasting the work in the television or via other means of public communication of works.

By contrast, in Germany, section 32(1) of the Copyright Act refers only to equitable remuneration (which could be proportional remuneration or lump sum or a combination of the two). It recognises the general principle according to which any author is entitled to an equitable remuneration for the granting of usage rights in any case, specifying that: "if the amount of the remuneration has not been determined, equitable remuneration shall be deemed to have been agreed. If the agreed remuneration is not equitable, the author may require the other party to consent to a modification of the agreement so that the author is granted equitable remuneration". Paragraph (2) adds that "remuneration shall be equitable if determined in accordance with a joint remuneration agreement (Article 36). Any other remuneration shall be equitable if at the time the agreement is concluded it corresponds to what in business relations is customary and fair, given the nature and extent of the possibility of exploitation granted, in particular the duration and time of exploitation, and considering all circumstances". It is also applicable to performers accordingly. If no remuneration is agreed, the author or performer can claim the adequate remuneration. If the contractually agreed remuneration is not adequate, the author can claim that the contract is adapted to an equitable remuneration.

The copyright acts of five of the Member States expressly allow authors to ask for a modification of the contract if the remuneration agreed upon is not proportionate to the income generated from the use of the work (Germany, France, Hungary, Poland, and Spain). This is sometimes referred to as the "best-seller clause". 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 sum. An example is art. 47 of the Spanish Copyright Act that allows the revision of the contract within ten years of the transfer of rights in exchange for a lump-sum).

French law is similar to the Spanish provision, but art L.131-5 is more specific in the calculation of the pecuniary harm. It allows the author to claim a revision of the initial remuneration if he suffers a prejudice of more than seven-twelfths as a result of a burdensome contract or an insufficient advance estimate of the proceeds from the work.

Other countries, such as Poland, do not expressly state that the best-seller clause is limited to cases where rights have been transferred in exchange for a lump sum. Art 44 of the Polish act states that "In the event of a gross discrepancy between the remuneration of the author and the benefits of the acquirer of author's economic rights or the licensee, the author may request that the court should duly increase his remuneration.'' Certainly, though, this situation should be more likely to occur in the

case of lump sum remuneration (if it is a percentage of revenues, higher revenues will automatically increase the remuneration). In addition, this right may be granted only by the court and the disproportion has to be very substantial.

Hungary has a provision similar to Poland. Art 48 states that "according to the general provisions of civil law the court may alter the licensing agreement even if such a contract infringes the author's substantive lawful interest in having an equitable share in the income on use for the reason that because of the considerable increase in the demand for the use of the work following the conclusion of the contract the difference in value between the services respectively provided by the parties becomes strikingly big".

Finally, it is worth mentioning that the Italian Copyright Law does not expressly provide for a best-seller clause, but uses specific sectorial arrangements instead. For example, in the audiovisual sector, art. 46.4 Legge sul Diritto d'Autore, provides that, unless otherwise agreed, the principal director, synopsis writer and screenplay writer who do not receive a proportional remuneration for the public screenings of their cinematographic works are entitled to receive an additional remuneration to be agreed upon with stakeholders, when the income resulting from the public screenings has reached a certain amount to be determined by contract with the exploiter.

2.2.4 Termination of contracts

When asked about the rules on the termination of contracts, revision of contracts and/or rights reversion, most correspondents indicated that the general rules of contract law have little to no bearing on the termination of copyright and related rights contracts.[42] In certain Member States, a 'non-use' or 'non-exploitation' may constitute a breach of contract, which may justify the termination of the contract (France,[43] Netherlands,[44] Italy) and/or the payment of damages (UK, Hungary). In others, rules on the obligations of the producers to exploit the work, and the legal consequences attached to the failure of doing so, are to be found in the copyright and related rights acts (Poland, Hungary).

The application of the civil law doctrine of unforeseen circumstances to copyright contracts is not straightforward. The Italian Civil Code considers the case where there is a change in financial circumstances of one of the parties. For example, a party may suspend the execution of its obligation when the financial situation of the other party becomes so vulnerable as to render the payment of the remuneration difficult, unless the party can offer a suitable guarantee. It could be argued that an action based on the provision on 'unforeseeable circumstances' could be open in the circumstances covered by the bestseller clause existing in other jurisdictions. However, there is no specific provision under Dutch law, which expressly gives authors or performers 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.

[42] See also Dusollier et al. 2014, p42.
[43] French Supreme Court, 26 September 2007, 06-42575.
[44] District Court of Amsterdam, 9 May 2012, Nanada v Golden Earring.

In most countries, there are no general civil law or copyright law provisions allowing termination because of bankruptcy (Germany, Hungary, Netherlands, and Poland). In Poland, bankruptcy law itself considers any contractual provisions reserving the right to modify or terminate a legal relationship to which the bankrupt is a party. By contrast, French law states that royalties due before the bankruptcy must be paid if the works or performances continue to be exploited. Not paying those royalties would constitute a breach of contract. In other Member States (UK, Italy) in general, and subject to the exceptions relating to various contracts, the execution of the contracts has to be suspended, at least until the liquidator, with the consent of the creditors' committee, decides to take over the contract in place of the bankrupt party. At this point the liquidator takes all its obligations, or it may decide to terminate it, except the cases of contracts for the transfer of the ownership of a good when the right has already been transferred.

The copyright and related rights laws of a few Member States (Hungary, Germany) specify that the author or performer may unilaterally terminate the agreement containing an exclusive licence to use if:

- the user fails to commence the use of the work within the period determined in the agreement or – in the absence of a stipulated period – within the period reasonably to be expected in the given situation; or
- the user exercises his rights acquired by the agreement in a manner obviously inappropriate for achieving the goals of the agreement or in a manner that is inconsistent with the intended purpose.

According to Hungarian law, should the producer fail to start the work of adaptation for screen within four years from the acceptance of the work, or if such work is started but is not completed within a reasonable deadline, the author may unilaterally terminate the agreement and may raise claim to the payment of a proportional remuneration. Any advance payment disbursed to the author shall be considered as due to him, and the author may freely dispose of his work. Danish law provides that the assignee shall be under an obligation to exploit the assigned rights. The author may cancel the agreement with six months' notice if the assignee has not exploited the rights within three years after the time where the agreement has been fulfilled on the part of the author. In Denmark, the copyright act states that in case of bankruptcy, creditors cannot pursue a claim for payment in the copyrights of an author or in the copyrights of persons to whom the copyrights of an author are transferred to by means of heritage or marriage. The same is the case for certain objects that are used for creating artworks, reproductions of scripts and works of art that are not published.

Among other circumstances which may justify a request to terminate a copyright contract is the change of conviction of the author recognised as a moral right under German law. In such a case, the author may revoke his rights if the work no longer reflects his conviction and he can therefore no longer be expected to agree to the

exploitation of the work. When claiming revocation, the author must substantiate his change of conviction. Appropriate reasons may be of an artistic or aesthetic nature.[45]

Under Polish copyright law, there are several other legal grounds for termination which are specific to copyright contracts. According to art. 58 CA if a work is communicated to the public improperly or with modifications the author may reasonably object to, he may, if the breach is not repaired despite his request, rescind or terminate the agreement. There are special provisions concerning the author's liability for delay or for faults of the work (i.e. when the work does not have the qualities determined in the contract or has legal faults, e.g. it contains plagiarised parts). In both cases the acquirer may terminate/rescind. One of the most significant legal grounds for termination is art. 68 CA. This provision in its paragraph 2 provides that any licence concluded for a period longer than five years should be regarded as a licence granted for an indefinite period. The consequence is that such a licence may be terminated by any of the parties without the need to show due cause, provided the notice period is observed (if no specific notice period has been agreed upon the default is one year's notice, as of the end of a calendar year). The aim of the legislator was to protect the author but the result is quite the opposite. To avoid dealing with ambiguous contracts down the line, and possible early termination, purchasers push for full assignments.

2.3 Collective bargaining

This section focuses on the way in which contracts are negotiated, specifically in respect of the role of collective bargaining and trade unions, with a view to understanding how the legal provisions are respected or applied *in practice*. Correspondents were asked to supply examples of the type of contracts used along with their main terms and conditions. Attention was also paid to the role of trade unions and CRMOs acting in a similar capacity in the drafting and negotiation of these contracts.

2.3.1 Music sector

The responses to our survey show that, as a general rule, music authors and performers in Europe conclude agreements with music publishers/CRMOs and record companies through individual negotiations. In some Member States, collective bargaining agreements have been signed by trade unions, but they often apply only to particular types of music performers, such as session musicians. Furthermore, while music authors and performers may find support from trade unions in negotiating contractual terms, in general, the survey shows that the role of trade unions in the music sector is rather limited. By contrast and as illustrated in chapter 2.12, in all Member States, CRMOs play a critical role in collecting and distributing royalties on behalf of music authors and performers.

[45] J. Kotthoff, § 42 UrhG, in Dreyer/Kotthoff/Meckel (eds.), Urheberrecht, Heidelberg. C.F.Müller, 2012, at 7.

In several Member States, including Germany, Hungary, Lithuania, Netherlands, Poland and Spain, trade unions of authors and performers are not influential participants in trade negotiations with record producers. Some national trade unions (or CRMOs acting in a similar capacity) do provide individual support by putting forward model contracts or assisting their members in negotiating contractual terms, but apart from that, no collective bargaining agreements have been established for music authors and performers in these countries. Although some common contractual practice has been established over the years, this is also not the result of collective bargaining. It is only because certain contractual provisions or practices have become custom or a habit in the music sector that they are commonly applied. One particularly important reason for a common contractual practice to have emerged in this area is that, traditionally, only a few large music publishers and record labels have dominated the music industry.

In Denmark, Italy and the UK, music authors and performers as a rule also conclude agreements via individual negotiations. However, trade unions of performers have signed collective bargaining agreements with national recording industry bodies in relation to specific categories of musicians. Often, these agreements include provisions on standard terms for employing or commissioning musicians.

In Denmark, collective bargaining agreements are in place between the Danish Musicians' Union (DMF) and IFPI Denmark governing the terms of work and transfer of session musicians' rights. In addition, DMF has concluded collective bargaining agreements setting standard working conditions, including salaries and compensations, for musicians of the Denmark Radio's orchestra and regional orchestras. Similarly, the Danish Artists' Union (DAF) has bargained collective agreements with minimum fees for performers performing on radio and TV or in advertisements and dubbings. In Italy, performers' trade unions have concluded a collective bargaining agreement with FIMI (IFPI Italy) concerning musicians of orchestras. This agreement does not concern the transfer of rights but only the payments due to the musicians for the recording sessions. Presumably this is caused by the peculiar treatment of non-featured music performers under art. 82 of the Italian Copyright Law, as explained in section 2.2.1. Since musicians of orchestras and session musicians are usually not recognised as performers, there is no need to make arrangement for the transfer of rights in the collective bargaining agreement. In the UK, there is a collective bargaining agreement between The Musicians' Union (MU) and the British Phonographic Industry (BPI) in relation to session musicians. This BPI & MU Agreement applies only to session musicians who do not have an existing contractual relationship with a record label in respect of the relevant recording in respect of which the musician is engaged under the terms of this agreement.[46] In addition, on behalf of singers in the UK, the British Actors' Equity has concluded collective bargaining agreements with BPI and with most broadcasting and film organisations in relation to rights on recorded performances.[47]

[46] The New BPI & MU Agreement, 2011, available at: http://www.musiciansunion.org.uk/wp-content/uploads/2009/01/The-New-BPI-MU-Agreement-2011.pdf.

[47] See http://www.equity.org.uk/documents.

In France, music authors and performers as a rule also conclude agreements via individual negotiations. Yet, trade unions representing performers ('artistes interprètes', e.g. under trade union SFA CGT), musicians ('artistes musiciens', e.g., under trade union SNAM CGT) technicians ('techniciens du spectacle') and employees ('salariés permanents') of record companies have concluded a collective bargaining agreement with SNEP (IFPI France) and UPFI (representing the most important French indie labels), covering the main performers (*artistes-interprètes principaux et assimilés*) and musicians (*artistes musiciens et assimilés*).[48] Hence, in contrast to the collective bargaining agreements in the other surveyed countries, which apply merely to session musicians or musicians of orchestras, the SNEP agreement applies to all music performers.

The agreement was signed in March 2008 and entered into force in April 2009 after the Minister of Labour issued a decree extending the effect of the agreement to cover the entire music sector.[49] The agreement provides for rules on remuneration for the assignment of the exclusive rights of music performers to record producers. It is criticised for leaving insufficient room for performers to individually negotiate contracts. On the basis of the SNEP agreement, the music industry has established model contracts that require performers to transfer all their rights to record producers, including rights previously transferred to performers' CRMOs like SPEDIDAM. SPEDIDAM considers that a number of these provisions are in contradiction with French law. Together with other performers' unions, it has therefore instituted legal proceedings against the signatories of the SNEP agreement to challenge its validity. This case is pending before the Court of Appeal of Paris. In addition to the SNEP agreement, which is the main collective bargaining agreement, other collective agreements may apply to performers in France.[50]

The collective bargaining agreements negotiated by trade unions generally follow established principles of copyright law. In countries where they apply, they are often referred to for the drafting of contracts. It must be noted, however, that the terms of collective bargaining agreements are not necessarily binding. In the UK, for example, collective bargaining agreements have no legally binding effect.[51] This is different in other countries, such as France, where the collective bargaining agreements are binding (if not in contradiction with the law) and have legally extended effect, so as to apply to all musicians, regardless of whether or not they are represented by the trade union.

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[48] For the sake of completeness, it might be worth noting that the signing trade unions were the following: F3C CFDT; FCCS CFE-CGC; Médias 2000 CFE-CGC; FM CFE-CGC; CFTC; FILPAC CGT; FNSAC CGT; FASAP FO; FEC FO; SNACOPVA CFE-CGC; SNAPS CFE-CGC; SFA CGT; SNAM CGT; SNM FO. On behalf of the industry, signing associations were SNEP and UPFI.

[49] Collective agreement No. 2770 on phonographic publishing, 30 June 2008, Brochure n° 3361: http://www.legifrance.gouv.fr/affichIDCC.do?idConvention=KALICONT000023974024&fastReqId=2123093736&fastPos=1&oldAction=rechConvColl.

[50] See e.g. Collective agreements No. 3226 on arts and cultural undertakings, 1 January 1984 (extended by Decree of 4 January 1994); No. 3278 on performers hired for television, 1 January 2012; and No. 3090 on performing arts in private sector companies, 3 February 2012.

[51] Trade Union and Labour Relations Act 1992, s179.

In the area of collective licensing of music, standard agreements are not widespread. A notable exception is the standard contract concluded between IFPI, the international representative of the recording industry, and BIEM, which represents CRMOs for mechanical reproduction rights of musical works in Europe. The standard contract determines *inter alia* the royalties that record producers must pay to the authors' CRMOs for the reproduction of protected works on sound recordings. For other types of rights, CRMOs typically negotiate with (groups of) users to establish the tariffs for specific uses of musical works and for the equitable remuneration for secondary uses of commercial sound recordings. Often, CRMOs reach sector agreements with specific groups of users. Depending on these agreements, the tariff is determined on the basis of actual use, the market share of a particular user, a share of advertising revenue, or a price per square metre or per (potential) visitor of the establishment where the music is played. In a number of countries, including Poland and Hungary, tariffs of CRMOs need to be approved and certified by a specific authority before they can be applied. The laws of other countries, such as Spain, oblige certain CRMOs to establish (and publish) standard tariffs.

The royalty payment which authors and performers will ultimately receive for the collective administration of their rights depends on the CRMO's distribution rules. In general, authors who become members of the CRMO submit themselves voluntarily to these rules by signing the representation contract. Some national CRMOs, including Sacem in France and Buma/Stemra in the Netherlands, have a long-standing practice of automatically assigning a particular percentage (e.g. 33.3 per cent) of the royalties collected to the music publisher. Accordingly, music authors receive only the remaining part (e.g. 66.7 per cent) of the royalties that the CRMO has collected. This practice is usually validated by the fact that royalties for the communication to the public and mechanical reproduction are in principle paid directly to the authors, in application of the CRMOs' bylaws, and that publishers to which the authors have typically assigned their rights should therefore be entitled to receive part of these royalties. By contrast, CRMOs that collect the equitable remuneration for the secondary use of commercial sound recordings on behalf of performers and record producers usually split the collected remuneration on a 50/50 basis. Sometimes this practice is based on an agreement between performers and record producers but in some countries, such as the Netherlands, the law prescribes that the remuneration is split equally.[52]

The laws of most countries lay down rules on the reasonableness of tariffs of CRMOs, the CRMO's distribution rules and the transparency of the collection, distribution and operation of CRMOs. In addition, in many countries, users can refer disputes on tariffs set by a CRMO to a special copyright tribunal or tariffs commission. At the European level, such rules on the 'good governance' of CRMOs have recently been reinforced by the adoption of Directive 2014/26/EU on Collective Rights Management.

In the United States, CRMOs also play an important role in the industry and are generally more crucial in establishing copyright remuneration practices than trade unions in the sector are. The principal CRMOs in the music sector are ASCAP, BMI and

[52] Art. 7(4) of the Act on Related Rights (the Netherlands).

SESAC.[53] The Harry Fox Agency has been the principal player in the licensing of mechanical rights alongside several entities that have emerged in the licensing of digital uses: Kobalt Music, Rightsflow (Google), etc. The collection and distribution of digital performance royalties to performers and copyright holders is facilitated by SoundExchange that was designated by Congress to occupy the role.[54] CRMOs obtain licences from copyright owners both to act on their behalf with respect to copyright infringement and to license the copyright works to users. Most copyright owners choose to license their works to and via a CRMO, which generally significantly reduces transaction costs associated with enforcement and licensing. CRMOs negotiate licence fees on behalf of their members on a non-exclusive basis and both collect royalties on behalf of their members and distribute them.[55] SoundExchange participates in rate-setting mechanisms such as those under Chapter 8 of the Copyright Act of 1976. In the case of ASCAP and BMI, antitrust (competition law) "consent decrees" provide that a federal judge sitting in New York (generally referred to as the "rate courts"—there is a different one for ASCAP and BMI) sets the terms of licenses if the parties cannot agree.[56] Additionally, copyright owners may set their own fees if they choose to license their works themselves. Considerations when determining a fee include fee structure, the value of the copyrighted work, and the importance of it in relation to its intended use and scope of use.[57]

2.3.2 Audiovisual sector

In some EU countries, the role of trade unions or similar collective associations in supporting authors and performers in their negotiations with producers in the audio-visual industry is very limited or almost non-existent. Examples of these countries are Hungary, Lithuania, Netherlands or Poland. In Hungary, the trade union or artists' association has no public model contract. In Poland, for instance, the trade unions' role is, in general, very limited, and has not resulted in any model contracts or even guidelines related to contractual practice.

Similarly, in Lithuania there are no nationwide trade unions in the audiovisual sector. There are a number of non-governmental associations in the sector (e.g. Lithuanian cinematographic association, independent producers association, film industry association, film operators association etc.) but they do not play any significant role in collective bargaining or contract negotiation with producers or users, which is done individually.

[53] The Copyright Act refers to the three existing CRMOs by name, however. See 17 U.S.C. §101.
[54] See 37 C.F.R. § 262.4.
[55] See Glynn Lunney, Copyright Collectives and Collecting Societies: The United States Experience, Chapter 11 in Collective Management of Copyright and Related Rights (Daniel Gervais, ed., 2010).
[56] See United States v. Broadcast Music, Inc., 1994 U.S. Dist. LEXIS 21476 (S.D.N.Y. 1966); United States v. Broadcast Music, Inc., 1966 U.S. Dist. LEXIS 10449 (S.D.N.Y. 1966); United States v. American Society of Composers, Authors and Publishers¸ 1950 U.S. Dist. LEXIS 4341 (S.D.N.Y. 1950) [US v. ASCAP 2]; Lunney, supra note 29 at 352-54.
[57] See Kohn, supra note 2 at 575.

Collective bargaining in the Netherlands hardly exists and the audiovisual sector in the country has traditionally experienced fragmentation and lack of focus as can be seen from the disjointed efforts of the CRMOs.[58] In recent years, it appears that more coordinated efforts have led to the creation of PAM (*'Portal Audiovisuele Makers'*), which brings together both industry associations and CRMOs that represent scriptwriters, film directors and actors. They have been particularly active in the consultation on the new copyright reform of art. 45d of the Dutch Copyright Act where they argue in favour of an unwaivable proportional remuneration, collected by CRMOs directly from the user and based on the gross income of this exploiter, in an effort to avoid intermediaries in the collection process.

The countries where trade unions and CRMOs in the audiovisual sector are the strongest are the UK, Denmark, France, Germany, Spain and Italy.

In Germany collective bargaining in various forms is common given that trade unions/associations have achieved a critical mass in the audiovisual sector, and many of these trade associations co-exist. Most of the contracts negotiated are not collective remuneration agreements in terms of copyright law but rather labour agreements that partly contain rules about the remuneration or wages for authors, performers and other creative people.

It is difficult, however, to provide the big picture given that the reality comprises a vast number of very particular cases. Furthermore, there are fundamental differences between the TV sector and the movie (cinema) sector.

Some parts of the German audiovisual sector are influenced by the activity of ver.di ('United Services Union'), one of the largest, multi-service trade unions in the world. The union's subsection connexx.av, the advocacy group of media workers, has negotiated a collective labour agreement ('*tarifvertrag*') for authors and performers on TV and movie productions. Among others, its scope of application concerns actors and directors. However, for neither of the two groups does the agreement define a fixed minimum remuneration. On the contrary, it explicitly states that, for them, the amount of remuneration is subject to free negotiation. Further, it contains no specific clauses regarding licences or copyright.[59]

Another example is the first collective labour agreement for actors on TV and film productions between ver.di, the federal association of actors ('BFFS'), and the German Producers Alliance ('*Produzentenallianz*') which was concluded in January 2014.[60] The agreement, a '*tarifvertrag*', determines a basic remuneration for actors in the form of a minimum wage for a day of shooting.[61]

Another labour agreement was concluded between ver.di and the '*produzentenallianz*' concerning supporting actors ('*kleindarsteller*'), which has been in force since 2012.[62]

[58] An example is the on-going litigation regarding the cable retransmission right.
[59] Schwarz/U.Reber, Das Vertragswerk der Filmproduktion, in v.Hartlieb/Schwarz (eds.), Handbuch des Film-, Fernseh- und Videorechts, Munich, Beck, 2011, 408.
[60] connexx-av.de, "Erster Gagen-Tarifvertrag für Schauspielerinnen und Schauspieler bei Filmproduktionen abgeschlossen, January 7, 2014, http://bit.ly/1ouWU1D.
[61] See sec. 3.2 et seq.
[62] connexx-av.de, "Tarifvertrag für Komparsen und Kleindarsteller!", January 2, 2012, http://bit.ly/TcHbux.

It establishes a basic lump-sum remuneration for each day of shooting, with additional fees applicable in the case of exceptional expenditures or performances (with generally no standard revenue share). The agreement has recently been renegotiated.[63]

Within the fragmented German TV sector, there exist several labour agreements concluded between the numerous concerned parties, consisting of private and public broadcasters – the latter mostly being under the jurisdiction of the 16 federal states (*'Bundesländer'*) – on the one hand, and ver.di and the professional associations BFFS (actors), BVR (directors), and VDD (scriptwriters) on the other.

Germany's largest commercial TV broadcaster, ProSiebenSat.1 has concluded joint remuneration agreements, pursuant to Sec. 36 UrhG, with both BVR and BFFS. Both contracts establish detailed remuneration rules on both fixed minimum fees as well as revenue shares. An agreement with the same purpose between ProSiebenSat.1 and VDD is currently being negotiated. However, RTL, the other major private broadcaster has no similar agreement.[64]

The public broadcasting sector in Germany is extremely fragmented and non-uniform due to the responsibility of the federal states for most public TV institutions. However, most broadcasters have concluded collective labour agreements with the respective subsections of ver.di. These are generally applicable to all audiovisual professionals and include detailed rules on remuneration per right including minimum wages.[65] For example, the remuneration scheme for scriptwriters includes licence fees for first and subsequent broadcasting as well as revenue shares.[66] However, again, this agreement is not indicative of similar ones. For example, in relation to the remuneration for directors, ZDF refused to enter into negotiations with BVR on the establishment of fixed remuneration.

It would appear, however, that there are still numerous areas in the audiovisual sector where no collective labour contracts or joint remuneration agreements exist. For example, there are no collective labour or joint remuneration agreements for film composers in Germany.[67] A reason could be that the current system lacks a clear binding character and hence negotiations might be harder to come by. In any case, it

[63] produzentenallianz.de, "Ein Gesamttableau, mit dem man noch leben kann", April 8, 2014, http://bit.ly/Ub1J7m.

[64] medienpolitik.net, "Die Machtverhältnisse sind ähnlich wie bei David gegen Goliath", April 24, 2014, http://bit.ly/1iU8jUR.

[65] See e.g. Tarifvertrag über die Urheberrechte arbeitnehmerähnlicher Personen des Bayerischen Rundfunks and Tarifvertrag über die Urheber- und verwandten Schutzrechte der Mitwirkenden des Bayerischen Rundfunks, which both refer to the Tarifvertrag über die Mindestvergütungen für arbeitnehmerähnliche Personen des Bayerischen Rundfunks (sec. 16.1 and 15.1, respectively). An example on the exact amount of remuneration within the TV division of the *Norddeutscher Rundfunk* can be found here: http://bit.ly/1ma2nbB.

[66] See for public broadcaster ZDF, connexx-av.de, "Neue Vergütungsregelung: ZDF, Verband der Drehbuchautoren und Produzentenallianz einigen sich", September 2012, http://bit.ly/1pR3K2u.

[67] Information provided by the German Film Composers Union (Deutsche Filmkomponistenunion, DEFKOM). According to the German Film Composers Union ('DEFKOM'), compositions in exchange for no remuneration or one-off fees are not uncommon.

would appear that the agreements comply in principle with the rules in copyright contract law, since there are no mandatory statutory rules that would, for example, prescribe revenue shares or prohibit total buy-outs. Also, the courts accept a great variety of remuneration clauses, depending on the particular case. The remuneration for authors and performers remains, to a great extent, subject to freedom of contract.

The collective labour and joint remuneration agreements aside, the audiovisual sector in Germany is not governed by model contracts any longer. For various reasons, the professional associations have ceased the practice of providing standard contracts for their members.

The relationship between scriptwriters and TV broadcasters in the Netherlands is similar to that in Germany. There are currently two model contracts for scriptwriters, one for TV and one for film, drafted by the CRMO for scriptwriters and the professional association '*Netwerk Scenarioschrijvers'* ('*NS*') which have come together under a so-called '*Contractenbureau*' ('*CB*') in order to conduct negotiations with TV, film and theatre producers. CB works as an independent legal advisor for screenwriters and does not therefore play any commercial agency or representation role for its screenwriting members. The TV broadcasting contracts generally imply a transfer of rights and a fixed amount of revenue for a particular broadcast package (e.g. x euros for three broadcasts). Further broadcasts are negotiated separately. The remuneration and terms can either be pre-negotiated in the contract or be negotiated separately at a later stage taking account of the success of a particular content. Overall, compensation for individually granted rights is uncommon in a practice where buy-outs remain the norm. Production companies and broadcasters are still very reluctant to pay specific remuneration per form of exploitation, other than for re-runs on TV. This means that authors and performers are not always able to negotiate different types of remuneration per line of exploitation, including digital media. In that sense, authors and performers have so far been unsuccessful in trying to reap the benefits of digital media.[68]

As regards film contracts**,** a transfer of ownership of most exploitation rights and remuneration generally takes place no later than on the first day of shooting. The remuneration for the scriptwriter is substantial and represents two to five per cent of the total production budget. It would normally represent the compensation for the right to visualise the script and for the transfer of exploitation rights, but in practice, the title of payments is hardly ever explicit. Further, in the Netherlands there is an exception to the general principle of assignment that would change under the proposed reform of art. 45d of the Dutch Copyright Act whereby the presumption of assignment to the producer in the audiovisual sector would also apply to authors of the film music in exchange for both a fair and a proportional remuneration.

[68] It is therefore of some relevance here that Dutch CRMO BUMA/STEMRA has been told by competition authorities to give copyright owners the option to exclude the exploitation of their copyrights by BUMA/STEMRA in five different categories of rights by using the opt-out system. In addition, an online calculation tool will be released that will help composers and songwriters decide whether or not to transfer all of their copyrights or parts thereof to BUMA/STEMRA. Please see *Definitief toezegginsbesluit 3 June 2014, Nr 13.1395.53, Besluit van het bestuur van de Autoriteit Consument en Markt als bedoeld in artikel 49a van de Mededingswet.*

In Denmark, the audiovisual sector is also, to a large extent, governed by collective bargaining and model contracts. Remuneration is usually based on an upfront fee plus a fee for the different exploitation options granted to the producer. Collective agreements set out minimum tariffs and employment conditions for the different groups of authors and performers involved in film productions.

In Spain, as AISGE, the collective for actors, confirms, collective bargaining in the audiovisual sector exists but mainly concerns labour-related aspects. Nonetheless, these agreements do stipulate that the performer has a right to receive payment for the transfer of his exclusive rights to the producer. The amount is set at a minimum representing five per cent of the performer's salary (that is, to be paid on top of the negotiated salary). This has been the case, for instance, in the model agreement drafted by the actors' union of the Madrid area. In the meantime, CONARTE, the confederation of Spanish actors' unions, has been recently incorporated in order to strengthen the role of the union at national level.

In France, which probably has the most elaborate and specific rules on remuneration, collective professional agreements (that are enforceable by law) set out standards and mandatory contractual practices. It is a French characteristic that CRMOs for authors also defend the interest of their members and are sometimes parties to collective agreements, together with the relevant trade unions.[69] The rationale for the prominent role of CRMOs is inter alia the fact that collective agreements in the field of authors' rights often have consequences on the collective management of royalties. In the field of related rights, however, the collective bargaining agreements that concern labour issues between producers (employers) and performers (employees under French law) will be negotiated by the trade unions (and not the CRMOs).

As to the calculation of remuneration, in copyright contracts, as opposed to related rights, the proportional remuneration should, in principle, be calculated on the retail price (i.e. the price of sale to the public[70]). Certain collective professional agreements, however, such as the agreement between authors and producers for the exploitation of *videograms* (DVDs), provide for a different basis of calculation, which is arguably more flexible. In that case, remuneration is based on the PPD ('*published price to dealers'* that is, the catalogue, or wholesale, price excl. VAT) as opposed to the retail price.[71] On the other hand, for DVDs of cinema works, for example, and in absence of

[69] For example, the Agreement on *videograms* of 18 December 2006, was signed, among others, by the USPA (the trade union of TV producers and CRMO for authors SACD.

[70] The French model contract for music publishing establishes in the remuneration of the author section that a fee of x% should be calculated (…) on the retail sale price before tax of each graphic copy of THE WORK or of its arrangements published by THE PUBLISHER and sold by the latter'. Other forms of remuneration, such as net receipts, are also contemplated for other uses.

[71] Based on sample contracts provided by our correspondent. Also contemplated, in the audiovisual sector, by the agreement signed on 18 December 2006, when a series of trade unions and professional associations agreed on the management of the remuneration of author members of the CRMO SACD or represented by the SCELF, for the exploitation of videograms. This agreement provides that the basis of calculation of royalties shall be the catalogue wholesale price catalog duty (called 'published price to dealers' or 'PPD'). This basis applies whether the rights are managed by the producer or the CRMOs.

such a collective agreement as exists for TV, it is necessary to calculate royalties on the basis of the retail price.

Finally, in the UK, collective bargaining agreements are not legally binding (as per the Trade Union and Labour Relations Act 1992 s.179). However, some forms of collective agreements have been signed on behalf of trade unions representing the interests of authors and performers. The Writers Guild of Great Britain (WGGB) represents mainly scriptwriters for films and television and has entered into agreements with broadcasters, like the BBC, and unions representing film producers and theatres, specifying minimum terms that would be offered to its members.[72] In relation to recorded performances, actors and singers are represented by the British Actors Equity, which has agreements with most broadcasting and film organisations. In the UK it is common practice to pay remuneration for an assignment of rights (they are generally not licensed) both as a lump sum (with minimum fees) and royalties on the exploitation of certain packages of rights.

Collective bargaining in the United States

Collective management in the audiovisual sector is markedly different from the music sector. Whereas in the music sector CRMOs function to facilitate the licensing of compositions and sound-recordings by minimising transaction costs, in the audiovisual sector, CRMOs take the form of guilds that resemble labour unions in many other industries.

In the US, only a few CRMOs in the audiovisual sector function like their equivalents in the music sector, for the purpose of licensing motion pictures. Among the CRMOs/guilds in this sector are the Screen Actors Guild-American Federation of Television and Radio Artists (SAG-AFTRA), Directors Guild of America (DGA), the Motion Picture Licensing Corporation (MPLC) and Christian Video Licensing International, Ltd. (CVLI). The MPLC facilitates the licensing of its catalogue of motion pictures in a variety of settings under an umbrella licence that is purpose-specific.[73] For example, there is a form of licence for educational uses, corporate uses, use by religious organisations, use in healthcare facilities, etc. Christian Video Licensing International is an organisation similar to MPLC that functions primarily in the sphere of licensing religious audiovisual works to churches.[74] However, there is currently no US copyright collective that collects and channels domestic royalties on behalf of the domestic creators of audiovisual works.[75]

The Directors Guild of America ('DGA'), the Writers Guild of America ('WGA'), and the SAG-AFTRA protect a large scope of media professionals, including film and television directors, screenplay writers, recording artists, and actors. These organizations are strong labour unions, which negotiate terms into collective bargaining agreements between producers on the one hand, and authors and performers on the other hand, outlining their rights and responsibilities, including levels of compensation and benefits, working conditions, and compensation for exploitation. Both the DGA and WGA function to collect and distribute remuneration from foreign levies on behalf their

[72] http://www.writersguild.org.uk/rates-agreements (last accessed June 2014).
[73] See http://www.mplc.org/page/about-the-mplc.
[74] See http://cvli.com/about/.
[75] Porcin, supra, note 33, at 18.

members under the Foreign Levy Agreement. In this aspect, they are an alternative to production companies who otherwise collect all levies and distribute them themselves. This is discussed further in the section on case law.

Among the several agreements concluded in the sector, is the one signed by the WGA-Alliance of Motion Picture & Television Producers Theatrical and Television Basic Agreement, often referred to as the Minimum Basic Agreement ('MBA'). The MBA covers separated rights and residual payments, which are based on screen credits. Article 13 sets the minimal compensation ("flat deal") to be received by a writer for his employment, depending on the extent of his contribution and the nature of the audiovisual work. Article 16 deals with separation of rights, e.g. where a writer has written an original story for which she receives separated credits. As mentioned before, this clause ensures that despite the application of the 'work for hire' doctrine, the writers can benefit from rights such as the right to publish a movie script in whole or in substantial part.[76]

The labour unions have indeed been successful in negotiating a form of remuneration in the audiovisual sector known as residual rights, which are "additional payments to workers for the exhibition of an entertainment product in media other than the one for which it was originally created, or for its reuse within the same medium subsequent to the initial exhibition. They are sometimes called 'reuse fees' or 'supplemental contributions'.[77] Residual rights provide another opportunity for authors to evade the limitations of the works-made-for-hire doctrine because they provide remuneration to the author that the author would not otherwise realise by not being the owner of the work under the copyright law.

Nevertheless, commentators report that through the application of the 'work for hire' doctrine, 'the modern screenwriter, whether creating works for film or television, is dependent on her employer for remuneration, no matter how commercially successful her creation is or how much creative control she exerted over the work in question'. According to Schwab, 'the unions' control over the majority of professional, experienced audiovisual production talent means that, in order for an artist to produce multiple projects outside of the studio system, she will need a significant revenue stream which is likely, paradoxically, to come only from the sort of heavily marketed, big budget projects financed by the studios'.[78]

2.3.3 Competition law issues

As noted above, in some Member States trade unions play an important role in the negotiation and conclusion of remuneration agreements between creators and exploiters. This observation is particularly true with respect to authors and performers in the audiovisual sector. Nevertheless, trade unions of authors and performers have not been set up in all Member States. Where they have, the extent of collective action

[76] Id., p13.
[77] See Alan Paul & Archie Kleingartner, Flexible Production and the Transformation of Industrial Relations in the Motion Picture and Television Industry, 47 Indus. & Lab. Rel. Rev. 663, 669 (1994); see also Porcin, supra note 33, at 14-15.
[78] John L. Schwab, 'Audiovisual Works and the Work for Hire Doctrine in the Internet Age', (2011) 35 Columbia Journal of Law & the Arts 141-168.

varies, whether at the stage of negotiation of arrangements or at the stage of enforcement. Apart from socio-cultural reasons that may partly explain the reluctance on the part of authors and performers to unite forces, legal reasons may also partly explain this phenomenon.

Even where self-employed authors and performers have organised themselves into dynamic trade unions, the European rules of competition law can pose a major obstacle to their collective action. Indeed, such agreements are commonly frowned upon as a form of prohibited concerted practice between undertakings, which has as its object or effect the prevention, restriction or distortion of competition on the Internal Market contrary to Article 101(1) TFEU. The rules of competition law generally preclude the collective negotiation of remuneration contracts for self-employed creators. The tension between competition law and the conclusion of collective bargaining agreements for self-employed authors and performers surfaced in an acute manner during the past decade, with respect to various categories of self-employed creators in Ireland[79], Hungary, Denmark, and in the Netherlands[80]. The Dutch Competition Authority (NMa) published in 2007 a reflection document in which it stated that a provision of collective labour agreement laying down minimum fees for self-employed substitutes was not excluded from the scope of Article 6 of the Dutch Competition Act and its European equivalent (art. 101(1) TFEU, ex art. 81(1) EC Treaty). According to the NMa, the fact that collective labour agreements are negotiated between an association for self-employed workers and an employers' association changes its legal nature into an inter-professional agreement. This opinion of the Dutch Competition Authority essentially put a halt to a longstanding practice of Dutch associations of writers, translators, musicians, and photographers to conclude joint agreements with an employers' association.

On 4 December 2014 the Court of Justice of the European Union rendered its decision in a request for a preliminary ruling presented by the Dutch trade unions for authors and artists, FNV KIEM (Federatie Nederlandse Vakbeweging - Kunsten, Informatie, Entertainment en Media) against the state of the Netherlands,[81] asking the Court 'whether, on a proper construction of EU law, a provision of a collective labour agreement, which sets minimum fees for self-employed service providers who are members of one of the contracting employees' organisations and perform for an employer, under a works or service contract, the same activity as that employer's employed workers, does not fall within the scope of Article 101(1) TFEU'. It is important to note that the collective labour agreement concluded in the present cases concerned not only employed orchestra musicians, but also affiliated self-employed musicians. The Court first recalled that 'although certain restrictions of competition are inherent in collective agreements between organisations representing employers and employees, the social policy objectives pursued by such agreements would be

[79] Irish Competition Authority, Agreements between Irish Actors' Equity SIPTU and the Institute of Advertising Practitioners in Ireland concerning the terms and conditions under which advertising agencies will hire actors, E/04/002, 31 August 2004.

[80] Joint Statement of the European Federations Representing Cultural and Creative Workers, on collective representation of freelancers in Europe. February 2010, http://www.scenaristes.org/pdfs/freelance.pdf.

[81] Case 413/13 (FNV KIEM), Decision of the Court of Justice of the European Union, 4 December 2014.

seriously compromised if management and labour were subject to Article 101(1) TFEU when seeking jointly to adopt measures to improve conditions of work and employment.

The Court ruled on two points: 1) the definition of 'undertaking' under Article 101(1) TFEU; and 2) on the definition of employee. On the first point, the Court opined that according to settled case-law, a service provider – e.g. a self-employed musician - can lose its status of an independent undertaking, if he does not determine independently his own conduct on the market, but is entirely dependent on his principal, because he does not bear any of the financial or commercial risks arising out of the latter's activity and operates as an auxiliary within the principal's undertaking. On the second point, settled case-law also establishes that the essential feature of the employment relationship is that for a certain period of time one person performs services for and under the direction of another person in return for which he receives remuneration. A person can therefore be classified as an employee within the meaning of EU law if his independence is merely notional, thereby disguising an employment relationship. According to the Court, the status of 'worker' within the meaning of EU law is not affected by the fact that a person has been hired as a self-employed person under national law, for tax, administrative or organisational reasons, as long as that persons acts under the direction of his employer as regards, in particular, his freedom to choose the time, place and content of his work, does not share in the employer's commercial risks, and, for the duration of that relationship, forms an integral part of that employer's undertaking, so forming an economic unit with that undertaking. In conclusion, the Court ruled that it is only when self-employed service providers who are members of one of the contracting employees' organisations and perform for an employer, under a works or service contract, the same activity as that employer's employed workers, are 'false self-employed', in other words, service providers in a situation comparable to that of those workers, that a provision of a collective labour agreement, such as that at issue in the main proceedings, which sets minimum fees for those self-employed service providers, does not fall within the scope of Article 101(1) TFEU'.[82]

Commentators must still reflect on the consequences of this very important decision of the Court of Justice. At first sight, the decision would seem, however, to open the door slightly wider to the possibility for associations of freelancers to legally negotiate collective bargaining agreements with associations of employers, within the limits of the rules on competition law.

Germany is among the few Member States to address, in its national law, the problem of collective bargaining by self-employed workers. Article 12a was introduced in 1974 in the Collective Bargaining Act and allows specific categories of authors and performers (mainly self-employed workers in the press and television sectors) under certain conditions, to benefit from the provisions of collective labour agreements. It provides:

(1) The provisions of this Act shall apply mutatis mutandis

[82] Id. para42.

1. To persons, who are economically dependent and need social protection comparable to an employee (employee-like persons), when they operate on the basis of services or work contracts for other persons providing services owed personally and substantially without participation of employees and

a) Who work mainly for one person or

b) Earn on average more than half of their remuneration from that person of the total remuneration to which they are entitled for their work; in case this is not predictable, the calculations are to be based, unless the collective agreement provides otherwise, in each case on the last six months, or in case of a shorter duration of activity, this period,

2. To the persons referred to in paragraph 1, for whom the employee-like persons work, and for whom the legal relations between them and the employee-like persons are based on a service or work contract.

(2) Several persons are to be considered as one employee-like person if those several persons, depending on the nature of the enterprise (§ 18 of the German Stock Corporation Act), are combined or belong to an organized community existing between them or to non-temporary working group.

(3) The provisions of paragraphs 1 and 2 shall apply to persons providing artistic, literary or journalistic performances, as well as to persons who are directly involved with the provision of such services, in particular the technical design of such performances, shall also apply in derogation of paragraph 1(1)b) first sentence, if they earn on average at least one-third of their remuneration from one person, of the total remuneration to which they are entitled for their work.

(4) This regulation does not apply to sales representatives within the meaning of § 84 of the Commercial Code.[83]

[83] Art. 12a German Collective Bargaining Act reads in the original language as follows : '(1) Die Vorschriften dieses Gesetzes gelten entsprechend
1. für Personen, die wirtschaftlich abhängig und vergleichbar einem Arbeitnehmer sozial schutzbedürftig sind (arbeitnehmerähnliche Personen), wenn sie auf Grund von Dienst- oder Werkverträgen für andere Personen tätig sind, die geschuldeten Leistungen persönlich und im wesentlichen ohne Mitarbeit von Arbeitnehmern erbringen und
a) überwiegend für eine Person tätig sind oder.
b) ihnen von einer Person im Durchschnitt mehr als die Hälfte des Entgelts zusteht, das ihnen für ihre Erwerbstätigkeit insgesamt zusteht; ist dies nicht voraussehbar, so sind für die Berechnung, soweit im Tarifvertrag nichts anderes vereinbart ist, jeweils die letzten sechs Monate, bei kürzerer Dauer der Tätigkeit dieser Zeitraum, maßgebend
2. für die in Nummer 1 genannten Personen, für die die arbeitnehmerähnlichen Personen tätig sind, sowie für die zwischen ihnen und den arbeitnehmerähnlichen Personen durch Dienst- oder Werkverträge begründeten Rechtsverhältnisse.

The compatibility of this rule with the German rules on competition has, so far, never given rise to a legal challenge. This provision is believed to serve the public interest by awarding protection to a group that economically and socially deserves it in the same way as employees. The legislative history of Article 12a of the Collective Bargaining Act reveals that the practice of negotiating collective bargaining agreements had developed in the press sector, between representatives of journalists and of newspaper publishers, until it was declared inadmissible by the Federal Competition Authority in 1973, for being equivalent to a price-fixing agreement and in breach of competition law. Article 12a was presented a year later as the solution to the problem.[84] The conditions laid down in Article 12a, according to which the provision applies to a person who is economically dependent and in need social protection comparable to an employee would seem, at first glance, to correspond to the conditions set by the Court of Justice in the FNV KIEM case.

In France, *performers* benefit from the special protection of Article L7121-3 of the Labour Code. According to this provision 'any contract whereby a person secures, for consideration, the assistance of an entertainer for its production, is presumed to be an employment contract when this artist does not exercise the activity for which the subject of the contract under conditions of registration in the commercial register.. This article is completed by Article L7121-4 of the Labour Code, which states that the presumption of the existence of an employment contract exists regardless of the method and amount of remuneration, as well as the qualification given by the parties to the contract. This presumption remains even upon evidence that the artist retains his freedom of expression in his art, that he is the owner of all or part of the material used or employs himself one or more persons to assist him, as long as he is personally involved in the show. The criterion to assess the existence of an employment contract is similar to the one used in Germany namely, the economic dependency of the worker, without need to prove the existence of a link of subordination.[85]

(2) Mehrere Personen, für die arbeitnehmerähnliche Personen tätig sind, gelten als eine Person, wenn diese mehreren Personen nach der Art eines Konzerns (§ 18 des Aktiengesetzes) zusammengefaßt sind oder zu einer zwischen ihnen bestehenden Organisationsgemeinschaft oder nicht nur vorübergehenden Arbeitsgemeinschaft gehören.
(3) Die Absätze 1 und 2 finden auf Personen, die künstlerische, schriftstellerische oder journalistische Leistungen erbringen, sowie auf Personen, die an der Erbringung, insbesondere der technischen Gestaltung solcher Leistungen unmittelbar mitwirken, auch dann Anwendung, wenn ihnen abweichend von Absatz 1 Nr. 1 Buchstabe b erster Halbsatz von einer Person im Durchschnitt mindestens ein Drittel des Entgelts zusteht, das ihnen für ihre Erwerbstätigkeit insgesamt zusteht.
(4) Die Vorschrift findet keine Anwendung auf Handelsvertreter im Sinne des § 84 des Handelsgesetzbuchs.'

[84] S. Ory, 'Rechtspolitische Anmerkungen zum Urhebervertragsrecht', ZUM 2001, 195-199, at p195.

[85] Cour de Cassation, 2e Civ., 25 mai 2004, *Bull*., 2004, II, n° 233; Cour de Cassation, 2e Civ., 13 décembre 2005, *Bull.* 2005, II, n° 318; see M. Zylberberg, La distinction travail indépendent/ salariat – Etat de la jurisprudence, Cour de cassation, Bulletin du droit du travail, 3e trimestre, 2008.

2.4 What are the key legal provisions for the remuneration of authors and performers?

On the basis of the answers provided by the correspondents in the ten jurisdictions, it would appear that the general provisions of contract law play a very limited role in granting support to authors and performers with the negotiation of exploitation agreements and the determination of the level of remuneration in the countries examined. Certain rules of contract law may affect the way a contract is interpreted or executed, but in general they do not influence the outcome of the negotiation on the transfer of rights or the remuneration to be paid. However, the copyright and neighbouring rights acts of some of the Member States, as 'lex specialis' to the general rules of contract law, do provide authors and performers some support in the licensing or transfer of their rights.

The analysis of the legal framework applicable to contracts between authors and performers and exploiters in Europe shows a very fragmented situation between the different Member States and across industry sectors. Many factors influence the authors' and performers' remuneration level, among which the principal elements are:

- the structure of the rights conferred by law;
- the existence of statutory provisions to protect authors and performers as weaker parties to a contract; and
- the use of collective bargaining and role of trade unions (significantly more influential in the audiovisual sector than in the music sector).

The rights enjoyed by authors and performers under the European *acquis* generally fall under either one of two categories:

- exclusive rights, which give authors and performers the power to control the use of their work or performance; or
- so-called remuneration rights, which give authors and performers no power to control the use of their work or performance but merely a right to claim the payment of remuneration for such use.

Contract law or copyright and related rights law may provide support to authors and performers through a number of measures, including the fulfilment of formalities, a restriction on the scope of transfer of rights, rules on the form of payment (lump sum vs. proportional remuneration), rules on the interpretation of contracts, and rules on the termination of contracts and reversion of rights. Not all rules have a direct impact on the level of remuneration paid to authors and performers, however.

Examples of existing protective measures at Member State level are the restrictions on the scope of transfer of rights, which ensure that authors and performers do not grant overly broad assignments of rights with a potentially detrimental effect on their liberty to create in the future or to obtain remuneration from other sources for other forms of exploitation. Authors and performers certainly have other protective measures at their disposal which they can incorporate into contracts, such as a termination right or a best-seller clause. However, in our opinion, these clauses lack the kind of direct, up-front impact on remuneration that can be observed in a restriction of the scope of transfer. These clauses work rather as 'ex-post' remedies

and, additionally, require enforcement by the author or performer. Having authors and performers challenge the contract can prove complex, expensive and time-consuming and thus impair the original purpose of the clause.

Remuneration rights are as a rule administered collectively through a CRMO that fixes the level of remuneration for that type of use (like the rental right and the public lending right). Some remuneration rights are expressly unwaivable as per the European *acquis*, such as the one related to the transfer of the rental right. This means that authors and performers always retain their right to obtain payment for the exploitation concerned, even if they transferred other rights to the producer. But in other cases the law is silent on the waivable character of remuneration rights and the right to obtain payment of remuneration will be dependent on the contractual agreement with the publisher/producer, such as the lending right and the right of cable retransmission.[86]

These rules usually do not apply to the relationship between authors and performers and CRMOs, because they are deemed to act for the benefit of their members. The relationship between CRMOs and their members is now regulated by the Collective Rights Management Directive, which should bring improvement in the authors' and performers' situation, even if not all issues have been addressed.

The legal elements that influence remuneration are:

- The structure of the rights conferred by law:
  - the ownership of rights; and
  - the nature of the right: exclusive right or remuneration right.
- The existence of statutory provisions to protect authors and performers as weaker parties to a contract:
  - the fulfilment of formalities;
  - limits on the scope of transfer with respect to future modes of exploitation and future works or performances; and
  - the waivability or unwaivability of the remuneration right.
- The use of collective bargaining and role of trade unions.

[86] For example, the law is not clear as to whether performers can waive their right to remuneration arising from the communication to the public of commercial phonograms. Please see, for instance, C Angelopoulos, 'Creative Commons and Related Rights in Sound Recordings: Are the Two Systems Compatible?' in Eds. L Guibault and C Angelopoulos, *Open Content Licensing. From Theory to Practice*, Amterdam University Press (2011).

3 Understanding Payment Flows

In this section we identify the key players involved in the music and audio-visual industries and map out their interactions. Mapping out the structure of the supply chain in this way allows us to understand payment flows within the industry, and thus understand the role the system itself plays in determining the remuneration of authors and performers.

There a number of complex relationships in these industries. The key players and the way in which the products reach the consumers depend on the industry (music versus audio-visual) and the type of author or performer involved. In addition creators who do not follow the mainstream route to selling their products are in a different situation in terms of rights management and remuneration. We consider the key relationships for each group.

As indicated in the previous chapter, broadly speaking, income for authors and performers can be separated into two key sources from different stages of the supply chain (authors and performers may receive either type or a combination of the two):

- Lump sum (ex ante) payments – these are the fees paid to authors and performers on either lump sum or a salaried basis at the development/production stage of a product (or when a product is finished but not yet exploited) and as such will generally be dependent upon the expected success and anticipated revenues. The lump sum can also be a bonus (i.e. an additional deferred payment linked to the success of a product).
- Proportional remuneration (royalties) – this source of income is linked to the actual commercial success of a work or performance and is usually expressed as a percentage of sales, operating profit or net income. It is only be realised at a later stage once revenues/profits are realised.

The remuneration received by individual authors and performers is determined by two separate factors:

- the amount of the total revenue that has been earned from a work or performance, which is determined by the success of the product or expected revenue in the case of an up-front lump sum; and
- the split of the total earned revenue, as described in the previous bullet point, between the different stakeholders, such as the author or the performer, the publisher or the producer etc., as determined by the contractual arrangement.

We focus on the latter, i.e. the aspect determined by the contractual relationships.

In the remainder of this chapter, a complete picture of the supply cycle is presented, covering all stages from creation to the point at which the creation reaches the consumers/audience. Both online and offline distribution channels are considered

along with a separation of mainstream versus more alternative supply-chains. These represent generalised mappings, as slight differences may exist across countries.

3.1 Overview of the music industry[87]

3.1.1 Recent trends

The music industry has undergone a number of transformations in recent years. Technological advances have been a key driver of change and have had a significant influence on relationships between the key players in the industry.

One of the most striking features of the music industry is the influence of technology. The digital age and technological advances have reshaped the industry and have created a number of alternative ways through which a creator can reach their audience.

The industry's digital sector in 2013 represented 39 per cent of aggregate revenue, while in three of the ten largest markets this share exceeds 50 per cent. Even though physical format sales still represent 51 per cent of total sales, streaming and subscription services are rapidly gaining market share and competition in the industry is increasing, prompting innovation and the development of new business models. Users of digital subscription services have increased from eight million in 2011 to 28 million in 2013. These developments point to the recalibration of business models towards access to music as compared to the ownership of music. Indeed, the proportion of digital revenue from streaming and advertisement-supported streaming has increased considerably, from 14 per cent in 2011 up to 27 per cent in 2013.[88, 89]

Digitalisation has created challenges and opportunities. A key challenge is the potential for piracy which is significantly more pronounced with digital technology. Piracy prevents the effective enforcement of copyright and as such allows content to be made available without remunerating the creators of the material. This may lead to a reduction in sales of legitimate music and thus earnings for creators, and ultimately distort the incentives created by copyright protection. Piracy is, therefore, a particularly important issue for the contemporary music industry.[90]

Digital distribution has also affected relationships between distributors, producers and creators of music. Prior to digital distribution, record labels and distributors had to make significant efforts to gain a place in the valuable "shelf-space" offered by music stores. Additionally, competition was fierce in order to obtain valuable radio or television exposure. This often resulted in marginalising some of the smaller players in the industry. Smaller players did not have the capacity of their larger counterparts to engage in extensive and expensive promotion campaigns. Digital technology has

[87] Additional information on the characteristics of the music industry is provided in an Appendix (see Appendix 1).
[88] IFPI (2014), Digital Music Report, p5-6.
[89] Advertisement-based streaming services include YouTube and Vevo; streaming services include Deezer and Spotify.
[90] Whilst a key feature of the online market, the impact of piracy on remuneration is outside the scope of this study.

revolutionised the industry by alleviating the cost of distribution (even though marketing efforts for prominent shelf space remains).

It is no longer necessary to publish the creation in a material form nor is it necessary to physically deliver it to retail outlets. The unit cost of making a song available online is considerably lower than that associated with offline distribution. This has increased the number of options for performers in the music industry to channel their creativity. There are now opportunities for creators to pilot their work on websites of mass access, such as YouTube, where no distribution costs are involved. Other examples, such as Jamendo, allow performers to publicly share their albums through Creative Commons licensing. This type of licensing enables performers to distribute their content, usually for non-commercial uses, without losing the rights to the underlying creation. Jamendo's business model provides significant remuneration opportunities for performers since it allows users to make donations that go straight to the performers, minus a small transaction fee. In addition, advertising revenue is split in half between performers and Jamendo.

A common type of business model in the digital era is that of subscription services. These services usually offer a basic service package for free which generates revenue through advertising. More premium service levels are offered in parallel to the basic option which remove the advertisements and offer additional options or improved functionality. These premium levels are provided through subscription fees. Examples include Spotify and Deezer.

Such services allow musicians to bypass some of the traditional channels that characterise the mainstream industries. In addition, the digital nature of data transmission creates a capability for distribution without regional barriers or time constraints.

3.1.2 Authors and performers in the music industry

In this section we introduce each of the different types of authors and performers in the music industry and explore the characteristics of their respective markets.

Performers in the music industry can be broadly separated into two categories; featured artists and session musicians.

Featured artists are those that either individually, or as permanent members of bands achieve publicity (at varying levels) and whose performances are made available for public consumption. The term "featured" sources from the fact that their identities (or brand name) are vital components of the product that is being sold. There is a brand associated to the featured artist and this brand will in many cases drive the demand for their product or alternatively act as a signal of its expected quality.

On the other hand, session musicians have a significantly more temporary role. They are hired, among others, by featured artists or bands and their presence is intended to fill in any musical skill requirements. There is no restriction by which a session musician could not be hired multiple times by the same band. However, such occasions would give rise to overlapping scenarios where a session musician is on the way to becoming a featured musician.

Authors are responsible for the creation of a piece of music. While in many cases the lines between authors and performers can be rather blurred, the process of authoring a musical piece is usually comprised of two parts. A composer is responsible for the musical background that characterises a song while a lyricist is responsible for producing the lyrics that will accompany the composed music. An individual that is capable of both writing the music and the lyrics of a song is considered to be a songwriter.[91]

Significant overlaps exist between authors and performers. The synergies of being able to both write a song and perform it can be considerable. A singer-songwriter is in a position to bypass parts of the supply-chain and is less dependent on extraneous influences. Moreover, being able to both author and perform music eliminates the requirement to search for musicians with complementary skills in order to complete a product.

3.1.3 Revenue streams in the music industry

Developments in the music industry have affected the potential sources of revenue open to authors and performers. Aside from more traditional methods of selling their creations, the development of the internet and the range of devices available have created the scope to earn revenue from digital sales (as discussed above).

Authors and performers have the following potential sources of income:[92]

- Communication to the public of their work or performance: This can happen in a number of ways including radio, television, online streaming, live performing, bars, clubs, shopping centres etc. This will generate income for authors in the form of royalty payments. Performers are also in a position to earn royalty payments (e.g. through the remuneration due under the communication to the public of commercial phonograms). They can also earn income through (live) performing and their exclusive right over their live performances.
- Sales of physical media (e.g. CDs or vinyl)**:** These sales are subject to mechanical royalty payments. These payments arise since users of authors' creations need to obtain the necessary "mechanical licence" in order to use their work. These licences are issued by the authors (usually via a CRMO) to the phonogram producers (record labels) in order for them to be able to legitimately distribute them to consumers. Performers are also remunerated for their participation in recording phonograms according to their contractual terms with the phonogram producer.
- Online/mobile sales (e.g. iTunes)**:** Similarly to the above, these sales generate remuneration for authors for both the mechanical and the making available right in the case of interactive online services. The performers' participation and the associated related rights will be remunerated according to the contractual agreement with the phonogram producer.
- Synchronisation: This category covers the synchronisation of musical creations with visual products such as advertisements, television shows or movies.

[91] Definitions of a songwriter vary; for the purposes of this report a songwriter is someone who can both write the music (composer) and the lyrics (lyricist) of a particular song.

[92] Stopps, D. (2008), "How to make a living from music", Creative industries No.4, World Intellectual Property Organization, p13.

Synchronisation deals also generate a flow of payments in return for obtaining a licence to use the author's or performer's work or performance.
- Private copying levies: These apply when copies are made under a private copying exception.[93]
- Online/Printed sale of sheet music or scores: Authors will earn money from sheet music and scores.
- Sponsorship or branding: Performers may earn additional income from sponsorship deals or merchandise/branding.

While these different sources of income cover authors and performers in general, the relative importance of the above mentioned income sources will vary across authors and performers according to their individual characteristics.

3.2 Music industry supply-chains

Supply chains in the music industry involve a number of participants. Here, we identify their roles and explore the interactions between them, and how this varies across the different categories of authors and performers. Initially, we focus on the differences observed between online and offline supply chains and following that we describe how the mainstream distribution and production channels differ from alternative supply chains. In our discussion we touch upon the involvement of CRMOs in administering different types of rights, as described in the previous chapter.

Before entering into the detailed dynamics of the supply chains, we present a description of the most important participants.

- Publishers — an author of a musical piece will in many cases make use of a publisher (often a company) by transferring some of their corresponding rights to them. Publishers then are responsible for promoting the songs to interested parties such as record labels, television stations, radio stations or advertising companies. The involvement of the publisher varies between countries particularly when comparing authors in the UK with authors in continental Europe. Publishers who are assigned the mechanical rights of Anglo-American repertoire also make use of various sub-publishers in their multi-territorial distribution in order to collect mechanical right royalties from local CRMOs. This is explored in more detail later in the report.
- Phonogram producers — in the case of studio recordings the phonogram producer will be the record label while in the case of fixations of live performances, the phonogram producer will be whichever company is assigned by the event organiser with the task of recording the live performance. By being the phonogram producer in case of studio recordings, record labels form a crucial part of the mainstream supply chain. Their role is not clear-cut and varies depending on size. Primarily, a record label is expected to market the recording of a phonogram in return for a performer handing over the related rights. Record labels can also be involved in a

[93] Private copying levies are one of the sources of income for authors and performers in the music industry, but they are outside the scope of this study. These private copying levies arise as a form of compensation for the harmful exceptions to the mechanical right for private use. As such, they are not directly related to the study's assessment of legal and contractual impacts on income deriving from exclusive rights and remuneration rights.

variety of domains such as the production, distribution and manufacturing. In addition, they could be responsible for monitoring and enforcing related intellectual property rights. Record labels can be categorised as being either "majors" or "independents" (indies). One of the main differences is that major labels are vertically integrated and provide a complete set of services including publishing, retail and ancillary services. On the contrary, independent labels are more constrained and do not have similar amounts of resources in order to conduct all these activities. Often, independent labels are limited to a more national, or regional scope, therefore necessitating the usage of intermediaries (such as aggregators) when compared to their vertically integrated counterparts.

- CRMOs — intellectual property rights associated with musical creations generate a stream of revenues from royalty payments when songs are played in public. In addition, they normally (with some exceptions explained below) manage the mechanical right for authors where royalties are paid every time a physical or online copy of a song is sold. It is in effect impossible for individual authors and performers to monitor and collect the income that would be rightfully theirs from the reproduction (either online or physical), public performance or broadcasting of their creative work or performance and this task is in some cases delegated to CRMOs (while in others to the producers). Operational rules for CRMOs vary across the EU, with some countries having stricter frameworks than others. The recently adopted Collective Rights Management Directive contains a number of rules on their governance and financial management.
- Distribution companies — the role of a distribution company is very straightforward: the distribution of the finalised music product to the retailers who will then promote the product to consumers. Distribution can occur through two channels, digital or physical with companies often offering both services. While the concept of a pure distribution company does exist, distribution typically forms part of a larger bundle of services. As an example, record labels often offer a full package of services including distribution. The important point to be made is that while distribution is a key part of the supply-chain, it can be offered by more than one type of participant. Due to the complex nature of online distribution and the fact that majors will in general provide a distribution service, our supply chain and payment diagrams present distribution companies as separate entities only where they are used by independent labels for physical distribution.
- Aggregators[94] — aggregators are used by independent labels or individual author/performers in order to encode their music in a format that can be used by the online retailers of the final product. In addition, they assist with the difficulties presented for independent labels in multi-territorial licensing. For online distribution for on-demand services, there are two types of involved rights, mechanical rights and the rights of communication to the public. Smaller independent labels grant the necessary licences to the online commercial users through these aggregators. MERLIN is an organisation comprised of independent labels and offers similar services as aggregators. MERLIN handles members' negotiations and, like aggregators, issues the necessary licences for commercial

[94] Charles River Associates (2014), "Economic analysis of the territoriality of the making available right in the EU", Prepared for DG MARKT of the European Commission, March 2014, p39.

use in multiple territories. One significant difference between MERLIN and aggregators is that MERLIN's role is to represent its members as a non-profit organisation in contrast to traditional aggregators which are profit seeking entities.

Both authors and performers typically assign their rights to an exploiter; authors to a music publisher and/or a CRMO, and performers to a record label. This is a general and long-standing practice in the music industry. Some recent developments challenge the existing practice of transferring exclusive rights to record companies and music publishers, albeit in different ways.

First, the arrival of talent shows on TV, such as 'Idols' and 'X Factor', has changed the landscape for performers in particular. The contracts offered to the musicians participating in the talent shows often require them to contribute to sponsoring events, to promote the talent show on social media, and to stimulate tele-voting by the audience, often without receiving any payment for these activities (though clearly they benefit from the publicity, particularly given the format of such shows where success relies on audience votes). Furthermore, the record contract offered to the winner of the talent show often requires a complete transfer of rights for all forms of exploitation.

At the same time, the music recording industry has also undergone some changes in the last decade because of the adoption of new business models by performers. As a result of more accessible and affordable recording techniques, it has become much more common for performers to prepare master tapes without the help of a record label (as illustrated in the alternative supply chains presented in section 3.2.4). This is especially the case for DJs and performers of electronic music and, perhaps to a somewhat lesser degree, for indie bands. In such a situation, performers sometimes sign agreements with a record label to benefit from its reputation or prestige or to profit from its better distribution facilities. Such agreements usually involve no transfer of rights, but merely grant an exclusive licence to the label. Only if record companies still bear the financial risk of investing in the recording and promotion of musical recordings, as they did traditionally, do the record contracts typically require a complete transfer of rights.

Finally, an important distinction that ought to be made at this point is between "Continental" repertoires and "Anglo-American" repertoires. The term Anglo-American is jargon used by the music industry to describe works from authors registered with CRMOs in the UK or the US while Continental repertoire refers to works that are registered in CRMOs in continental Europe.[95] A distinctive feature of Anglo-American repertoire is that online distributors are required to obtain authors' rights from a variety of involved stakeholders in order to legitimately use their works. This happens because of the Right Management Organisations (RMOs) that have recently appeared (formed by major publishers in order to manage and license the "Anglo-American" repertoire in the European market), introducing another layer of rights clearance. In

[95] European Commission (2012), "Impact assessment accompanying the proposal for a Directive of the European Parliament and of the Council on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online uses in the internal market".

particular, the new RMOs manage the mechanical reproduction rights for online uses while the making available rights are still administered by national CRMOs.

For Anglo-American repertoire, not all rights, however, have been transferred to these newly formed RMOs, with the "making available" right still remaining with the traditional CRMOs. Furthermore, publishers forming these RMOs have only transferred mechanical rights to RMOs from the traditional CRMOs in cases of multi-territorial usage.[96] This situation results in particularly differentiated supply chains for online distribution between the Anglo-American repertoires and the Continental ones.

3.2.1 Offline supply-chain for authors

In the mainstream, offline supply chain (Figure 3.1) the publisher plays a very important role for songwriters. As explained above, the publisher is the channel through which the author widely promotes and manages his work. The author assigns his rights to a publisher who will manage the consequent registration with the appropriate CRMOs.[97] Additionally, the publisher is responsible for distributing the musical sheets of the author's creations directly to retail outlets.

As a rule, music authors transfer practically all their rights, for the full term of copyright, to music publishers when entering into a publishing agreement. In return, they usually receive an advance payment and will then receive royalties for the exploitation of their works, from which the advance payment is recouped. In practice, publishing agreements are individually negotiated. The contracts in the majority of cases require the broadest transfer of rights possible, with the exception however of the mechanical reproduction rights and rights of communication to the public that authors have assigned in advance to CRMOs.

The CRMOs are also very important in the supply chain, collecting royalties for several types of uses of works and recorded performances and distributing them between the relevant right holders. In addition, they provide licences to a number of groups which can include mechanical licences to the record labels (as the phonogram producers) as well as licences to broadcasters and places where communications to the public take place. Moreover, synchronisation licences are most often obtained by audio-visual (AV) producers from the publisher of the author, while there appears to be an increasing provision of such licences though CRMOs (e.g. UK).

In all countries surveyed as part of our legal review, CRMOs administer the exclusive rights of music authors for the mechanical reproduction and communication to the public of their works. Most of the authors' royalties relating to the mechanical reproduction and communication to the public of their works will be collected and distributed directly to them by the CRMO, even where the rights have been assigned to the publisher. In addition, many CRMOs manage the cable retransmission rights on behalf of music authors (e.g. SIAE in Italy, Artisjus in Hungary, LATGA in Lithuania,

[96] Charles River Associates (2014), "Economic analysis of the territoriality of the making available right in the EU", Prepared for DG MARKT of the European Commission, March 2014, p42.

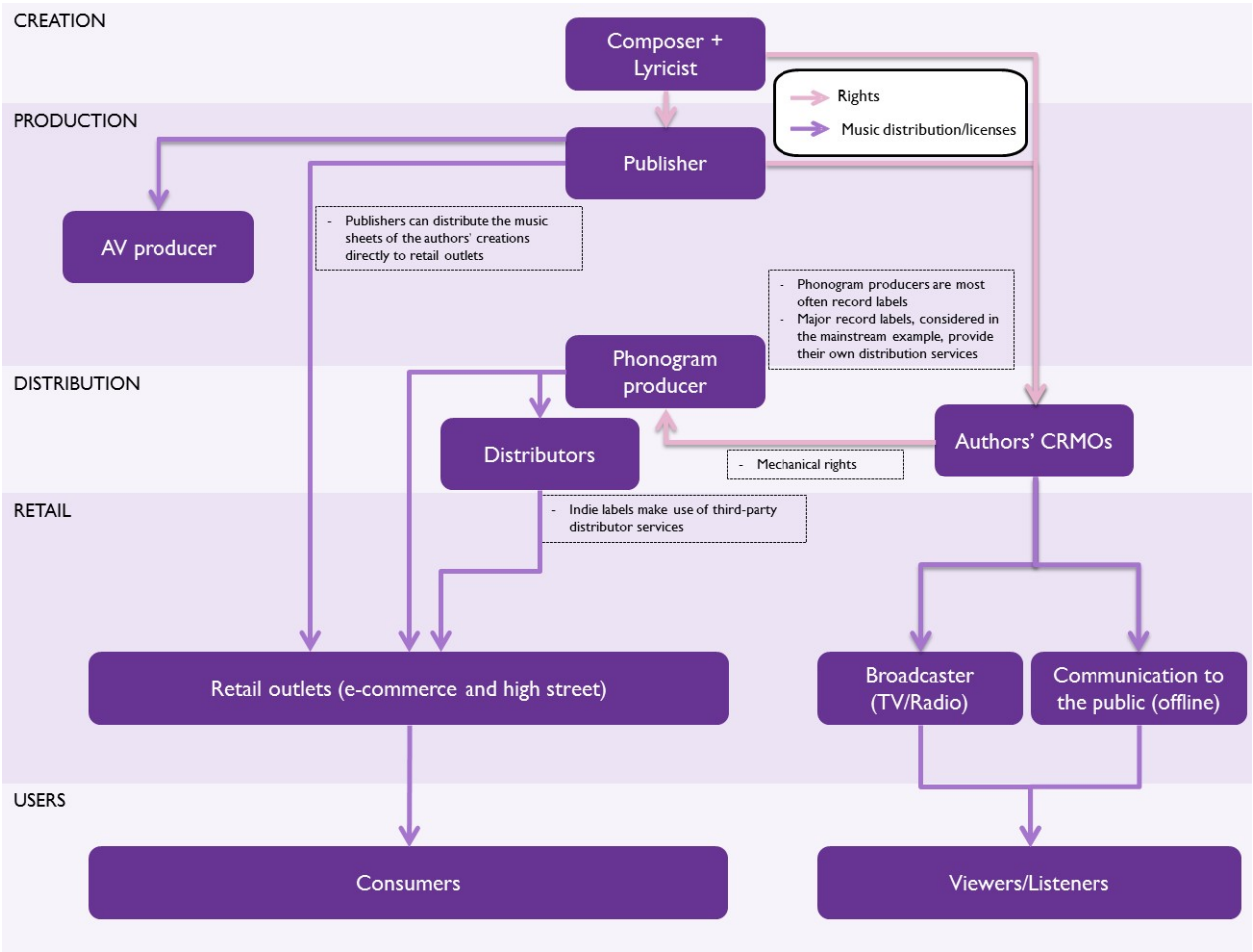
[97] While we expect that in general the publisher would take care of registering with the relevant CRMO on behalf of the author, we have included an arrow directly from the author to the CRMO to account for the possibility that the author would do this themselves.

ANGOA and AGICOA in France, Copydan Verdens TV in Denmark, GEMA in Germany, and PRS for Music in the UK and Buma/Stemra in the Netherlands). Some CRMOs also collect and/or distribute rental and lending rights for music authors (e.g. SIAE in Italy, LATGA in Lithuania, CFC and Sofia in France, GEMA in Germany, MCPS in the UK and Buma/Stemra in the Netherlands). For music authors the collective exploitation of rights often represents a significant source of income.

The distribution of much music in the offline, mainstream model takes place through the major labels, which are the phonogram producers. Due to their vertically integrated business models they are able to provide distribution services to their clients as well and thus appear in the figure below as belonging to both the distribution and the production part of the supply chain. Independent labels make use of third-party distribution companies in order to reach the retailers.

The following figure illustrates these relationships for authors in the music industry regarding the offline distribution of their work. This figure captures the interactions between the different key players in the music industry and songwriters (i.e. composers + lyricists). Authors who are not both lyricists and composers may need to interact with each other in order to produce a complete work. This interaction can be governed by contractual arrangements but the flow of assignment of rights and the subsequent payments of royalties remains the same as for songwriters.

Figure 3.1: Offline supply chain for songwriter



Source: Europe Economics.

As described above authors earn their income from several sources. Firstly, income from their songs' communication to the public; this includes public performances (appears as 'communication to the public (offline)' in Figure 3.2) and broadcasting. Public performance fees are collected from the CRMOs who are responsible for licensing the authors' works to broadcasters and/or public performance venues. They are then distributed back to the publisher and the author with the breakdown between them being determined by their contractual relationship and the rules governing the respective CRMO. It should be noted that phonogram producers also receive licence payments from these sources but this income stream is more relevant to performers and is thus not presented in this figure.

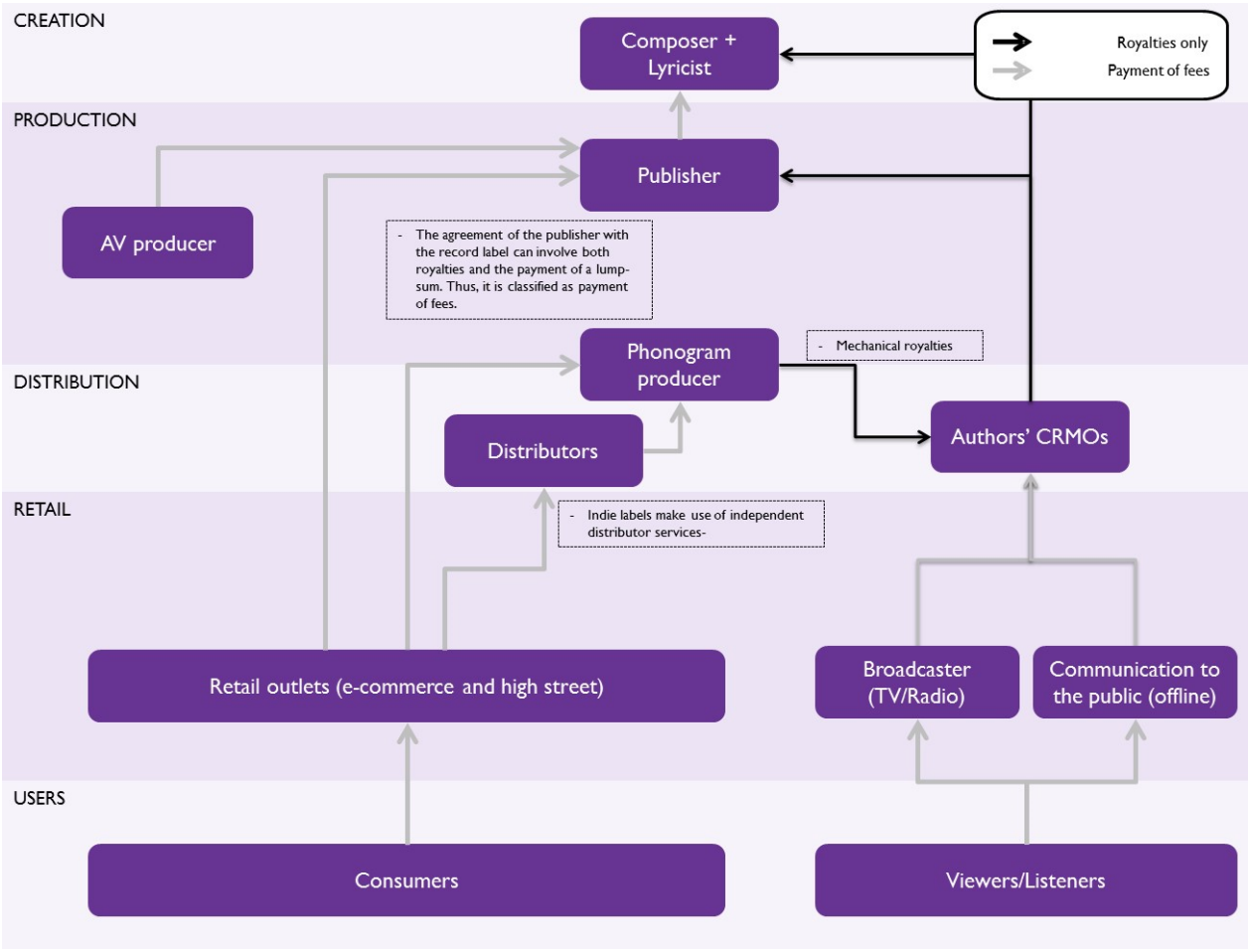
The second and third sources of income are the sales of products either through physical or online distribution channels. Online distribution is covered in the next section. In order for these sales to be legitimate, phonogram producers need to obtain permission to use an author's work in their recording. This will happen through the author's CRMO, and will allow phonogram producers to make their recordings available for distribution. In return for this permission, the authors, through the CRMO, will get mechanical royalties from each copy of the recording sold. These mechanical royalties from phonogram producers are then distributed back to publishers and authors (therefore having a black arrow).

Again, the role of CRMOs is crucial; they collect the money from phonogram producers who pay for the mechanical licences as well as from broadcasters and communication to the public. CRMOs then distribute the revenue to authors and publishers according to their operational framework.

Publishers (or the CRMOs) also provide a synchronisation licence to those that wish to use the music in an AV production who in return pay them a fee, part of which belongs to them with the rest returning to the author (again according to contractual terms). Moreover, the publisher is responsible for distributing (online or printed) the music sheets created by the authors to the relevant retail outlets, thereby generating additional income from their sale.

The "fee" arrow going from the publisher to the author is a generic representation of any transfer of income that arises from their contractual arrangements.

Figure 3.2: Payment flows to songwriter for offline distribution



Source: Europe Economics.

3.2.2 Online supply chain for authors[98]

In the online scenario there are a variety of business models at the retail end. As such there are a number of different ways in which the players can and do interact. Specifically, businesses will obtain the licence to distribute the phonogram directly from the phonogram producer, but will need to clear the authors' rights in order to distribute the phonogram with the relevant rights management organisation and (as relevant, see below) with the publisher.

The process will differ according to whether their repertoire is "Continental" or "Anglo-American". A substantial difference between the two repertoires lies in the fact that there is an explicit separation of mechanical rights and the making available right for the Anglo-American case. Digital providers need to make certain they clear both rights in an appropriate manner which will depend on both the territorial distribution of the work and the origin of the repertoire.

[98] This section has used information from: Charles River Associates (2014), "Economic analysis of the territoriality of the making available right in the EU", Prepared for DG MARKT of the European Commission, March 2014, Section 2.

In Anglo-American repertoire cases the making available right (or performing right) is assigned to the traditional CRMOs (such as PRS for Music in the UK) with the mechanical rights being assigned to the publisher. The publisher then is in essence the "owner" of the mechanical rights can manage the right without requiring the author's consent and therefore has a number of available options to license these rights and collect the generated royalties.[99] The publishers license the mechanical rights either directly or via their selected RMOs (dotted arrows in Figure 3.3). For the Anglo-American repertoire the author's publisher will use local sub-publishers to manage the authorisation of the mechanical right to foreign CRMOs. For the making available right (for which the ownership is retained by the songwriter himself) CMROs grant licences to commercial users.

In Continental European repertoire cases the mechanical right is assigned to the CRMOs representing music authors (e.g. Buma/Stemra in the Netherlands, SIAE in Italy and GEMA in Germany), alongside the making available right.

Hence, a phonogram producer or digital service provider has to acquire a licence for both the making available and mechanical rights from the authors' CRMO in the case of the Continental repertoire or in the case of the Anglo-American repertoire the making available right from the CRMO and the mechanical right directly from the publisher or from the publisher's selected RMO. The phonogram producer in many cases also engages directly with digital service providers.

The licensing of online rights for musical works is increasingly exercised by large pan-European consortia of CRMOs, such as ARMONIA, or of music publishers and CRMOs, such as CELAS, DEAL, PEDL, PEACOL, JOL and SOLAR (see below).

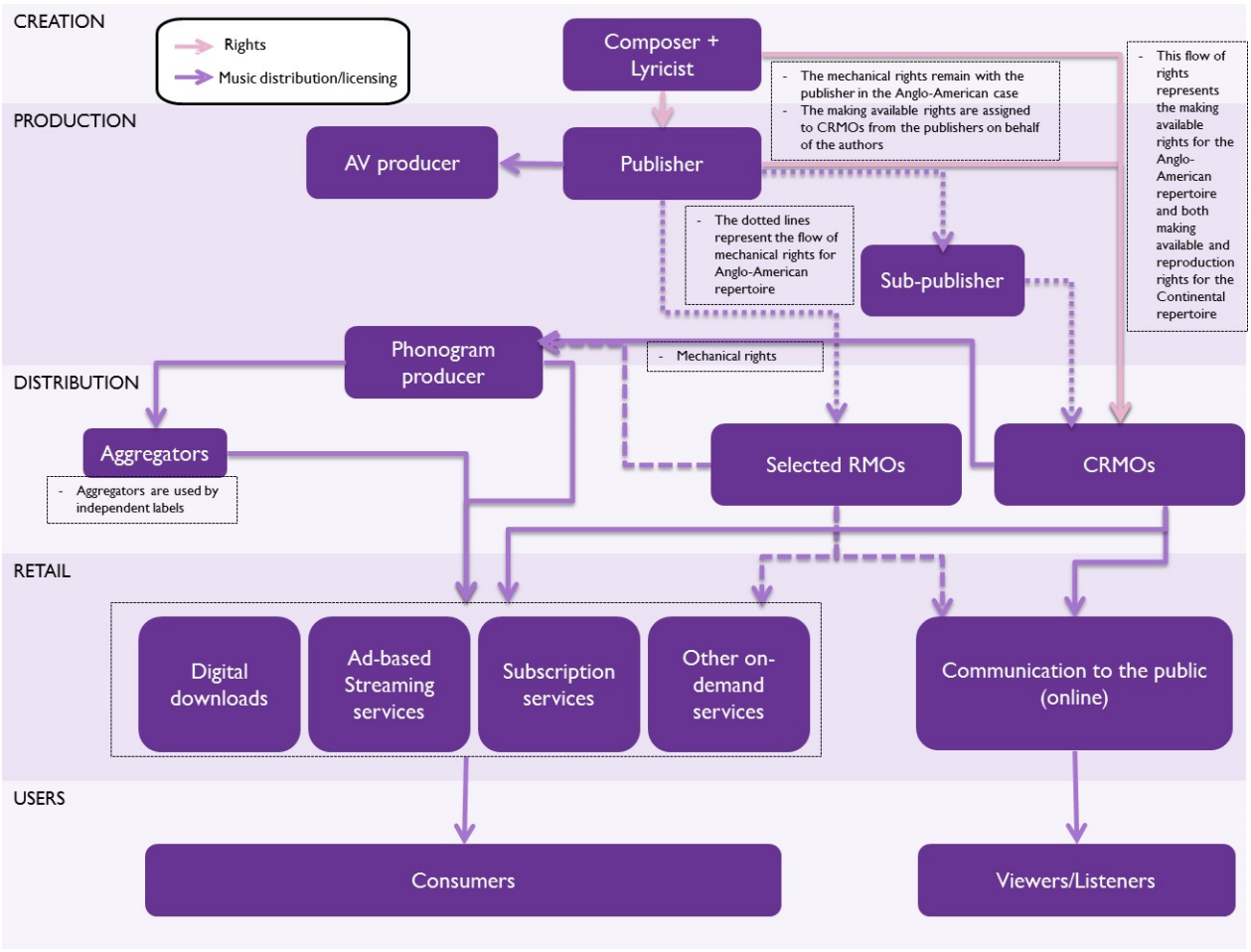
Although the practice of collectively administering the rights for online use is so new that no general lessons can yet be drawn from it, in countries where CRMOs have engaged in the online exploitation of musical works, contracts have been concluded with all the major players, including Spotify, YouTube and iTunes, and many smaller online music suppliers. Online music still represents a small part of the total income collected by CRMOs,[100] but is expected to rise in the coming years. Buma/Stemra indicates that the tariffs for streaming are based on the same criteria as for communication to the public, i.e. a percentage of the total income of the online music suppliers generated (from advertising-based or subscription-based models) in the Netherlands. As far as possible, the royalties are distributed to music authors depending on the frequency of streaming.

Figure 3.3 illustrates the flow of author's rights in cases of both Continental and major Anglo-American repertoire.

[99] As in the offline case, we have indicated that the songwriter engages directly with the CRMO as well as potentially via the publisher. While this is likely to happen in some cases, we would expect that in general the publisher would take care of the registration with the CRMO on the behalf of the songwriter.

[100] To put it in perspective, Buma/Stemra (the Netherlands) has reported that, for the year 2012, only €3.9m out of a total of € 178.6m came from online exploitation of musical works.

Figure 3.3: Online supply chain for major Anglo-American and Continental repertoire songwriter



Source: Europe Economics.

Publishers can alternatively rely on a separate organisation to license rights in their repertoire to users.

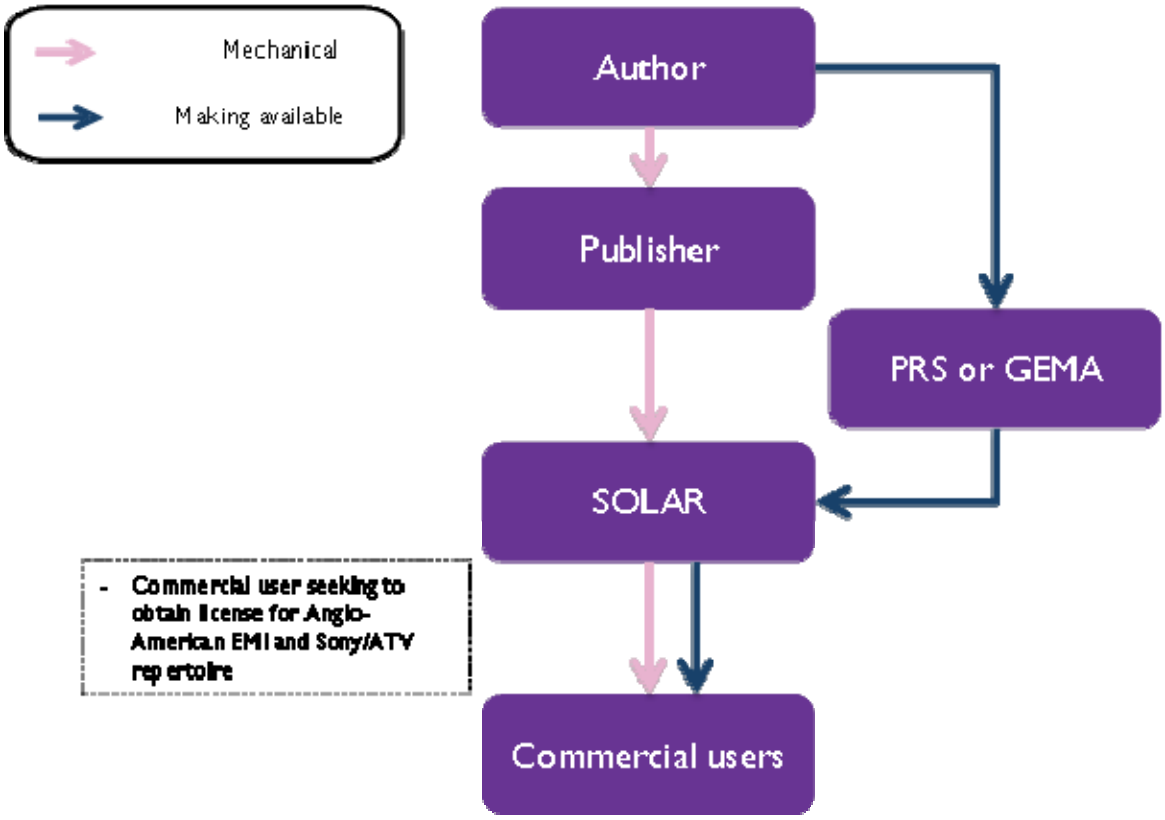
Large publishers of major Anglo-American repertoire have created their own organisations. A prime example of such an organisation is CELAS. CELAS was created to "represent a certain set of EMI Music Publishing's repertoire for online and mobile exploitation in Europe".[101] In doing so, it created a one-stop destination for those who want to obtain licences for multi-territorial online and mobile distribution of EMI content in Europe. The presence of CELAS-type organisations allows commercial users to obtain licences for the use of a repertoire through one channel instead of having to interact with both traditional CRMOs and RMOs.

In 2012, EMI was broken up and its publishing arm was acquired by a Sony/ATV consortium. Following that, in September 2014, building on the success of vehicles such as CELAS, a new agreement was made between *Sony/ATV Music Publishing*, the UK authors' CRMO *PRS for Music* and the German authors' CRMO, *GEMA*, to replace CELAS with a new joint venture called SOLAR in licensing Sony/ATV's pan-European

[101] Source: https://www.celas.eu/CelasTabs/About.aspx.

digital rights for Anglo-American repertoire.[102] The figure below illustrates how CELAS (or SOLAR) would interact with publishers, CRMOs and commercial users.

Figure 3.4: The simplified assignment of Anglo-American repertoire rights through SOLAR



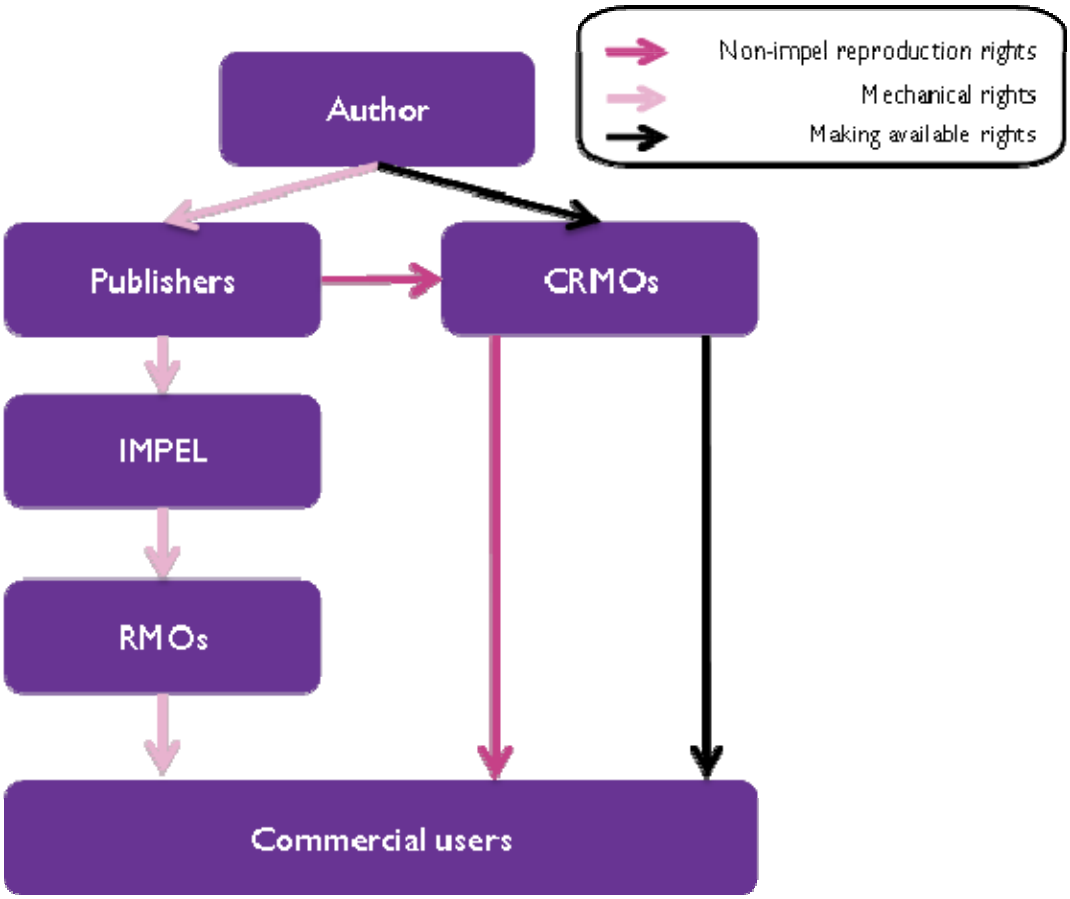
Source: Europe Economics.

Smaller, independent publishers can rely instead on "Independent Music Publishers' European Licensing" (IMPEL). IMPEL has been established by a group of independent publishers with a rather similar aim, namely to facilitate the online licensing of Anglo-American mechanical rights.[103]

For cases of independent Anglo-American repertoire there are two alternative paths that can be followed. The first covers the case of IMPEL membership. In that case, the mechanical rights go from the publisher through IMPEL before reaching the selected RMOs. IMPEL combines the repertoire of different independent authors and distributes it on a multi-territorial basis. When non-IMPEL members are involved, the mechanical rights are licensed from the publishers directly to the CRMOs (see figure below).

[102] http://www.prsformusic.com/aboutus/press/latestpressreleases/Pages/sony-atv-prs-for-music-gema-launch-joint-venture.aspx.
[103] Source: http://www.prsformusic.com/impel/Documents/IMPELInformationPack2012.pdf.

Figure 3.5: Independent Anglo-American repertoire licensing of rights



Source: Charles River Associates (2014), "Economic analysis of the territoriality of the making available right in the EU", Prepared for DG MARKT of the European Commission, March 2014, p40.

Figure 3.6 depicts the payment flows of royalties and fees for songwriters who have works in a Continental or a major Anglo-American repertoire. When there is an RMO involved, payment of mechanical royalties goes through them. Alternatively, payments of royalties go through the CRMOs until they reach the publisher and the author. In the case of Anglo-American repertoire, sub-publishers will collect payment from foreign CRMOs, keeping a fee, and will then direct the payments to publishers. The split between author and publisher is governed by the contractual arrangements between them.

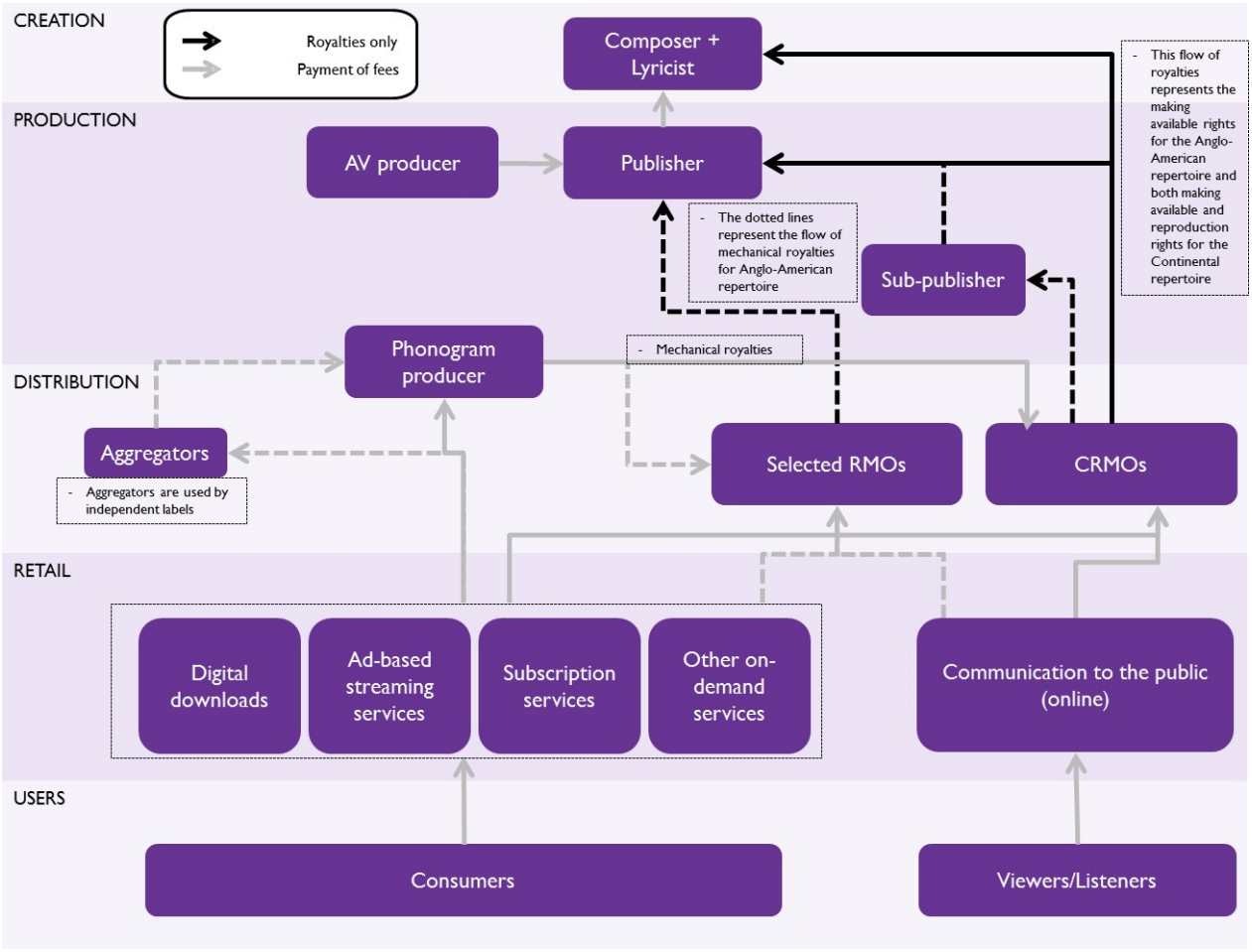
The flow of income from phonogram producers is illustrated through a "payment of fees" arrow in order to allow for the possibility of a royalty and/or lump-sum agreement. Synchronisation fees will be paid to the publisher and will eventually reach the author according to the contractual arrangements in place with their publisher.

Providers of digital on-demand services have rather varied business models in place and thus the manner in which remuneration will be determined can be very different. Hence, the arrows going away from the frames surrounding digital service providers are defined as fees in order to capture this variation.

Aside from the Jamendo model described earlier, Spotify is another example, offering basic and premium services. The basic package includes advertisements and a more limited service offering, while the premium package requires a monthly subscription

fee payment in return for a superior service offering. Spotify remunerates the right holders by allocating 70 per cent of its monthly revenue for royalty payments. This amount is then allocated to the authors and performers according to their popularity, measured by the number of streams compared to the aggregate number of streams. The rights owners (e.g. record labels, publishers or songwriters themselves) associated with the songwriters' works are then paid according to their respective entitlements, which vary across country according to local law.

Figure 3.6: Payment flows to Continental and major Anglo-American songwriters for online distribution



Source: Europe Economics.

3.2.3 Supply-chain for performers

Considerations regarding the origin of the repertoire are not applicable in the case of performers and the differences between online and offline exploitation are less pronounced, therefore there is no need to present online and offline supply chains separately.

The supply chain for performers looks almost identical to that for songwriters after the distribution stage. The fundamental difference is in the creation and production phases as the interaction of a phonogram producer with a performer is significantly different.

The phonogram producer only needs to obtain the rights related to an author's piece of work but it needs to be actively engaged with a performer who will be a vital part of the final recording. The corresponding shares of the performer and the producer are the result of the contractual negotiations between them (see Figure 3.7).

In most cases, featured artists transfer virtually all their rights, for their full duration, to record producers when signing a record agreement. This typically includes all primary and secondary forms of exploitation of the recorded performances (e.g. exploitation on CD, DVD, compilation albums, video clips, synchronisation, ringtones, downloads, streaming and other online use), with the exception of the equitable remuneration right for the secondary use of commercial sound recordings. Here too, featured artists often receive an advance payment and will subsequently receive royalties for the exploitation of their recorded performances, from which the advance payment is recouped. Because in most cases the online exploitation rights are also assigned to the record producer, licences for online use are often negotiated directly between online music suppliers and the producers, who will typically allocate a share to the featured artist following the agreement. On the one hand, an example from Italy, collected as part of the legal review, shows that the producer usually first deducts 10-20 per cent of the net income for administration and overhead costs and then, depending on the contract, allocates 20-50 per cent to featured artists. On the other hand, examples from other countries demonstrate that many record contracts still lack specific clauses on exploitation via online distribution channels. In the still relatively few occasions in which featured artists have only entered into a licensing deal with record producers, they have sometimes retained the right to individually exercise the online exploitation rights. However, in most cases, the online rights are handled by the record labels against the payment of royalties. In general, record labels are in a better position to deal with online music suppliers, because often they contract directly with them or they pass through aggregators to deliver their music works to online platforms.

In nearly all countries surveyed as part of our legal review, featured artists negotiate record contracts individually. In France, however, performers are covered the SNEP collective bargaining agreement as explained earlier in the report (section 2.3). This agreement stipulates that a performer who assigns certain rights to a record producer is entitled to a basic salary according to the length of time worked; an additional lump sum payment for the acquisition of secondary rights of exploitation; and an additional proportional payment for collective exercise of exclusive rights (six per cent of the net receipts collected by the CRMO, to be paid to the performer in the form of royalties, but only if the producer has entrusted a CRMO with the management of one of the rights mentioned above). The right of making available on demand is automatically transferred to the producers with the rights of fixation and physical distribution of the sound recording. Apart from a single fixed fee for the transfer of the latter rights, performers receive no specific remuneration in return for the transfer of their rights for on demand uses of their recorded performances.

The session musician will be offered contractual terms granting them a one-off payment, an entitlement to royalties or a combination of both. In return, they will provide their musical services which are required in order for the phonogram to be produced (either in the form of a studio recording or as a live performance that will be

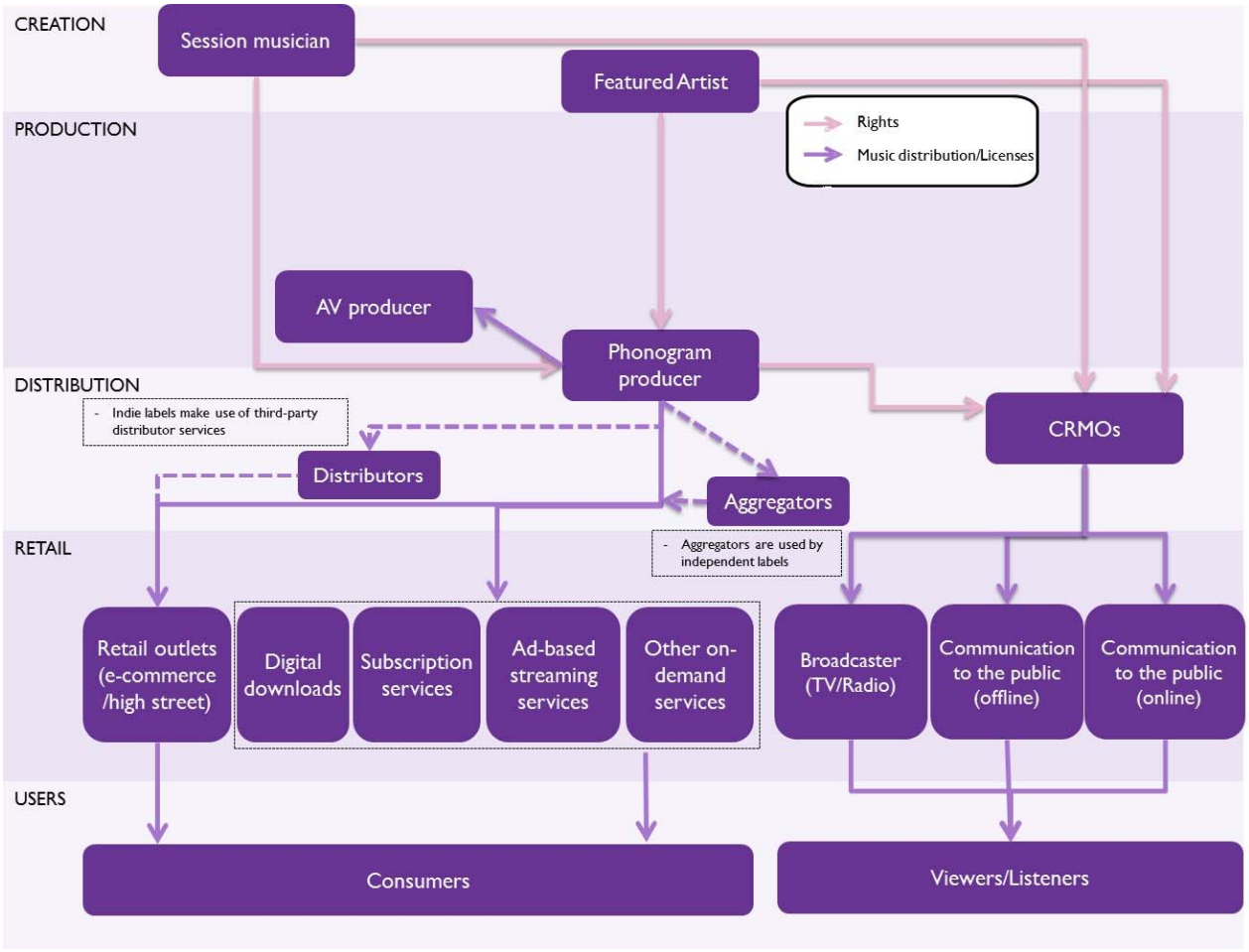
recorded and eventually distributed). Most of the time, session musicians sign contracts which involve a nearly complete buy-out of rights. This is no different in countries where collective bargaining agreements about the terms of session musicians' work and use of their recorded performances apply. Usually, these collective agreements stipulate a buy-out fee, which may vary according to different factors, such as the number of performances recorded and the length or the type of the recording session. Some collective agreements also include a basis for certain residual payments. In the UK, for example, additional fees for e.g. synchronisation rights are commonly negotiated with session musicians on a case-by-case basis.

Yet, it is not possible to buy-out all session musicians' rights. In most countries, session musicians retain the statutory right to an equitable remuneration for the broadcast or communication to the public of their recorded performances. As discussed earlier in section 2.2.1, in Italy, by contrast, session musicians are not usually recognised as performers that play "a significant artistic part", hence they receive no income from the exploitation of their works, other than the session fee they receive as payment for their labour.

The involvement of the session musician with respect to the entry point in the supply-chain varies. Alternative scenarios can be envisaged where the session musician interacts directly with either the performer, or the phonogram producer. For our purposes we assume session musicians interact with phonogram producers.

In all Member States surveyed as part of our legal review, CRMOs are established to collectively manage the right of performers to receive equitable remuneration for the broadcasting and communication to the public of performances recorded on commercial sound carriers. These CRMOs collect this remuneration from broadcasters and all other entities that play sound recordings in public, such as the catering industry (bars, restaurants, etc.), shops and retailers. The right of making available to the public is not administered by these CRMOs. It is an exclusive right of performers and is therefore exercised individually, often by record producers to which the rights are assigned (see below). In many Member States, CRMOs are also in place for administering cable retransmission rights for music performers (e.g. AGATA in Lithuania, Nuovo Imaie and Itsright in Italy, SPRE in France, Copydan Verdens tv and Performex in Denmark, GVL in Germany and BECS in the UK). In some countries, CRMOs also collectively manage the lending rights (e.g. Norma and STAP in the Netherlands) and rental rights for music performers (e.g. AGATA in Lithuania, GVL in Germany and BECS in the UK), but in practice this does not always result in the collection of remuneration. It has been reported that no fees for rental rights have been collected in Lithuania, because the local market for audio rental is virtually non-existent.

Figure 3.7: Supply chain for featured artists and session musicians



Source: Europe Economics.

Performers are entitled to royalties from the communications to the public or broadcasting of their performance due to the related right generated by their participation in the fixation of the phonogram under Article 8(2) of the Rental and Lending Rights Directive. Moreover, this remuneration must be shared between performers and the phonogram producers. The situation is not similar globally however, with countries having opted out of the relevant provision in the WIPO Performances and Phonograms Treaty (WPPT), such as the US, not recognising the related right holder's right to public performance and broadcasting related remuneration.

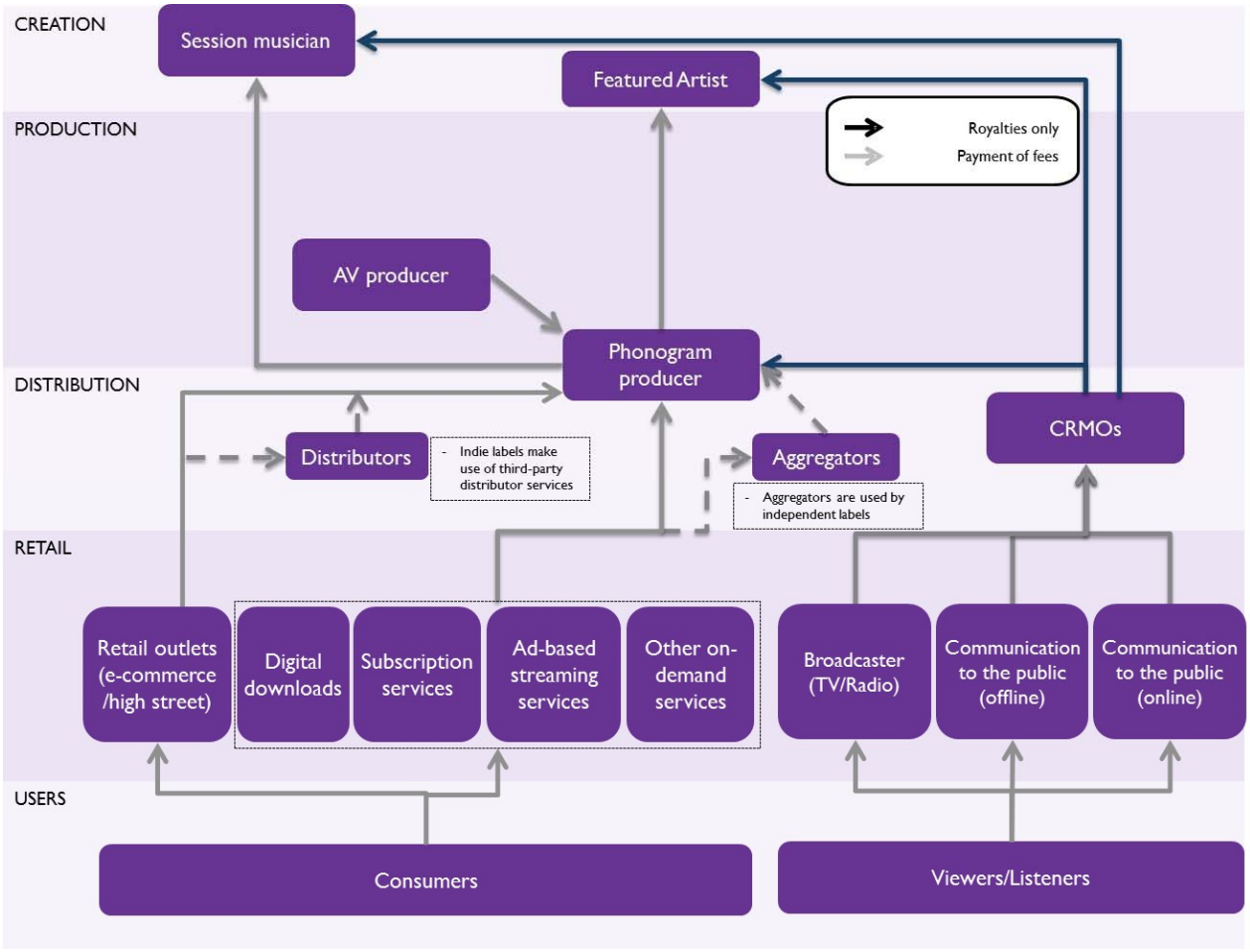
For performers, another stream of income is royalties from phonogram producers' distribution (physical distribution and online use). This is wholly governed by the contractual arrangements between the key players. Performers will only earn the part of the sales that was pre-agreed in the contract terms. Alternatively, they may accept a lump-sum payment earlier on in return for waiving their rights to royalties or opt for a combination of the two.

The situation is different for independent labels who act as phonogram producers. They will make use of aggregators and/or MERLIN in order to license the rights required for online distribution. This distinction occurs because only majors have the capacity to undertake aggregator functions in-house. In return for licensing the rights,

royalties will flow back through the aggregators to eventually reach the phonogram producers (see figure below).

Phonogram producers also receive a "master re-use" fee from synchronisation of their sound recordings to visual media from the AV producers. In that case too, the performer is entitled to a share of the proceeds, the level of which is determined by the contractual arrangements between the two parties.

Figure 3.8: Payment flows for featured artists and session musicians



Source: Europe Economics.

3.2.4 Alternative cases

In the presentation of the mainstream supply chains it was made clear that the phonogram producers (most often the record labels) play a vital role in the system. However, the evolution of online media has generated an abundance of new opportunities for performers. This section will present how performers who possess the skills to produce a complete song, either on their own or with a supporting team, can bypass the record labels and reach the consumers more directly. Such a scenario is most likely for individuals who possess performing and creating skills simultaneously.

The advancements made by technology can now replace, to a certain extent, many of the recording label's offerings. Social media can be used to promote one's creation

and to initiate the creation of a brand name for the performer. In addition, a song can reach audiences through alternative media, which act as a significant facilitator of the distribution process.

A song can be created and uploaded to a streaming service where it is able to gain popularity. This involves little cost and no licensing of rights to third parties while the streaming service will remunerate the performer according to its business model (e.g. under the YouTube Partner Program scheme etc.).

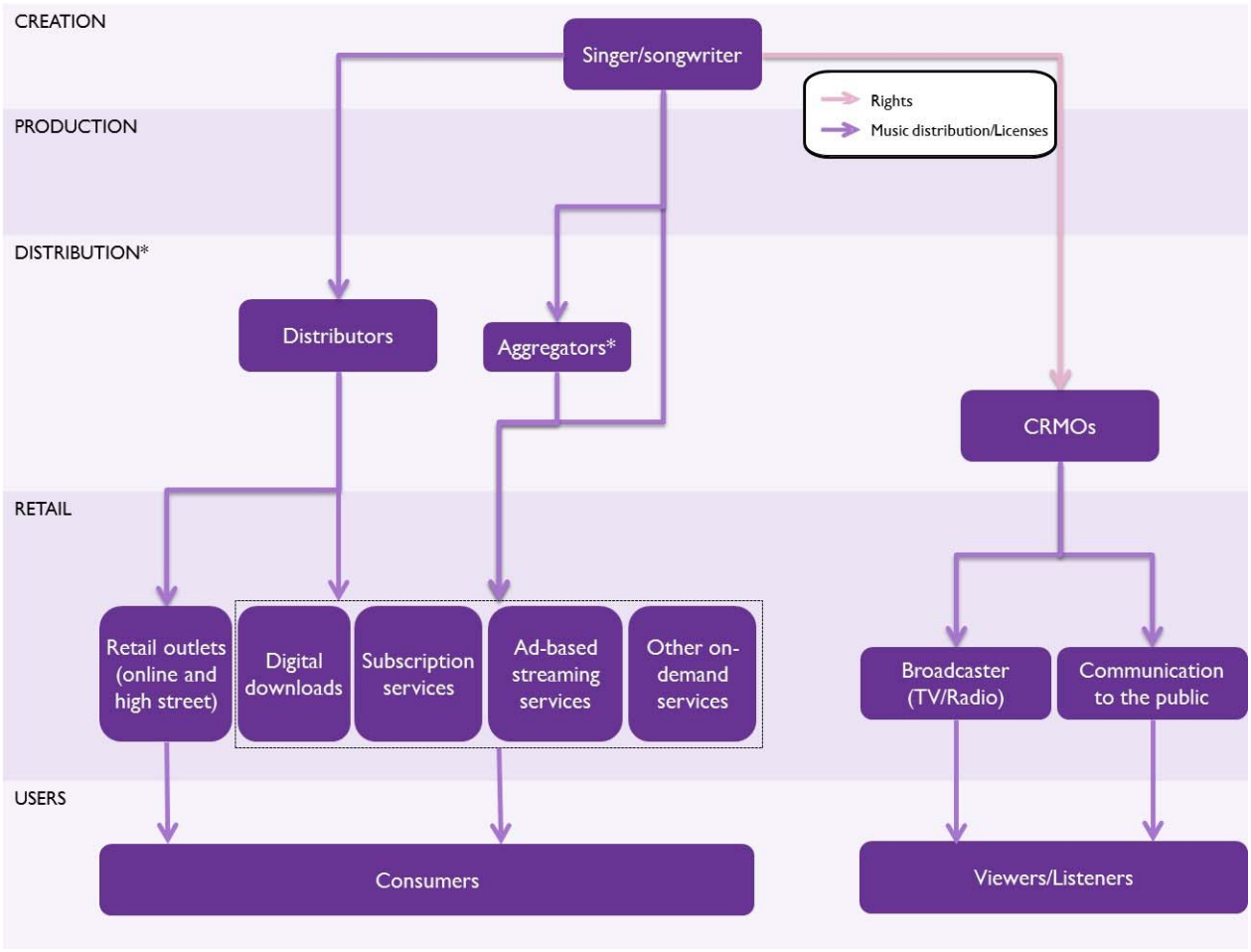
A performer can direct their creation straight to the subscription service providers or digital download websites. Alternatively, they can make use of services like Jamendo which provide listeners with access to the registered songs. The remuneration they receive will depend on the specific business model of the provider. With innovative and changing business models there are numerous opportunities that can be explored and can effectively act as a means to distribute ones creation to a wide audience. What the creator receives in return depends on the case in question.

Aggregators could also be important for this alternative supply chain as they can be engaged by individuals to bring their product up to the quality that on-demand service providers require.

Independent performers can also register with a CRMO which will then be responsible for collection, monitoring and distributing monies back to the musician. However, there exist services targeting independent performers, such as Jamendo, Bandcamp and Soundcloud that can result in the exclusion of CRMOs from the supply chain (except in respect of broadcasting and communication to the public). By posting content on these services, performers willingly participate in a royalty-free environment whereby they are remunerated according to the business model of the entity in question.

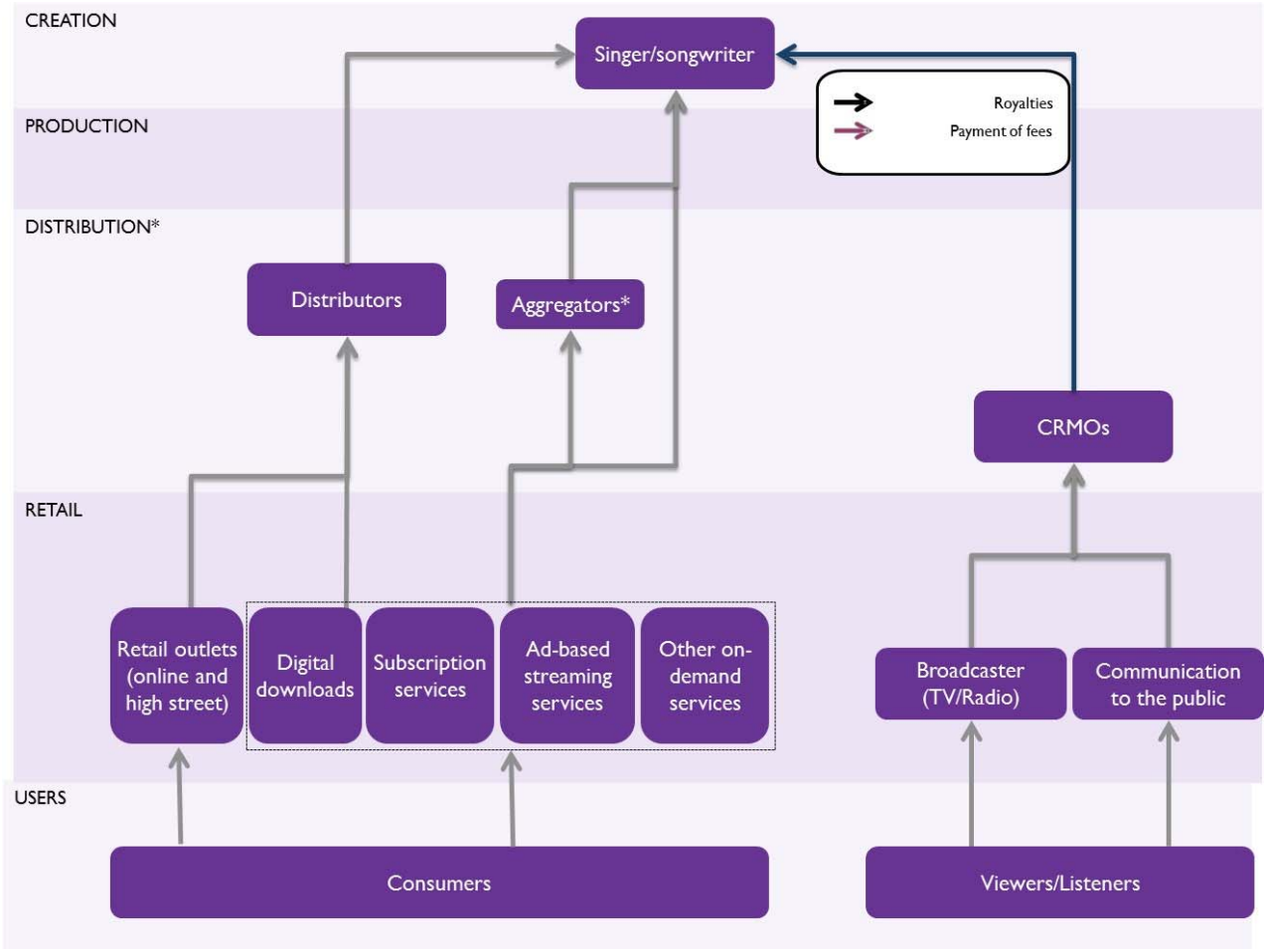
Jamendo offers a “pro” service, which its independent registered musicians can use in order to license their songs to users. This is a royalty free service, where instead of royalties, a licence fee is collected by Jamendo. Soundcloud’s basic package allows users to upload a limited amount of content and to stream the content uploaded by other users; the premium package offers higher uploading limits as well as a wider distribution network along with access to an array of statistical information. Finally, Bandcamp provides a free platform for uploading music to independent musicians but takes a cut from sales, which is dependent on the level of sales as well as some additional features such as the viewing of lyrics.

Figure 3.9: Alternative supply chain for performers



Source: Europe Economics.

Figure 3.10: Payment flows under alternative supply chain for performers



Source: Europe Economics.

While this is a viable approach for musicians, we would consider this currently to be a short run model, which if successful would converge to the mainstream model in the longer run. The important role of record labels in the supply chain and the benefits that their expertise can provide are particularly attractive factors for a performer to consider. As explained earlier in this section, record labels can assist individuals to reach wider audiences and can help with the marketing limitations that would characterise individual efforts.

3.3 Overview of the audio-visual industry[104]

The European audio-visual sector was estimated to have generated an economic value of €107 billion in 2011, representing 2.6 per cent of EU GDP. It also provided 1.2 million highly qualified jobs.[105] The analysis presented in this section focuses on authors and performers in the film and television industries. While certain individuals may be active in both films and TV, the mechanics that govern the industries differ

[104] Additional information on the characteristics of the audio-visual industry is presented in an Appendix (see section 8).

[105] MEDIA, "20 years of passion, 1991 – 2011", http://bookshop.europa.eu/en/media-pbNC3110667/

and, for this reason, our analysis of supply chains and payment flows is presented separately for films and television.

3.3.1 Characteristics of the European film industry and recent developments

Within the EU, five countries – France, Germany, the UK, Italy and Spain – dominate the film production market. Indeed, during 2011 the total production covered by these countries corresponded to approximately 63 per cent of EU film production. Between 2006 and 2011, the number of films produced in the EU rose by around 28 per cent. Box office revenues increased by around 44 per cent between 2010 and 2011 to reach a total of €8.9 billion.[106]

The production of films can be characterised by high sunk costs at an early stage of the lifecycle (i.e. development and production stages) and great uncertainty surrounding the financial return of the film project (as it is difficult to predict the success of the film until it is actually shown in cinemas).

European consumers tend to favour US films whereas consumption of European films varies heavily across Member States.[107] Indeed, the EU has had a trade deficit with the US for film products for many years, reflecting the high penetration rate of American films in the EU. The market share of US films, defined in terms of cinema admissions in EU, was around 62 per cent while EU films (both domestic and non-domestic productions) only represented around 37 per cent in 2012.

Traditionally, a key point of consumption for both US and European films has been cinemas. Despite the significant technological changes in recent years (discussed in greater detail below), there is little evidence that cinemas are becoming significantly less important as a means of film consumption. Indeed, the number of cinema screens in the EU increased from 24,000 in 1999 to 29,719 in 2011. France, Germany, the UK, Italy and Spain have the largest number of screens but smaller countries tend to have higher density of cinema screens on a per capita basis. Indeed, Ireland, Malta and Sweden are the top three countries with cinema screens once adjusted by population size.

With the improvement of digital technology, and in particular the internet, a number of cost-saving opportunities have opened up to the industry. The technological advances have helped to cut costs in the film production process.[108] For instance, the tedious process of physically editing and assembling a film can be avoided and it is now possible to carry out the editing process of digital movies on a personal computer.

At the retail level, the film exhibition market has experienced significant technological advances in recent years. European cinemas have moved towards using digital

[106] Europe Economics analysis of European Audiovisual Observatory statistics.
[107] Charles River Associates (2014), "Economic analysis of the Territoriality of the Making Available Right in the EU".
[108] Charles River Associates (2014), "Economic analysis of the Territoriality of the Making Available Right in the EU".

technology; by 2013, approximately 70 per cent of European screens used it.[109] Cinemas have also started to provide more differentiated services with value added experiences, such as high-quality sound and lighting effects that consumers value. Together with the introduction of 3D technology and consumers' preference for high resolution of films, cinemas have remained in demand as they provide an entertainment experience that is not necessarily limited to the film itself.

In addition to the digitalisation of cinemas, there have been significant developments in both the physical-format video and 'video-on-demand' markets during the past decade. In the early 2000s, the European video software market was shifting from video to DVD and high definition Blu-ray discs.[110] In 2011, the estimated penetration rates of DVD and Blu-ray hardware in TV households in selected EU countries were 75.6 per cent and 3.1 per cent respectively.[111] The introduction of VOD has changed the physical rental and sales markets dramatically. With the increasing use of VOD, consumers no longer need to rely on a specific TV broadcast time to watch their preferred films/TV programmes or wait for the delivery of a physical DVD, but can choose to watch it at any time. A range of new devices, such as laptops, tablets and hand-held DVD players have also developed to support VOD systems so that users can play films when and where they want.

The number of VOD service providers has increased significantly over the years and the main players include iTunes, Xbox Video, Netflix, Video Unlimited, Lovefilm, Ace Lrax, Crackle, Google play, HBO (central Europe), MUBI, VoYo etc. The majority of the film services (80 per cent) are online while the remaining 20 per cent operate on TV digital platforms.[112] By 2011, the revenue generated from VOD online services for film had reached nearly €195 million; an increase of more than 1,000 per cent from 2007. It is expected that the popularity of VOD services will continue into the future while physical medial sales and rentals are expected to fall as a result.[113]

The impact of digitalisation has also resulted in a significant change in the economic architecture of its value chain. Instead of the traditional distribution channels, producers nowadays have the option to bypass distributors and reach consumers directly through the online retail platforms.[114]

[109] http://euromedaudiovisuel.net/Files/2013/06/27/1372318200299.pdf.

[110] Blu ray remains only a small proportion of the market, the estimated penetration of Blu-ray hardware in TV households in selected EU-27 countries in 2011 at only 3.1 per cent. This is the median penetration rate in Ireland, Italy, Sweden, Denmark, UK, Netherlands, Portugal, Belgium, Spain, Austria, France, Germany, Hungary, Czech Republic, Finland, Greece and Poland. Source: Source: EAO and Screen Digest (2011 data).

[111] It is the median penetration rate in Ireland, Italy, Sweden, Denmark, UK, Netherlands, Portugal, Belgium, Spain, Austria, France, Germany, Hungary, Czech Republic, Finland, Greece and Poland. Source: Source: EAO and Screen Digest (2011 data).

[112] http://www.obs.coe.int/documents/205595/1540191/JTalavera+-+The+European+Market+of+VoD+Services/91b6fc6a-a1b0-431c-ab9d-c644a6a6ed74.

[113] http://online.wsj.com/news/articles/SB10001424052702304887104579306440621142958.

[114] Charles River Associates (2014), "Economic analysis of the Territoriality of the Making Available Right in the EU".

3.3.2 Characteristics of the television industry and recent developments

The broadcasting industry in Europe was originally dominated by public channels, i.e. state owned or controlled companies. Since the 1970s, however, transmitters no longer rely only on over-the-air signals to broadcast TV products as alternative technologies have been developed, such as satellite transmission of radio signal or cable transmission in digital format.

Prior to the introduction of cable and satellite television the range of television channels was rather limited. Nearly all television channels were free to view, as they were subsidized either by the national government, or by television licences. The entrance of cable and satellite broadcasters in the 1980's, resulted in an exponential growth in the number of channels, and a shift in power from public to private control.[115] With this shift the source of revenue for providers changed from licensing and government subsidies to advertising. Advertising represented the main form of revenue up until 2009, when pay-TV began to overtake it. In 2010 pay-TV accounted for 48 per cent compared to 43 per cent for advertising.[116]

A recent development in the television industry involves its expanding reach to platforms such as tablets and smartphones. This change comes with the growing popularity of internet based streaming. The result has been that the distribution channels of broadcast TV are becoming increasingly more diverse. In 2009, satellite broadcasting accounted for 31 per cent of the EU TV market, cable for 30 per cent, digital terrestrial TV for 25 per cent and Internet Protocol Television (IPTV) for 5 per cent.

These developments have helped to expand the capacity of the television networks such that the number of public and private national TV channels increased significantly over time; by 2011, there were 7,400 television channels based in Europe, (corresponding to an increase of nearly 1,300 per cent from the 531 channels in 2000).[117] The UK, Italy, France, Germany and Spain accounted for almost two thirds of all European channels in 2008-2009, while more than half of EU Member States had fewer than 40 registered channels in the same period.[118]

During the recent economic downturn, the total number of television channels has remained relatively stable but the number of High Definition (HD) TV channels in Europe has increased significantly.[119] The number of HD TV channels had reached 612 by the end of 2011, an increase from 274 at the end of 2009. Sport continued to be

[115]Van Der Wurff R. (2005), "Competition, Concentration and Diversity in European Television Markets", p249.
[116]EY (2014), "Creating Growth: Measuring Cultural and Creative markets in the EU", p. 55.
[117]European Investment Bank, "The European Audio-visual industry: an overview", European Audiovisual Observatory, http://www.mediadeskuk.eu/latest-news/general-news/2012/april/number-of-high-definition-tv-channels-in-europe-increases/.
[118]Source: European Audiovisual Observatory / MAVISE, http://media-ucn.co.uk/Articles/Comparison%20of%20UK%20and%20rest%20of%20EU%20TV%20market.htm.
[119]European Audiovisual Observatory (December 2012), "Boom in HK television channels".

the most important genre, accounting for approximately 20 per cent of all HD channels, followed by film and generalist content.

The boom in HDTV has been driven by digitalisation. In 2006, at the Regional Radio communication Conference, 119 member states of the International Telecommunications Unit (ITU) agreed to the GE06 Regional Agreement. This agreement called for a complete switch from analogue to digital television by 17 June 2015. Although all nations in Western Europe have met this deadline, some Eastern European nations, including Ukraine, Serbia, Russia, Armenia, Belarus, Georgia, and Moldova have not. Although these nations have not made the switch yet, they are all in the process of switching, and many are expected to complete the transition by the end of 2015.[120]

Despite technological advances and the significant increase in the number of television channels, the high level of concentration in the broadcasting industry persists.[121] The national markets tend to be dominated by a small number of broadcasters, particularly the public service broadcasters.

3.3.3 Authors and performers in the audio-visual industry

In this section we introduce the different types of authors and performers in the audio-visual industry that represent the focus of this study.

Principal directors create an overall vision for the film/TV programme, based on the screen-play, and they control, guide the technical crew and cast in executing the vision. Principal directors can work freelance or as employees of production companies. Under EU legislation, principal directors who worked on successful projects are considered to be an author of the completed products (film/TV).

Screenwriters work as a freelance professionals. A screenwriter works with other participants, often the producer, to create the stories for audio-visual projects and develops a screenplay for audio-visual products.[122] Once a screenplay is adopted and the rights of the script agreed with the purchaser, screenwriters are rarely involved in the later development of a film/TV programme.

Composers of music for film and television compose, perform and arrange instrumental and vocal music to be used in television or film productions. They work with directors and producers to write scores to suit the production.

Individual performers portray a character according to the screenplay and the instructions of the principal director of an audio-visual work. These performers include actors, voice actors, analysts, stand-up comedians, talk show hosts, and game show hosts.

3.3.4 Revenue streams in the audio-visual sector

Authors and performers generally receive an up-front payment in the form of lump sum or salary for their agreement to contribute to the audio-visual work. This

[120]Source: http://www.itu.int/en/ITU-D/Spectrum-Broadcasting/Pages/DSO/Default.aspx.
[121] European Investment Bank, "The European Audio-visual industry: an overview".
[122]B. Ferguson (2009), "Creativity and Integrity: Marketing the "In Development" Screenplay".

payment relates to actual work being done, for example to compensate an actor for days of shooting a film or to purchase the rights to a screenplay from a screenwriter. In addition, authors and performers may receive additional ongoing payments for the exploitation of their works or performances. The mix of up-front payment and other remuneration depends on their agreement with the producers.

Authors and performers have the following potential sources of income:

- Communication to the public (outside online exploitation as explained below): For films, cinema exhibition generates revenue through the sale of tickets. This will generate income for authors and performers only in cases where this has been contractually agreed with producers. Participation in "box-office" income is most likely reserved for very successful authors and performers with increased bargaining power. For TV, communication to the public occurs via broadcasting to a TV. Revenues are generated from consumers' subscription fees (pay-TV), advertising revenues, and public funds (in the case of public broadcasters) including the revenue collected from licence fees. Authors and performers receive remuneration for their right of communication to the public according to their agreements with the exploiter.
- Physical sales of video: Revenues can be obtained through the sales of video products, such as DVDs, BluRay etc. For offline exploitation, authors and performers are remunerated for their reproduction right (for the right to make a copy of the works) and distribution right (for the sale of the DVD) as per their agreement with the exploiter.
- Rental of video: Revenues can be obtained through the rental of physical video products, such as DVDs. Authors and performers are remunerated for their rental rights as per their agreement with the exploiter.
- Online sale of video and on demand access to video: For online platforms, revenues are collected where consumers pay a fee for their subscription to the online film library or pay per view of each film/TV programme. Authors and performers are remunerated for the reproduction and making available rights according to their agreements with the exploiter.

Similarly to the music industry, another source of income for authors and performers is private copying levies but, as noted above, they are outside the scope of this study.

The relative importance of these revenue streams will vary across different types of authors and performers.

3.4 Supply chain of the audio-visual industry[123]

It is important to understand who the key industry participants are, how they interact, and what their relationships are with authors and performers. Before entering into the detailed dynamics of the supply chains of the audio-visual industry, we therefore present a description of the most important participants (other than the authors and performers described earlier).

[123]Charles River Associates (2014), "Economic analysis of the Territoriality of the Making Available Right in the EU", Europe Economics discussion with industry experts, European Investment Bank (2001), "The European Audio-visual industry: an overview".

- Producers are a very important part of the productions process for both the film and the TV industry. A producer can either be an independent individual or may work on behalf of a studio company to develop the concept of a film and oversee the whole creation and production process of a film. There are several different types of production companies with their activities ranging from being solely concentrated on video production (film, TV show etc.) to being parts of vertically integrated organisations that are active in additional parts of the supply chain such as distribution and marketing. The European film production industry is relatively fragmented and is made up of a large number of small independent production companies with the majority of them producing no more than one film per year.

  The producer can sometimes act as a creator and work along with other creators to develop different parts of a film, such as the screenplay. In such cases, he would also share the right of his creation, along with other creators of the film. Besides the creation role, he would be responsible for all parts of the production, including acquiring the rights from creators and music rights from external parties and arranging finance for the production process. In principle, the rights that the producer will need to acquire from different rights holders would depend on the forms and mediums in which the producer intends to exploit the final product (e.g. online or offline).

  The producer will also be responsible for maximising the revenue of the completed film by securing favourable distribution and exhibition deals. Given their central role in the film making process, the producer is typically the main licensing entity of most, if not all, of the associated economic rights of the completed film product.

- Distributors are the entities that have the right to generate revenues from copyrighted material through releasing works to the public or managing the licensing to sub-distribution parties that are responsible for other areas of distribution (in terms of territory, language and medium).[124] In order for distributors to be able to engage in the above activities they will need to have obtained clearance from the right holders (i.e. the producers). The combination of rights that will need to be obtained depends on the intended use.

  They are also responsible for the marketing of the product and often help fund the project (e.g. through pre-sales). Distributors can be established as part of a large studio company (such as StudioCanal in France) or an independent film distributor (such as Momentum Pictures in UK). Their size could vary from large international company to small local distributor specialising certain types of films.

- Aggregators serve a similar function to traditional distributors but only focus on the online retail market. The aggregators operating in Europe include but are not limited to Juice, LevelK, Do&Co Digital and the Movie Partnership. They act a distribution outlet and maintain a network of video-on-demand platforms, through which content of film products are converted and distributed to the online service providers such as iTunes, Netflix, Google Play and Amazon Prime etc. They would also collect the revenue generated from the providers and distribute them to the right holders through the producer. For uses of the work that relate to digital sales,

[124]WIPO (2011), "From script to screen. The importance of copyright in the distribution of films", Creative industries – N.6, p13.

aggregators would need to clear the reproduction rights while for the provision of on-demand access they would need to clear the making available rights.

- Broadcasters (for the purposes of Sections 3.3 and 3.4) distribute audio-visual content to their audience via terrestrial radio signals, through cable or satellite, as well as IPTV, either free-to-view or on a subscription basis. They are required to obtain the rights to broadcast the audio-visual products from the right holders. This can be done through a number of parties, including the producers, distributors, original broadcasters or the CRMOs of the right holders. Broadcasters can also undertake in-house production of TV programmes.
- Collective right management organisations (CRMOs) collect remuneration on behalf of rights owners. Secondary rights in particular are administered by CRMOs, though their involvement varies across Member States:[125]
  - The cable retransmission right.
  - Private copying levies.
  - Rental and public lending rights.
  - Educational uses.

The contractual practice in the audio-visual sector revolves around the figure of the producer. The producer tends to concentrate all economic rights in an audio-visual work, which means that he represents a *'one-stop-shop'* for the clearance of rights. This producer-centric model is the one feature shared by the countries under analysis, whether the ownership is derived (coming into being from a legal 'presumption of assignment', such as in Italy or Spain) or *ab initio*, that is, through a *'work for hire'* doctrine or similar legal instrument (e.g. UK). Indeed, we have not observed any indication that the pivotal role of the producer in today's audio-visual contractual practice has suffered under the structural changes brought about by digitalisation.

3.4.1 Supply chain of the film industry for authors and performers

The European film industry can be divided into several stages of activity, representing the supply chain. The structure of industry is multidimensional and complex with various players such as content providers, right holders and distributors operating in different stages of the supply chain. The development and production of the films can last up to several years while the distribution and exhibition of the production can take place indefinitely. In general, the majority of revenues may be collected during the first five years of the film's distribution life cycle but this differs significantly for different films.

The creation stage of a film project involves the development of the concept by a producer, which is then evaluated to determine whether the project will progress to the production stage. The producer assesses the commercial potential of the product and estimates the budget and likely return on the investment. They also, at this

[125]Source: http://www.saa-authors.eu/dbfiles/mfile/1900/1901/Executive_Summary_SAA_White_Paper_English_.pdf

stage, acquire the rights of the primary products, such as screenplay and music and searches for technical, artistic and financial partners.

Once a project is given the go-ahead, it will enter the "pre-production" phase, which involves finalising the film's budget and the gathering of all human, technical and financial resources. These include finding a suitable director, forming the crew and casting the performers, hiring technical facilities as well as planning production schedules, shooting locations and costumes etc. Once the pre-production process is completed, the film will progress into the production stage in which the director creates the overall vision for the film, and guides/controls the technical crew and cast to execute the vision based on the screenplay. After shooting is completed, the director and other technical specialists will edit the product and introduce various technical elements, such as special effects and soundtracks. The final version of the film is created upon completion of the post production stage.

The final version will then pass into the hands of the distribution company which will promote and sell the completed product via their exhibition network. This includes traditional distributors covering the full range of retailers and aggregators who specialise in the distribution of online works.

Traditionally, the exhibition of a film usually starts in cinemas in its home country before it is passed over for exhibition abroad. It will then follow a sequence of release windows – physical sales and rental and video-on-demand, followed by pay and free TV broadcasting. At the end of the retail chain it will be archived for future exploitation. While some windows remain open indefinitely, such as DVD sales, others occur within a specific time frame according to the licence agreement, such as cinema exhibition. The sequence of the retail life cycle differs from one country to another and not all film products would enter all stages of the retail chain.

With digitalisation and consumers' increasing preferences for flexibility in watching a product, it is also possible to have a "reverse" window pattern in which a film is released on VOD before or at the same time as cinema exhibition.

As noted above, producers are the key points of interactions for the authors and performers. The contractual negotiation between authors and performers and the producer will result in a specification of terms regarding which rights are transferred, for what uses and for how long. In practice, producers prefer getting a complete transfer of rights so that they can engage in unimpeded exploitation of the work and they can enjoy higher benefits in case of upside potential being realised. The greater the bargaining power of authors and performers, the higher the levels of remuneration they can command for any of their rights that they eventually transfer to the producer. In practice, few (very successful) authors and performers manage to obtain a deal in which they receive proportional remuneration. Below, some country-specific examples are explored.

In Lithuania the contractual practice of authors and performers comprises an almost complete transfer of rights to the producer. The one caveat that is generally made relates to equitable remuneration in the context of the private copy. Moreover, in performers' contracts, provisions expressly state that any right to equitable remuneration arising from broadcasting, retransmission or any communication to the public, is transferred to the producer (in exchange for a lump sum). In fact, under

Lithuanian legislation, the only right actors retain is a right to remuneration for rental. Authors' CRMOs administer certain rights of a few authors (who managed to negotiate them in the contract) while related right CRMOs (AGATA) essentially do not deal with actors since actors effectively have no rights in their fixed performances.

In the Netherlands, an increasing number of producers are asking actors to sign an exoneration clause ('*vrijwaringsclausule'*) to prevent a number of exclusive rights being exercised collectively through CRMOs (*see duplication of rights issue*). That is, audio-visual producers want to make sure that the rights assigned to them are not challenged by CRMOs under the claim that those same rights have also been transferred to them by the author or performer.[126]

In Spain EGEDA has set up an initiative for VOD whereby producers make films available online and decide the terms of distribution (for which performers would be entitled to receive remuneration pursuant to the making available right). In the Netherlands, we understand that some actors have transferred their making available rights to NORMA.[127]

Producers, as the key right holders of a completed film, are in charge of the distribution of the licences to the distributors and aggregators. Some producers may have in-house teams dedicated to distribution and can directly reach the retailers. Others may need to pay a distribution fee to the distributors and aggregators to release the film via their network. The distributor would then sell the licences to use the film for commercial purposes to cinemas, physical sales and rental providers, other retailers and TV broadcasters.

For online distribution, online services providers also acquire licences from distributors and/or aggregators.

The situation described above reflects the mainstream model. Under this model TV broadcasters also access a film through distributors or aggregators and do not engage with CRMOs for any licensing purposes. While in most cases the cable retransmission right, for example, is covered by the presumption of transfer to the producer, in some instances (illustrated by dotted lines in the diagram below) CRMOs manage television broadcasting on behalf of their members and as such are responsible for licensing the rights for TV broadcasting and for the licensing of the cable retransmission rights to broadcasters.

The role of the CRMO will depend on Member State practice and the role of the CRMO in the industry. For example in Spain, Italy and Poland, the broadcaster as the final distributor is considered by law to be responsible for payments to the authors and performers. These are paid through the relevant CRMOs. Such a provision makes it clear that it is an obligation of the broadcaster, and not of the producer, to pay remuneration to authors and performers.

[126]Given the legal uncertainty in the Netherlands, as evidenced by recent court cases: Rechtbank Amsterdam, 27 augustus 2014, IEPT20140827, ECLI:NL:RBAMS:2014:5397 (LIRA/UPC c.s.) and (NORMA- NL Kable) ECLI:NL:GHSGR:2012:BW1078.

[127]See also AEPO ARTIS, 'Performers' rights in international and European legislation: situation and elements for improvement', Brussels (2014).

In France audio-visual authors can transfer the management of their rights to CRMOs that negotiate licensing contracts and establish tariff rates with broadcasters. This is independent of direct licensing by the film producer who negotiates its own remuneration with the broadcaster. An example of such CRMO is the Société des Auteurs et Compositeurs Dramatiques.[128]

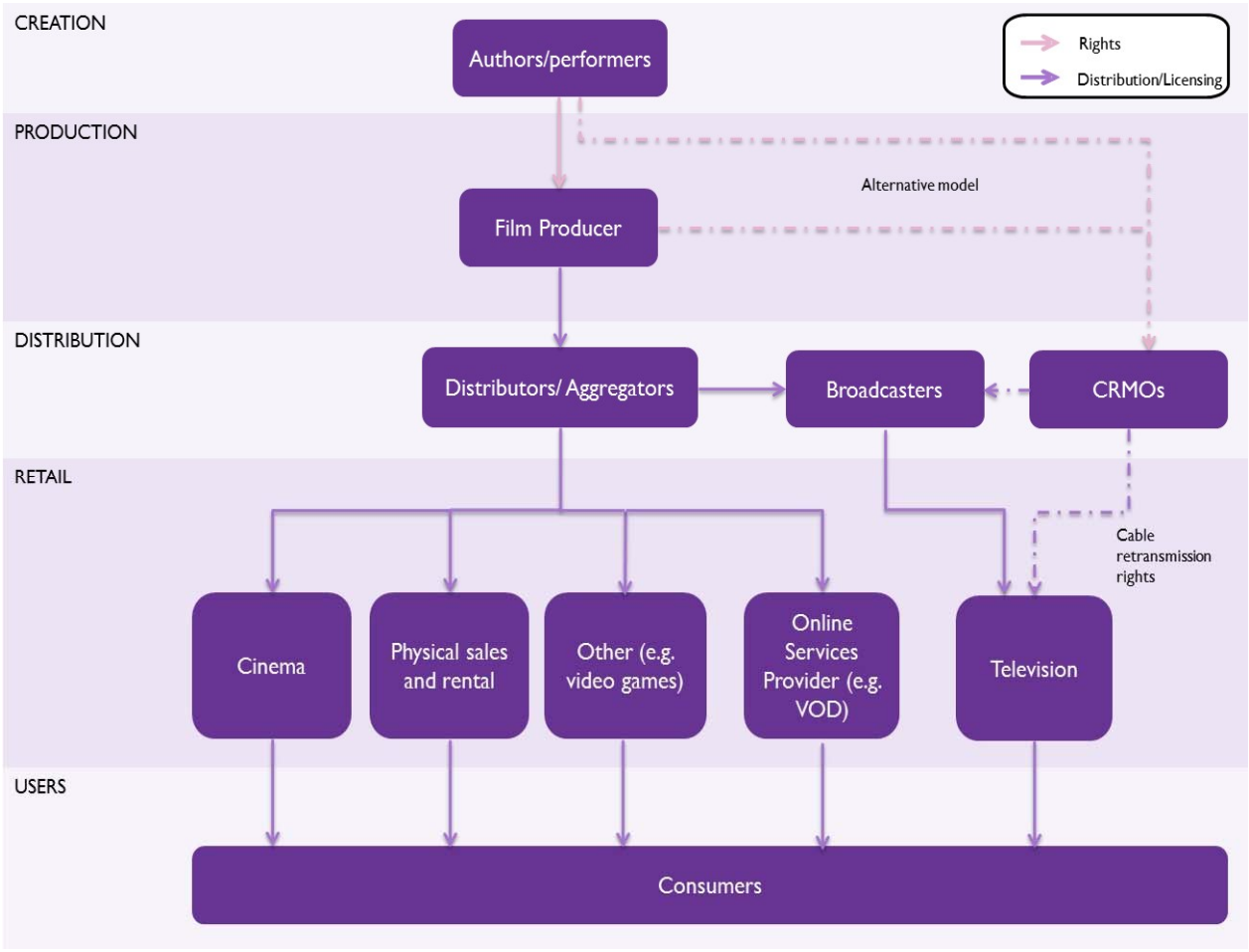
In Germany VGF (Verwertungsgesellschaft für Nutzungsrechte an Filmwerken) was founded by film producers and film distributors in order to administer and collect levy claims under the German Copyright Act. The society represents film studios and directors and holds the rights of communication to the public and making available over the internet. The licence granted by the society to cable network operators allows the retransmission of cinematographic and television works in the respective cable network.[129]

In Spain SGAE (Sociedad General de Autores y Editores) represents *inter alia* music publishers and film directors. It holds reproduction/copying rights, public performance rights, distribution rights and rights of communication to the public. It licenses to broadcasters the communication to the public right.[130] In Poland SAFT (Stowarzyszenie Aktorów Filmowych i Telewizyjnych) manages performers' communication to the public rights and grants cable or satellite television broadcast rights.[131]

The supply chain of the film industry is presented in the diagram below.

[128]Committee on development and intellectual property (CDIP), (2014), "Study on collective negotiation of rights and collective management of rights in the audiovisual sector", p.22.
[129]Source: http://www.collectingsocietieshb.com/CollectingSocieties/DisplayCollectingSocieties?societyfk=112
[130]Source: http://www.collectingsocietieshb.com/CollectingSocieties/DisplayCollectingSocieties?societyfk=225
[131]Source: http://www.collectingsocietieshb.com/CollectingSocieties/DisplayCollectingSocieties?societyfk=120

Figure 3.11: Supply chain of the film industry



Source: Europe Economics.
Note: It is possible that a film producer oversees both the creation and production stages and also has direct contribution at the creation stage.

The flow of payments in the European film industry can be characterised according to the stages of the supply chain.

At the outset, the producer usually makes initial payments to various right holders, in the form of salary or a lump-sum, to acquire the inputs for production. Whether authors and performers receive additional ongoing payments for the exploitation of their works or performances will most often depend on their agreement with the producer.

This agreement will specify which rights will be transferred to the producer as well as the remuneration in return for this transfer.

Only few authors and performers with substantial bargaining power will be able to secure proportional remuneration for the transfer of their rights, with the majority transferring their rights in return for a lump-sum payment. The level of payment received will depend on the popularity and prior success of the author or performer as well as the number of rights that they will be transferring to the producer, the mediums these rights will relate to and the length of assignment.

In some countries however authors and/or performers are entitled by law or collective bargaining agreements to remuneration for certain forms of exploitation (e.g. online,

broadcasting, rental). CRMOs also often play a role in distributing royalties generated by cable and other retransmission rights.

There is a wide array of contractual practices in both the delimitation and the management of remuneration rights and it generally differs significantly between countries. Differences exist, for example, in respect of equitable remuneration for the communication to the public of commercial fixations. This relates not only to actual means of communication but also to the distinction, not always clear, of what is exclusive and what is subject to a remuneration right. Further, even in countries where protection of fixations has not been extended to audio-visual works such as the Netherlands**,** SENA, the CRMO for music performers, also aims to extend its mandate to the collection of equitable remuneration for video-clips.

In Spain, the role of CRMOs in the collection of proceeds is important. Spanish law states that the creative party should receive remuneration for every type of economic exploitation assigned. Although other countries such as the Netherlands also include a similar provision in its legislation, Spanish law is more specific in the practicalities regarding collection for uses such as rental or communication to the public (art. 90 LPI). In practice, though, CRMOs such as AISGE, the Spanish CRMO for audio-visual performers, argue that this system seldom works in practice. That is, collective agreements state, for example, that a performer is owed five per cent on top of any agreed salary from the transfer of his rights to a producer. In practice, again according to CRMOs, this amount is generally not added but rather deducted from the performer's salary.

A similar situation exists in the Netherlands. In practice, actors, when negotiating with the producers, generally receive a salary that already includes the payment for the transfer of rights (i.e. it appears that the copyright-based transfer is not singled out as such). Industry representatives argue that additional remuneration was paid for re-runs, but this appears to no longer be the case.

In Lithuania the contractual practice is that authors and performers receive only a lump sum payment from the producer. Even though actors retain a right to remuneration for rental, the absence of a functioning audio-visual rental market in Lithuania, means that no remuneration is currently collected for this type of use either. As a result, CRMOs' participation in collection of remuneration in audio-visual sector is very limited.

In France, as regards cinematographic works, a CRMO for performers (ADAMI) is paid, after the cost of the film has been amortised, a global amount of two per cent of the producer's net receipts ('*recettes nettes part producteurs*' or 'RNPP'). The CRMO should then distribute the sum to the performers in proportion to the salary they received for acting in the film. It should be noted that, according to our correspondent, not many films actually manage to amortise their cost of production.

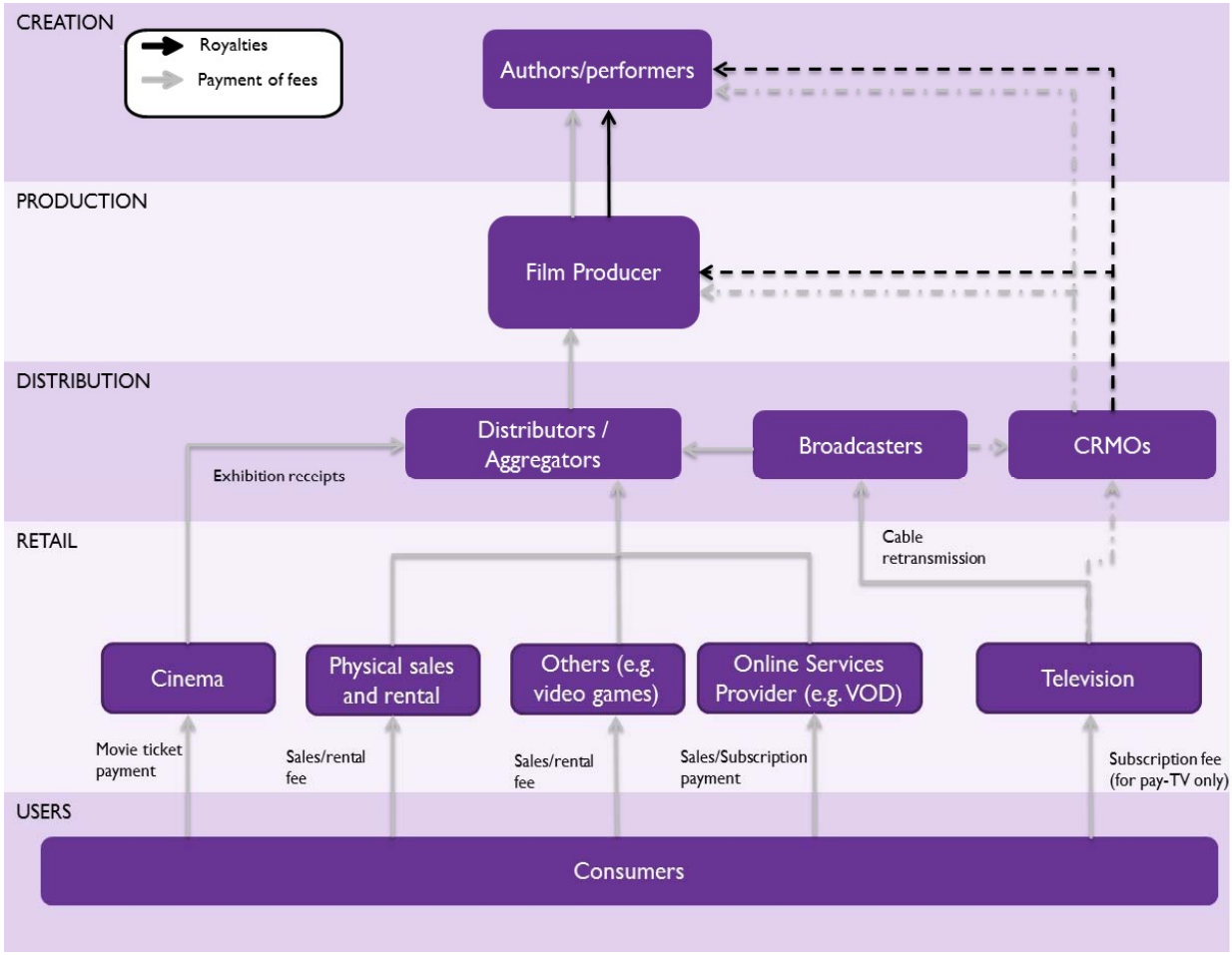
As regards VOD, the collective bargaining agreement of 11 September 2007 provides for a payment of six per cent of the net receipts by the producer to the performers. This amount is redistributed by ADAMI to the performers in proportion to the salary they received.

Regarding authors (film directors and screenwriters), the relevant agreement of 12 October 1999 (extended by Decree of 15 February 2007) notably provides that the exploitation by pay-per-view and VOD of cinematographic and television works are directly managed and collected by SACD.

Similarly, in Spain, as described earlier, an EGEDA initiative for VOD means that performers are entitled to receive remuneration pursuant to the making available right. In the Netherlands, NORMA is currently approaching providers of VOD services to negotiate a remuneration scheme for making available on demand.[132]

The flow of payments in the film industry is presented in the figure below. The dotted lines in the diagram reflect the possibility for the CRMO to be more or less involved as discussed in the country examples above. The national context may mean that the CRMO is responsible for transmitting to the author and performer (or even the producer where the remuneration rights have been transferred) the monies for the rights they manage, such as cable retransmission.

Figure 3.12 The flow of payments in the film industry



Source: Europe Economics.

[132] See also AEPO ARTIS, 'Performers' rights in international and European legislation: situation and elements for improvement', Brussels (2014).

3.4.2 Supply chain of the television industry[133]

The early stages of a TV production involve the development of content and production of the products following a similar process to the film industry, such as acquiring of rights from screen writers and seeking financial partners. Specifically, authors' and performers' rights for the reproduction, distribution, making available and communication to the public rights will need to be cleared by exploiters who wish to promote the work in the full array of physical and digital formats. Differences in the rights that are transferred to producers may be influenced by the producer's intended use of the work.

As such, the producer is, again, the key player in the formulation of the idea and oversees the whole development and production stages. He also holds the majority, if not all, of the economic rights of the completed TV products. In some cases rights for cable retransmission and TV broadcasting may be licensed through CRMOs.[134] The treatment of rights will however vary depending on the nature of the programme, specifically:

- If a programme is commissioned, a TV broadcaster places an order for a programme or a series with a producer. In this instance, the broadcaster retains full editorial control of the product and producers lose the rights on the production.
- Under a coproduction model a TV broadcaster and other investors hold a share of editorial control and product rights.
- Under a licence fee model a TV broadcaster buys the right to broadcast a programme/product for an agreed number of runs over a limited period of time. In this scheme, the producer retains the rights to the programme.

Once a TV programme is completed, it will enter into the programming and packaging stages in which the broadcaster will acquire it for broadcasting. Broadcasters need to acquire the licence of programmes that are not produced in-house; this is in relation to the communication to the public right. The licence to broadcast a work that was not produced in-house needs to be obtained either from other broadcasters or from CRMOs e.g. in countries where the cable retransmission right is licensed by them.

The broadcaster will package the programme and TV products will be available to view by consumers either via broadcasting transmission or via cable operators. TV products with adequate commercial value could also be exploited in the form of physical and online video copies (including VOD) and could generate revenues from the physical and online retail channels, similar to film products. For online retail channels, aggregators can obtain the licences of the programme directly from producers or from broadcasters to distribute to online service providers. TV programmes can also be made available through the platforms of online services providers via aggregators.

[133] Charles River Associates (2014), "Economic analysis of the Territoriality of the Making Available Right in the EU", Europe Economics discussion with industry experts, European Investment Bank (2001), "The European Audio-visual industry: an overview".

[134] As far as cable retransmission rights are concerned, in Member States where CRMOs are mandated to manage such rights, they are also, according to a 2006 ECJ judgement, in control of authorising TV operators to use the protected material. Source: http://eprints.nottingham.ac.uk/1708/2/ECJ_clarifies_collecting_societies_(2).pdf.

Online service providers acquire the necessary licences from aggregators and/or broadcasters.

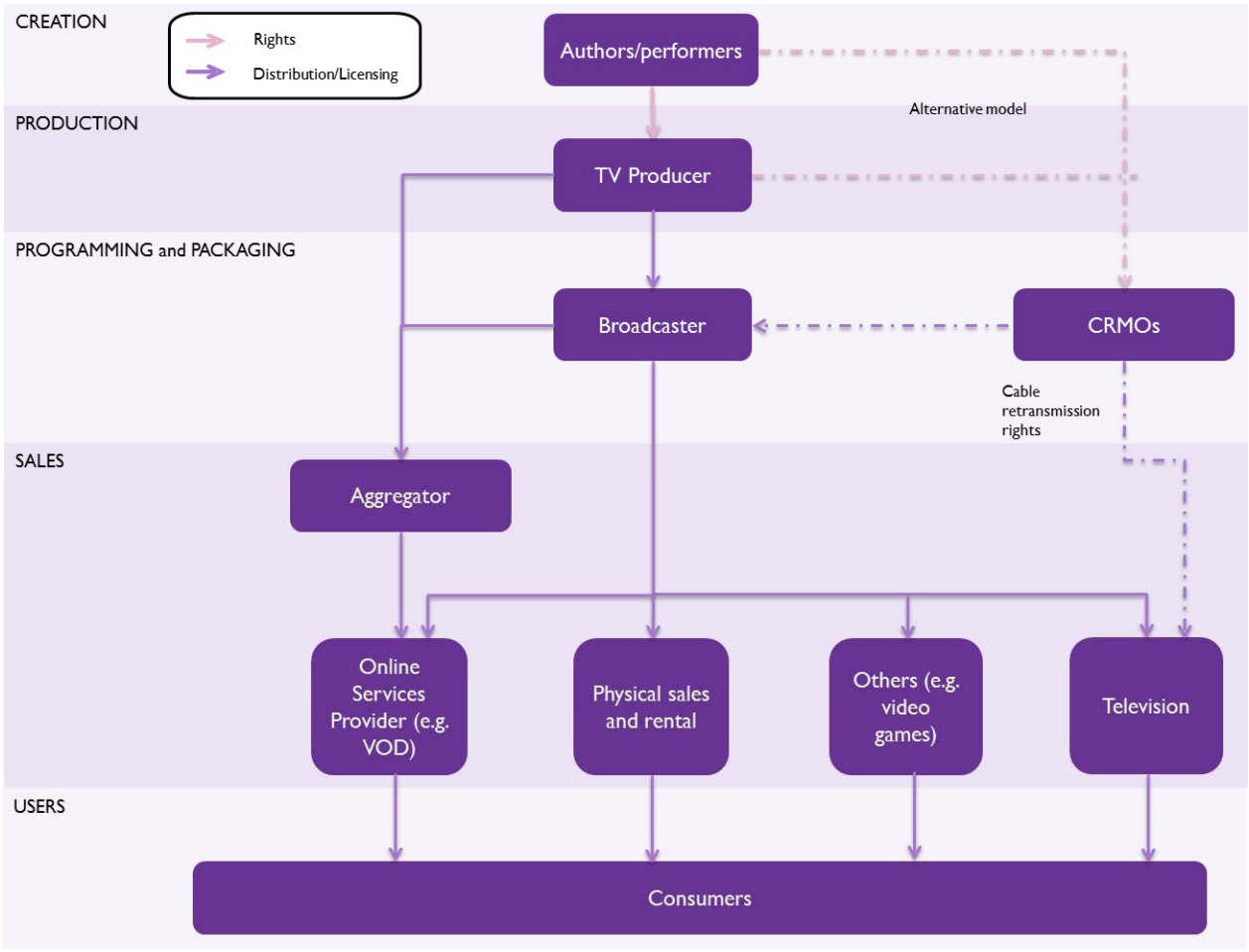
A key issue in the transfer of rights in this industry is the potential for legal uncertainty in the rights licensing and collecting schemes. The legal uncertainty seems to arise mainly from the lack of the specification of rights within the presumption of assignment of rights to the producer. The number of rights that are assigned is not always specified and, as a result, often leads to 'double counting'. In the Netherlands for example, this has meant that, regarding for instance the cable retransmission right, both producers (under presumption of assignment) and CRMOs, arguing that authors/performers have assigned the rights to them, claim to be owners. In practice, CRMOs have been aiming to license the cable retransmission right to users such as TV operators. These however, claim to have already acquired content from a producer on a 'free-from-rights' basis and therefore don't hold the claims from CRMOs as valid. That is, TV operators are of the opinion that these exclusive rights are already transferred to the producer and therefore CRMO's are not legally entitled to manage and collect remuneration under these rights.[135]

In line with the mainstream and alternative models presented for the film industry (section 3.4.1), the dotted arrows represent the alternative model where the CRMOs are involved in the licensing of TV programmes. In this alternative model, some of the authors', performers' and TV producers' (the right holders) rights are licensed by CRMOs (as opposed to the broadcasters or aggregators being involved in this process). Thus, dotted arrows from the CRMOs to the broadcasters represent the alternative distribution route that needs to be followed in some Member States.

We present below the supply chain of the television industry below.

[135]The audio-visual CRMO's in the Netherlands (LIRA for screenwriters, VEVAM for directors and NORMA for actors and other performers) have been negotiating over the last years with distributors, broadcasters and producers (united in the so-called "RODAP") regarding remunerations for authors and performers concerning their exclusive rights (for (cable) broadcasting and making available on demand). These negotiations have now been taken up by PAM.

Figure 3.13 Supply chain of the television industry



Source: Europe Economics.
* It is possible that a TV producer oversees both the creation and production stages and also has direct contribution at the creation stage.

In return for the rights transfers from authors and performers, the producer would need to make initial payments to various right holders to acquire the inputs for production. This could be lump-sum payments, salary or a combination of both. Depending on the contractual agreement, upfront payments are often required by creative talent, such as the director and actors to participate in the production of a product.

In line with the film industry, the intentions of TV producers with regards to the exploitation of the work will be the main determinants of an author or performers remuneration arrangements. In principle, the larger and more diverse the network through which a TV producer intends to distribute the work the broader the transfer of rights would need to be. In turn, broad transfers of rights imply that a higher level of remuneration would be demanded by the author or performer.

Authors and performers in a stronger bargaining position will be more capable of negotiating conditions that they may view as more favourable (e.g. proportional remuneration or a more limited transfer of rights).

Performers in free-to-air TV have different remuneration percentages agreed on top of the performer's salary depending on, amongst other factors, the time of day of the

broadcast. As regards cable or satellite TV distribution, the producer pays a percentage of his net receipts to the performer based on established percentages.

Broadcasters earn revenues from subscriptions for pay-TV channels, advertisements, and/or public funds and these revenues are then re-distributed up the supply chain to different right holders via the producer. The right holders can also receive remuneration for the TV broadcasting rights of their works from TV operators and broadcasters, which would be collected via their representative CRMOs.

In France, SACD, the main CRMO for authors, has negotiated other collective professional agreements, such as the agreement of 20 December 2012. This agreement provides that the payment for the commissioning of a script for a TV fiction must consist of at least 30 per cent of non-recoupable lump sum royalties (i.e. no reimbursement is due even if the work is not successful).

Broadcasters can also generate revenues from other retail channels of the programmes in the form of DVDs/Blu-ray via physical sales and rental and those revenues would be re-distributed by the broadcaster back to producers as a return for their reproduction and distribution rights. The payment/royalties by online service platforms would be collected by either the broadcasters or the aggregators. Aggregators would then either pay the appropriate amount to the broadcaster or the TV producer (depending on who engaged them in the first place).

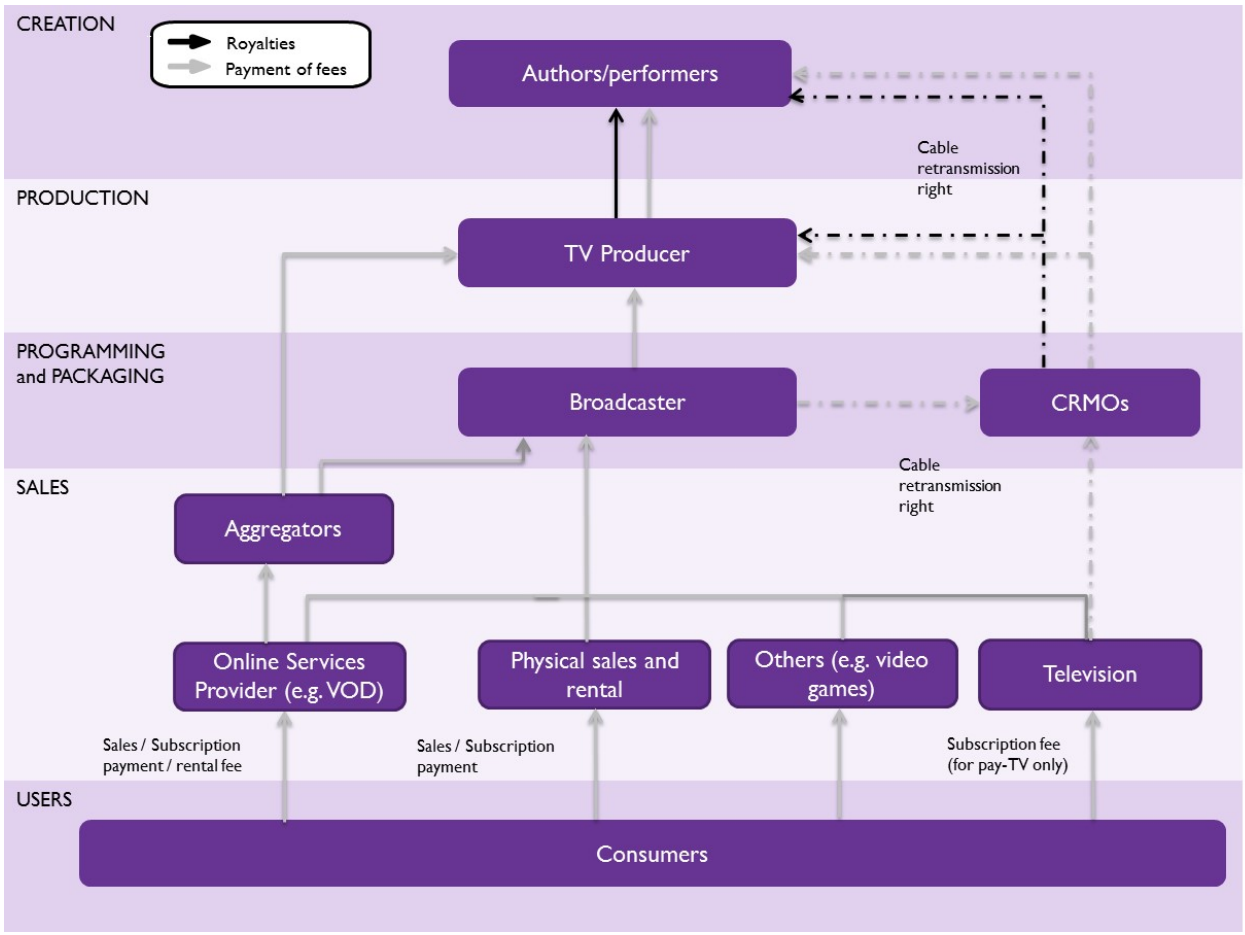
We present the flow of payments in the television industry below. The black arrow for royalties refers to the flow of royalties from TV producers to authors and performers. CRMOs also have a role in distributing the royalties from TV operators to TV producers, authors and performers but this would depend on the country practices which vary across Europe. This is represented as a dotted black arrow.

Equally, the grey arrow shows the flow of licence payments from the sales stage to the creation stage of the television industry. Similar to royalties, CRMOs may play a role in the distribution of licence payments and this is represented as dotted grey arrow.

The flow of retail payments between users and retailers in the sales stage is shown as purple arrow.

In addition to royalties and licence payments, authors and performers can also receive a salary as part of their remuneration package and this is represented as blue arrow.

Figure 3.14 The flow of payments in the television industry



Source: Europe Economics.

3.5 What are the key relationships in determining remuneration for authors and performers?

As illustrated above, supply chains and payment flows in the music and audio-visual industries involve a number of players and vary both across different types of authors and performers and across Member States.

The music industry supply chain is particularly complex with distinctions between both offline and online music, and authors and performers. For authors the roles of the publisher and CRMO are particularly important and represent the main point of interaction under traditional models. Their interaction with record labels is generally limited to instances where the record label is itself the publisher. The relative importance of these players can vary between the offline and online worlds. The range of business models in the online domain has altered the traditional dynamic between authors, their publishers and their CRMOs. The role of the CRMO in the online supply of musical works is more direct than in the offline model (where mechanical rights and the associated royalties are funnelled through the record labels). In the online scenario CRMOs are increasingly involved in licensing and in the collection of royalties associated with the making available right.

In contrast to authors in the music industry, the record label (as a producer of phonograms) is a key player for performers in the music industry. Indeed the phonogram producer plays the central role in the supply chain as a whole; the role of the CRMOs is more restricted to the collection of fees for communication to the public and other forms of remuneration.

In the audio-visual industry too, the central player is generally the producer, who acts as a focal point in both film and TV. Meanwhile the role of the CRMO is much more limited and it varies across different EU Member States. There is currently no standard remuneration practice across Europe and authors and performers would be remunerated for their creation according to the local market practices.

This analysis provides two important insights for the determination of authors' and performers' remuneration in the music and audio-visual industries. First, in most cases, the level of remuneration that authors and performers earn is dependent upon the contract negotiated with the publisher/producer in exchange for a transfer of their exclusive rights. Second, the complexity of supply chains and the associated payment flows can make it difficult for authors and performers (as well as others operating in the industry) to fully understand the source and rights associated with the remuneration they receive.

4 Analytical Approach

In the previous sections we have identified the legal provisions that have the potential to influence remuneration and the key players with whom authors and performers negotiate their remuneration. However, to analyse the remuneration of authors and performers we must understand the full range of factors that might be expected to affect remuneration outcomes, and the process by which remuneration contracts/agreements are defined. This forms the theoretical framework against which the data gathered through the legal review and survey of performers and authors are examined. The data will then be used to determine the extent to which such factors do in fact influence the remuneration of authors and performers and, in particular, the role of the legal framework in determining the observed outcomes.

4.1 Development of theoretical framework

As noted above, the first step in our analytical approach is to develop a theoretical framework within which it will subsequently be possible to assess the remuneration of authors and performers. The theoretical framework is designed to be general in nature and is intended to encompass all types of author and performer across both industries and from any Member State. Given this objective, it has been necessary to simplify reality in order to produce the theoretical framework.

The figure below presents an overview of the process by which the level of remuneration received by authors and performers is determined and identifies the key influences on remuneration outcomes.

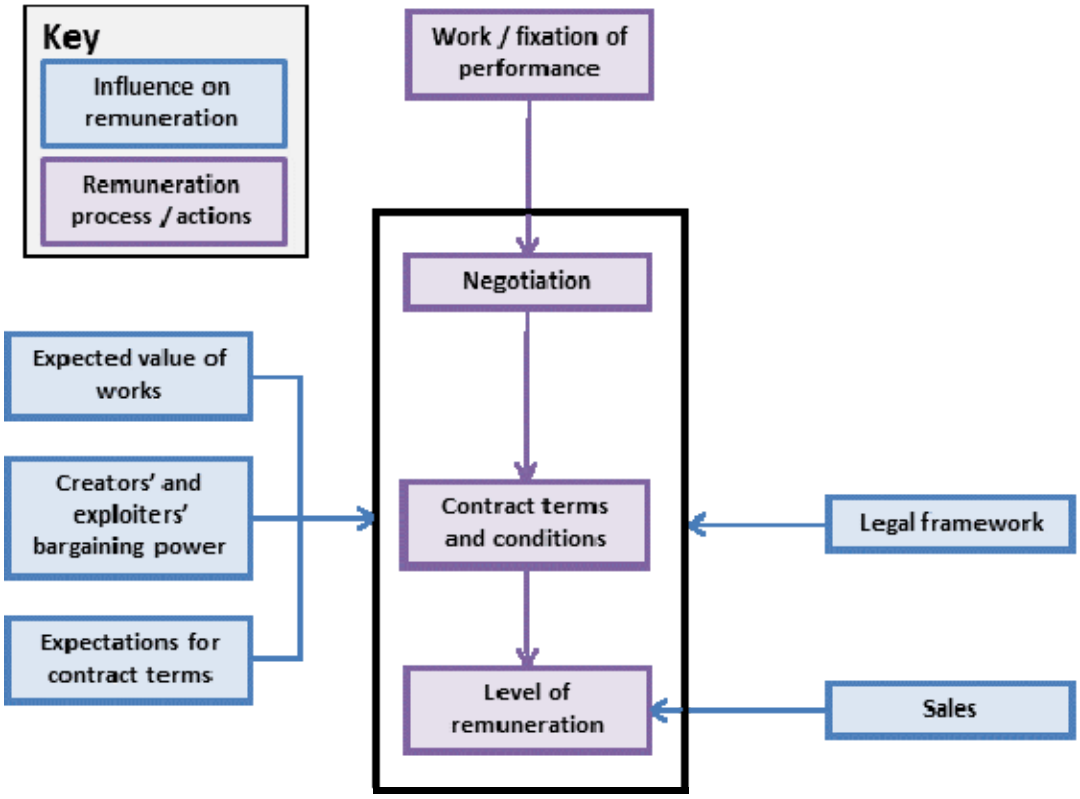
As shown in the figure, the first step in the process is that a piece of work has been developed (e.g. a song) or a tentative agreement exists between the creator and exploiter (e.g. an actor has successfully auditioned for a part). The creator and exploiter will then enter into contract negotiations, which will in turn result in a specific contract with set terms and conditions and set remuneration agreements (the actual level of remuneration will, in some cases, be affected by the commercial success of the work). The figure also presents a number of high-level influences of the negotiation (i.e. factors that can potentially affect the level of remuneration received by the author / performer). Subsequent diagrams in this section describe these influences in greater detail and illustrate how they may affect the remuneration of authors and performers.[136]

It is important to note that this framework has been designed to capture all types of possible contractual arrangements. Therefore, some elements of the figure may seem

[136] It should be noted that the influence of the legal framework is covered is several different sections below. The legal factors discussed in detail in this chapter are: rules on the form of payment; collective bargaining; exclusive/non-exclusive nature of rights; waivable/non-waivable character of non-exclusive rights; and rules on transfers of rights (e.g. specification of modes of exploitation, limit on transfer of rights of future works, future modes of exploitation).

to be less applicable to certain types of remuneration contracts. For example, it is typically the case that CRMOs apply the same terms and conditions to each of its members and hence there is no room for negotiation. Similarly, certain remuneration contracts may be in the form of lump-sum payments and so independent of sales. Such cases can nonetheless be accounted for within the proposed theoretical framework: there would simply be one or more 'missing' boxes from the specific diagram.

Figure 4.1: High-level process of securing remuneration



The following sub-sections discuss the framework in more detail. It should be noted that a 'no negotiation' case can be captured by the discussion below in the sense that it is an extreme example in which the bargaining power is held entirely by a single party which is able to dictate the terms of the agreement. In such a case, the options available to the other party are 'take it or leave it'.

4.2 Expected values, risk sharing and incentives

The characteristics of both the product itself and the product market have important implications for the functioning of a remuneration system, particularly with regards to information on the value of the product.

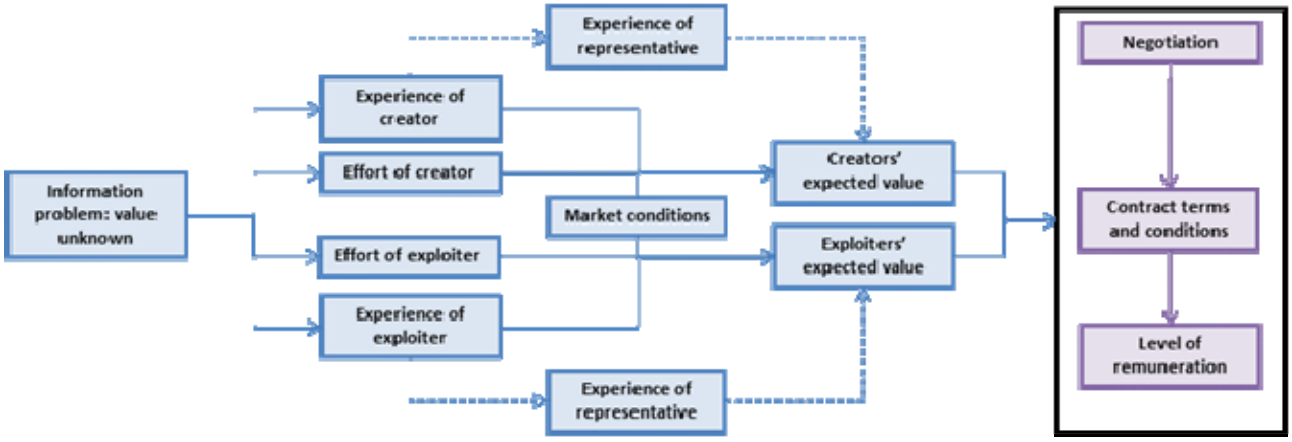
In this study, the product in question is the economic right for the purchaser to exploit the works of an author or performer.[137] The purchaser is, therefore, an intermediary and so the value of the product to both the seller and the purchaser is dependent on

[137] We abstract from the small minority of cases in which a creator may interact directly with a user.

the actions of third parties: end consumers (notwithstanding the fact that the creator and exploiter can themselves influence the outcome through their effort).

Therefore, in contrast to a standard product market, the value of the economic right cannot be known by either party *ex ante*. Neither the author/performer nor the purchaser knows precisely how many sales of the economic right can be achieved nor the total revenue that would be achieved through the sale of the product until after the economic right has been purchased. Both parties to the transaction face an information problem. The figure illustrates the information problem underlying the negotiation.

Figure 4.2: Influences on expected value



Source: Europe Economics.

In particular, the figure shows that the existence of an information problem means that at least one party to the transaction will have imperfect information on which to base his expectation of the value of the work which, in turn, would affect the level of payment / remuneration that the party seeks during negotiations. One aspect of the information problem relates to the fact that the market success of the work cannot be known by either party *ex ante*. Therefore, each party will need to form its expectation based on the information that the party holds on the quality of the work (information which may be asymmetric) and their judgement of the likely market success of the work. The *ex post* accuracy of the latter estimate may be improved given greater experience and hence both the experience of the creator, the exploiter and any representatives that they use can affect expected values. However, the *ex post* success of the product is also affected by the effort exerted by both the creator and the exploiter, and the effort exerted by one party may not be verifiable by the other (which is another information problem). This will be factored into judgements on the expected value of the product and subsequent contracts may be designed to provide positive incentives for effort and thereby to maximise income for both the creator and exploiter.

The interplay of asymmetric information, risk and incentives will affect the nature of contractual agreements. The presence of asymmetric information will affect the negotiation differently depending on the nature of the asymmetry. Specifically, the impact will differ significantly between cases where the information is held by the creator and cases where the information is held by the exploiter.

A substantial stream of economic literature has explored the implications of risk, asymmetric information and incentives. The models developed in the literature are referred to as 'principal agent models'. Authors and performers in the music and audio-visual industries can be considered as our agents while the exploiters (e.g. record labels, producers, publishers etc.) who negotiate with them in order to reach final contractual terms are the principals. At this point, we introduce the implications of asymmetric information for the outcome of a contract.

We first consider a three staged process to the negotiation: proposal by the principal of a contract, acceptance/rejection by the agent and finally, execution or reservation allocation (if proposal is not accepted).[138] This model is relevant for many contracts for authors and performers. Risk aversion and incentives will influence the principal's decision of what level of remuneration to offer to the agent but the agent's only decision is whether to accept or reject the contract.[139]

More precisely, a principal or agent would be classified as risk averse if he prefers to receive a guaranteed income of, say, €100 over a package in which he receives €50 with a chance of 50 per cent and €150 with a chance of 50 per cent even though the expected remuneration of these payment arrangements is identical (i.e. €100). Risk loving individuals would prefer the risky option over the guaranteed €100 while risk-neutral individuals would be indifferent between the two options.

While this may not be correct in all cases, we might assume that exploiters in the audio-visual and music sectors typically have a greater preference for risk than do creators, based on theoretical and empirical evidence that wealthier individuals are less risk-averse than poorer individuals, and exploiters are likely to have higher incomes each year than are performers.[140] The appetite for risk may also differ between exploiters: some may be more risk loving than others. For example, exploiters that are owned by shareholders are likely to be more risk loving than are those that are privately owned and financed by debt (e.g. partnerships or sole traders).[141] In addition, exploiters have traditionally been better able to diversify risk across their portfolio of authors and performers and this possibility may also increase their willingness to bear risk for a given individual author or performer.

Risk loving individuals would typically prefer proportional remuneration arrangements, as while this comes with a risk that they earn little (e.g. if a piece of work has been unsuccessful) it also comes with a chance that it would earn a substantial amount of remuneration. By contrast, risk-averse individuals would in general prefer lump-sum

[138] The reservation allocation can be conceptualised as either a pre-existing contract (in case of a renegotiation) or a non-agreement situation.

[139] Maskin, E. and Tirole, J. (1992), "The Principal-Agent Relationship with an Informed Principal, II: Common Values", Econometrica, Vol. 60, No. 1 (Jan., 1992), pp1-42.

[140] See, for example, Guiso and Paiella (2008),"Risk Aversion, Wealth, and Background Risk" whose empirical research confirms that the degree of absolute risk aversion is decreasing in individual endowment.

[141] This is because a 100 per cent debt-funded organisation will be disciplined only by its lenders (as opposed to shareholders). Lenders want to be repaid. So the lender's concern is to minimise downside risk – there is no upside risk for a lender. By contrast, an organisation with equity will have shareholders that experience upside as well as downside risk. Such shareholders will want to maximise enterprise value, which includes upside risk. The consequence is that the organisation will have a higher risk appetite if it has shareholders.

remuneration at the expected value of their work to a risky option that has the same expected value.

A further issue here is that of timing. Lump-sum payments result in remuneration for the creator today whereas proportional arrangements result in payments being received over time. The theory of time preference for money states that individuals prefer to receive money today over an equivalent payment in the future. Individuals will differ in their strength of preference for payments today: those with a strong preference for payments today are referred to as having a high discount rate, while those that have less strong preferences for immediate payment have lower discount rates. Authors and performers are likely to have higher discount rates than are exploiters and hence would have a stronger preference for lump-sum payments.[142]

The above discussion suggests that authors and performers would agree on lump sum remuneration at the expected value of the work under conditions of perfect information (i.e. if the true expected value of the work were known to both parties *ex ante*).

However, as indicated above, there are a number of features of music and audiovisual markets that complicate negotiations, including the presence of asymmetric information and the more general problem that it may not be possible for either the author or performer to estimate the true expected value of the work accurately due to hidden information and uncertainty with respect to the actions that the other party would take to promote the work (which can potentially be mitigated through careful contract design to ensure positive incentives).

In some cases, the principal will have private information. The agent may be aware that the principal has such information (but does not know what this information is) and takes this fact into account during the negotiation.[143] The principal, knowing that the agent is interested in his private information will take advantage of it and will design his contract offer accordingly. There is no standard result of this type of model: it will depend on the principal's beliefs concerning the extent to which the knowledge that the principal possesses private information affects the agent's decision. Where the principal has private information but the agent does not take this information into account during the negotiation, the outcome of the negotiation is always better for the principal than for the agent.[144][145]

When the information is possessed by the agent rather than the principal, there is a variety of potential outcomes. However, if the informed agent has some influence over the determination of the contract, the outcome reflects the case where the information held by the principal affects the agent's decisions. Under a scenario where

[142]Timing issues are also discussed below in the context of bargaining power in negotiations between authors and performers.

[143]Maskin, E. and Tirole, J. (1992), "The Principal-Agent Relationship with an Informed Principal, II: Common Values", Econometrica, Vol. 60, No. 1 (Jan., 1992), pp1-42.

[144]Maskin, E. and Tirole J. (1990), "The principal-agent relationship with an informed principal. I: The case of private values", *Econometrica*, Vol. 58, No 2, (March) p379-409.

[145]To note, Myerson (1983), indicated that the structure of the offered contract can potentially reveal some of the principal's private information. This may become relevant if the contract is to be renegotiated. Myerson, R. (1983), "Mechanism Design by an Informed Principal", Econometrica, 51, 1767-1798.

both the principal *and* the agent possess meaningful private information, once again the outcome would be similar to the scenario where the principal has private information and the agent is aware of it, as long as certain technical assumptions regarding their preferences were imposed.[146]

In the context of the music and audio-visual sectors, it is possible that the principal (i.e. the exploiter) may have superior information on the market for the work and hence may be able to better judge the likely success of the work. In a model where the principal makes a proposal to the agent which can either be accepted or rejected, the principal may exploit its superior knowledge of the market to propose remuneration arrangements that are below the expected value of the work, and thereby secure a better payoff for himself than would be the case under perfect information. The agent (i.e. the creator) may accept this proposal given its lower level of market knowledge on which to base a judgement of the expected value of the work.

As discussed above, another form of information asymmetry is the effort exerted by the agent (creator). Where the income of the principal (exploiter) depends on the actions of the agent, the principal would wish to provide positive incentives for the agent to exert effort, assuming that the level of income is increasing in the level of effort. To provide such incentives, the principal would seek to make the agents income dependent on the success of his work, which would be influenced by the effort exerted by the agent. This implies that the principal would have a preference for proportional remuneration rather than lump-sum.

We now consider a negotiation process where a principal is able to update the offered incentive scheme having observed the agent's performance in the previous period.[147] The main theme in this model is the "ratchet effect" according to which an agent with superior performance in the first period has incentives not to convey full information to the principal. This happens because the principal would use the information on the superior performance to update the incentive scheme to a more demanding version. In other words, the creator may choose not to exert the maximum possible effort to promote his work in the first period, given his expectation that the exploiter would observe his effort and alter the terms of the contract in a manner that would require the exploiter to exert more effort to earn the same level of remuneration in the next period.

Under an alternative incentive model implicit incentives are taken into account, in the form of career concerns.[148] In this model, the performance of the agent is dependent on their talent and their effort (for which there is a cost to the agent). The reward

[146]The assumption is that the utility functions of both the principal and the agent are quasi-linear on the money that is being transferred.

[147]Laffont, J.J. and Tirole, J. (1988), "The dynamics of incentive contracts", *Econometrica*, Vol 56, No 5 (September) p1153-1175.

[148]Holmstrom, B. (1982), "Managerial Incentive Problems: A Dynamic Perspective", in Essays in Economics and Management in Honor of Lars Wahtbeck (Helsinki: Swedish School of Economics). Tirole et al. (1999) generalised this model. Dewatripont, M, Jewitt, I. and Tirole, J. (1999), "The economics of career concerns, I: comparing information structure", The Review of Economic Studies, Vol 66, No 1, Special Issue: Contracts (January) p183-198.

earned by the agent reflects the market's expectation of the agent's talent based on the observable performance. The paper concludes that there is a unique equilibrium level of effort which increases the easier it is to monitor and assess the agent's performance.[149]

Monitoring the effort of some authors and performers is likely to be easier than for others. For example, it would be straightforward to observe the number of concerts and promotional activities undertaken by a music performer to promote their new album but it would be less easy to observe the effort exerted by a composer or lyricist in producing a commissioned work. However, even where effort is observable, it is unlikely to be fully observable. For example, while the number of concerts is observable, the effort exerted within each concert is likely to be less observable but would affect the audience's enjoyment of the evening and hence the likelihood of making further purchases. This suggests that music performers may have stronger incentives to exert effort where they have career concerns (e.g. they need to secure a new contract) than in cases where they are in the early stages of a multi-album contract, all else being equal. The incentives to exert effort for composers or screenwriters may be lower because of the fact that the level of effort is less easy to verify.

This discussion has introduced the concept of principal-agent models and has outlined specific models that demonstrate the different impacts that asymmetric information may have depending on the holder of that information, the risk aversion of the principal and the agent and the need for the principal to provide incentives for the agent to exert effort. The actual value of the work will often depend on the actions of the creator, the exploiter and consumers following the agreement of a contract.

The actions of end consumers (i.e. the level of demand for the final product) are not under direct control of either the creator or the exploiter but, as indicated above, can be influenced by the effort put in by each party. For example, the exploiter could put a significant amount of resources into promoting the work, or could make fewer efforts. Similarly, in cases where a contract is agreed prior to the creation of a work (e.g. for actors, session musicians and principal directors) the creator could choose to make substantial efforts to produce the highest quality work or could choose to make less effort and produce a work of lower quality.

The level of effort chosen by each party will depend on the incentive properties of the contract, including the extent to which the remuneration risk arising from the uncertain actions of end consumers is shared between the creator and exploiter. In broad terms, it is possible to define two different methods of determining the amount of remuneration that must be paid to the author or performer of a work: lump sum and proportional remuneration. Each of these models creates very different risk sharing arrangements and incentives for creators and exploiters.

- Lump sum (ex-ante) payments — as described earlier the author or performer receives a single payment for their work based on the expected success and anticipated revenues. As such the risk is wholly borne by the exploiter; if the work

[149] To note, this finding relies on the additive nature with which talent and effort are considered. If there was a complementarity between the two then there would be multiple equilibria.

is unsuccessful the exploiter may make a loss, equally all returns earned above and beyond the amount of the lump sum will be retained by the exploiter. Hence the exploiter has strong incentives to promote the product and achieve maximum sales. Under this arrangement, however, the author / performer has little or no incentive to engage in actions that might increase the sales of his product because his remuneration is independent of sales.[150] That being said, the creator may nonetheless have incentives to exert effort if he considers that his effort today may influence the outcome of future agreements (e.g. if there is scope for the contract to be renegotiated with different terms in the future or to boost income from live performances).

- Proportional remuneration (royalties) — since the amount of money received by the author or performer depends on the actual level of sales or revenue achieved, this arrangement has the greatest degree of risk sharing and also provides the strongest incentives for the creator of the work to exert effort in order to increase sales.

Where authors and performers are remunerated through a combination of lump sum and proportional payments, the result will be a combination of the above; there is some degree of risk sharing and both the exploiter and creator have an incentive to exert effort to promote the work.

As explained in the legal analysis presented in chapter 2, the majority of countries included in this study leave the amount and form of remuneration to be determined by the contracting parties: only France, Germany, Poland and Spain have rules on the form of payment. These rules generally seek to ensure that the relevant author or performer of a work receives equitable remuneration, which is typically interpreted as being in proportion to the realised value of the work (e.g. as measured by sales revenue). Proportional arrangements provide positive incentives for the author / performer to promote their work but somewhat dulls the incentives of the exploiter to promote the work, relative to the case in which the performer receives a lump-sum payment and the exploiter receives all sales revenue.

The extent to which there are significant differences between incentives under proportional and lump-sum remuneration will, however, depend on the proportions received by the creator and the exploiter. For example, an arrangement in which the exploiter receives 95 per cent of the realised value of the work would provide strong incentives for the exploiter to promote the work but weak incentives for the performer. Such an arrangement provides an incentive structure that is similar to that of lump-sum payments. Conversely, incentives for the creator would be strong under an arrangement in which he receives 95 per cent but would be weak for the exploiter.

This suggests that while rules that favour proportional remuneration certainly ensure that both exploiters and creators receive income based on the success of the work, they do not guarantee that the absolute level of remuneration received by authors

[150] To note the existence of a best-seller clause, where the author or performer receives an additional payment if a certain level of success is achieved, would create incentives for the author or performer to maximise the actual sales achieved. It would only affect the balance of the risk borne by the author/performer and exploiter if the initial lump sum payment is lower than it would have been in the absence of the bestseller clause.

and performers is higher than in countries without such rules. There are two key reasons for this:

- The incentives to promote the work under proportional remuneration arrangements are lower than under lump sum payments for the exploiter(since under this scenario the exploiter will retain a smaller proportion of sales revenue than if such revenue were not shared proportionally with the creator) but greater for the creator (since they can benefit from their efforts). It is not certain which of these effects will dominate.
- The success of the work cannot be known with certainty *ex ante*: some works will be successful while others will not. In cases where works are particularly successful, the creator may indeed earn higher remuneration under proportional arrangements than under a lump-sum contract but the reverse may be true in the case of unsuccessful works.

These opposing influences should be borne in mind in any policy considerations that would seek to achieve appropriate remuneration for authors and performers.

4.3 Bargaining power and expectations for contract terms

Bargaining power

In each of the models described above, there may be significant scope for bargaining (notwithstanding the fact that certain revenue streams – such as those from CRMOs – are to all intents and purposes non-negotiable).

Previous studies have noted that authors and performers have relatively little bargaining power in such transactions and it is partly for this reason that collective bargaining agreements have emerged in some countries (e.g. for audio-visual authors in the UK).[151] Another reason for the emergence of collective bargaining may be transaction costs: the average bargaining transaction costs will be lower with collective bargaining than with individual bargaining.

To understand the reasons why authors and performers may have relatively little bargaining power it is necessary to understand the full range of factors that influence bargaining power, and thereby affect the outcome of a negotiation. The key influences on the bargaining power of the creator and exploiter are shown on the figure below.

The creator's bargaining power is influenced primarily by:

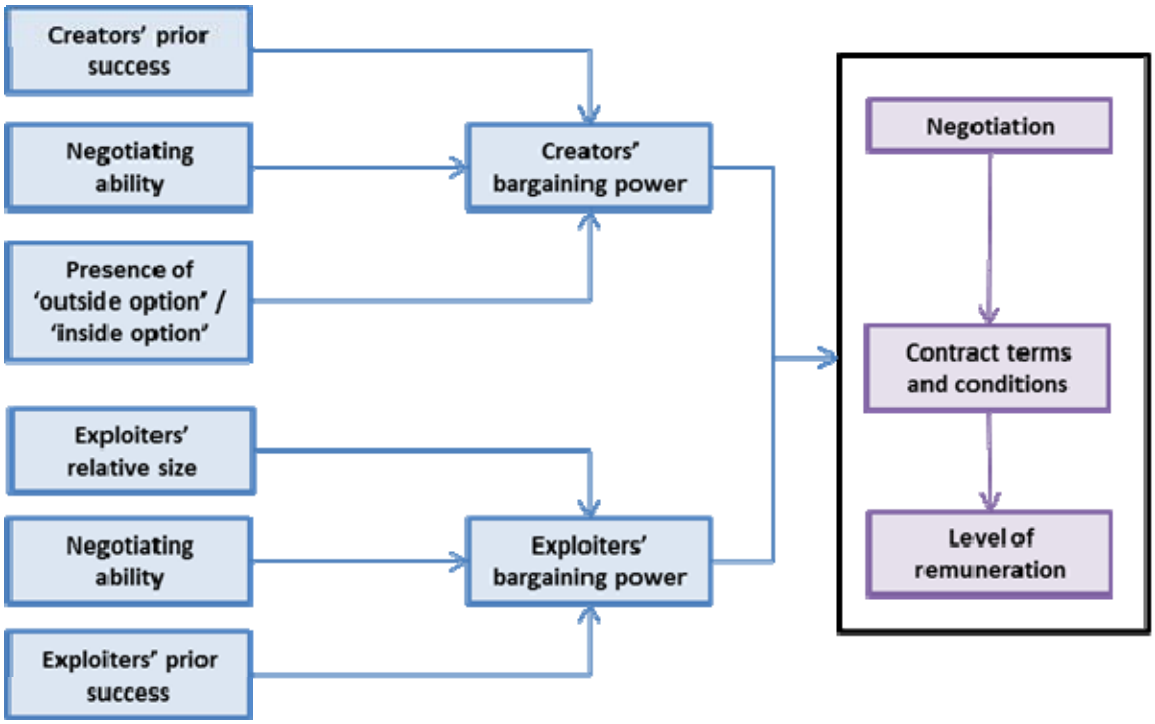
- Prior success (the more successful a creator has been in the past, the greater his bargaining power today, based on an assumption that their works will be more valuable).
- Negotiating ability (the more adept the creator is in influencing the views of others, the greater his bargaining power).
- Presence of an outside option (the creator's bargaining power will be greater if he has several interested exploiters than if he only has one option).

[151] See, for example, Institute for Information Law, Amsterdam (2002), "Study on the conditions applicable to contracts relating to intellectual property in the European Union", p32.

- Presence of an inside option (the creator's bargaining power will be greater if he has an option to earn income on his work while negotiations with the exploiter are at an impasse).

Both prior success and negotiating ability also influence the exploiter's bargaining power, as does its size relative to its competitors (i.e. its market share).

Figure 4.3: Influences on bargaining power



Source: Europe Economics.
Note: The bargaining power of the exploiter is likely to be more important in certain settings than in others. For example, there are cases in which the creator will have several parties that are interested in exploiting his work (e.g. if a particular actor is in high demand or if a successful featured artist is coming to the end of its current contract).

The economic literature has found that the bargaining power of a player is improved if he is more patient than the other player. The concept of patience encompasses aspects additional to the time discount factor such as the haggling cost of the players. For the creator (i.e. the agent in the above models), other sources of income could help to decrease his haggling costs (as this would reduce the immediacy of any financial need) while for the potential exploiter of the copyright, (i.e. the principal in the above models) having other musicians in the portfolio could help. However, the cost of a lengthy negotiation may be greater for the creator if there is a particular time / date at which he needs to launch the work (e.g. if the creator needs to release a work by the end of the year, the failure to meet this deadline could result in a loss to the creator and hence the negotiation cost would be higher than in the absence of such a timing constraint).

The presence of outside options for either party will increase bargaining power if and only if the option is considered attractive enough. Moreover, for the outside option to act as a threat, it needs to be a credible one. In addition to outside options, each party may have an inside option, which is the income generated by the product in question while negotiations are at an impasse.

The presence of outside opportunities is explored in a paper by Tirole et al (1987).[152] Outside opportunities are considered as either the decision to bargain with different buyers of one's product or the seller consuming the product themselves. This can be particularly relevant for the creative industries where multiple buyers could represent the different interested producers and own consumption of the good could involve online exploitation of the produced work without any intermediaries. This latter case is particularly relevant to music performers as they can choose to put their music online directly, as explained in chapter 2.1. The use of such an outside option at one point in time may lead to the performer securing a more lucrative contract in the future as it will allow him to demonstrate the popularity of his work.

The model is built on the assumption that the seller (i.e. the creator / the agent) will grow pessimistic of the buyer's valuation of their good and will not bargain indefinitely with just one buyer (i.e. the exploiter / the principal). According to the paper, "the link between the buyer's willingness to accept an offer and the seller's eagerness to go outside generate multiple equilibria".[153]

If switching between buyers incurs no costs and there is a large number of buyers then the seller can adopt a 'take it or leave it' approach which makes them as well off as if they could pre-commit to a bargaining strategy. The seller is, in other words, at least as well off as when there is a single buyer. In case of delay costs involved in changing buyers, then the seller could make multiple offers to the current buyer before considering switching. The 'take it or leave it' approach is likely to be available only to a small number of authors and performers: those that have been particularly successful in the past and so are in particularly high demand today. For example, a highly respected famous actor may be able to use a 'take it or leave it' approach where they have several exploiters seeking their services but a less famous actor is unlikely to be in such a strong bargaining position.

If the outside options are not attractive enough then the party with more attractive inside options is in a superior bargaining position. In the context of the music and audiovisual sector, inside options are relevant only for certain categories of author and performer. For example, music performers might be able to earn income from their works while negotiations are at an impasse by playing concerts or by placing their works online (as per the 'alternative supply chain' outlined in chapter 2.1). Inside options are less relevant for authors: although music authors may be able to earn a small amount of income via the sale of sheet music while the opportunities for screenwriters and principal to earn such income are limited. Similarly, actors may lack inside options because the work is not produced until the contract has been established, although there may be some cases in which an inside option is available (e.g. in the case of an actor that is currently working on a television series and would need to resign from that role to take the opportunity for which a contract negotiation is ongoing).

[152]Fudenberg, D., Levine, D. and Tirole, J. (1987), "Incomplete information bargaining with outside opportunities", The Quarterly Journal of Economics, Vol 102, No 1, (February) p37-50.

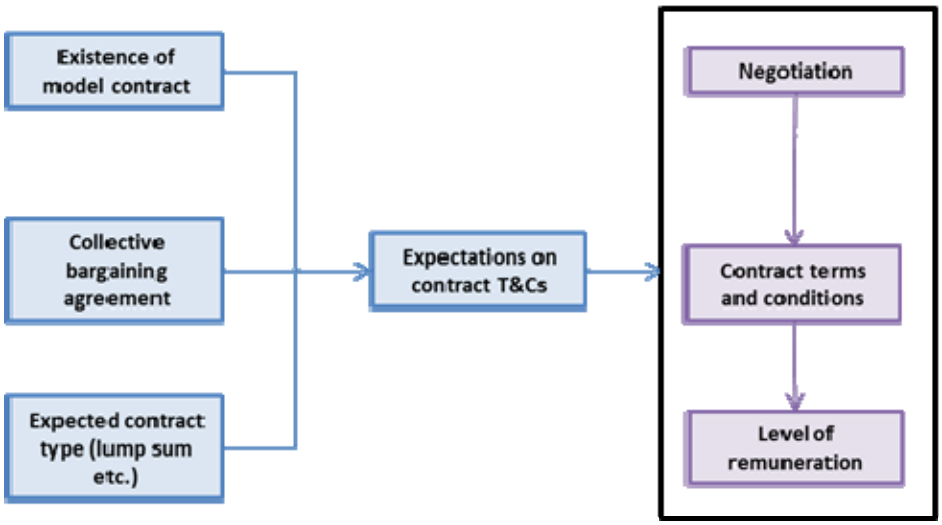
[153]Fudenberg, D., Levine, D. and Tirole, J. (1987), "Incomplete information bargaining with outside opportunities", The Quarterly Journal of Economics, Vol 102, No 1, (February) p37.

Expectations for contract terms

The outcome of a negotiation will, in some cases, be influenced by formal or informal 'industry standards'. For example, 'model contracts' (e.g. prepared by a trade union) may specify expected terms and conditions of a contract, including with respect to minimum remuneration levels or the structure of remuneration payments. Where these apply, there will be a direct impact on the outcome of the negotiation. Even where model contracts do not exist, there may be a 'default' perceived by both creators and exploiters and grounded in knowledge of contracts that were agreed in similar cases and this can lead to a self-fulfilling expectation of contract terms and conditions, and potentially to a *de facto* model contract. This possibility is borne out in practice for the music sector, as described in chapter 2.

Collective bargaining agreements, which are typically negotiated by unions on behalf of their members, can also affect the outcome of a negotiation. Such agreements may lead to greater remuneration for the author or performer as they help to overcome some of the difficulties faced by creators with respect to their lack of experience and limited bargaining power.

Figure 4.4: Influences on expectations for contract terms



Collective bargaining agreements can cover a range of terms and conditions that affect the working conditions of those covered by the agreement. Some agreements concern only the labour conditions of workers and do not refer to remuneration. Even where remuneration is part of a collective bargaining agreement, a variety of outcomes are possible. For example, chapter 2 showed that such agreements apply to supporting actors in Germany, for example, where the collective agreement specifies basic lump-sum remuneration for a day's shooting together with specific rules for additional payments. By contrast, the level of remuneration for other actors and directors is subject to free negotiation.

In general, we would expect model contracts and collective bargaining agreements to lead (on average) to higher remuneration for authors and performers. This is because of the fact that collective bargaining helps to overcome the possibility that individuals have relatively little bargaining power in negotiations and may also help to overcome the information problem: the representatives of authors and performers are likely to

be better informed about the value of music and audiovisual works than are individuals. Moreover, there is evidence from other industries of the positive impact that collective bargaining has on remuneration. For example, statistics published by the Department of Business, Innovation and Skills in the UK found that the difference in average gross hourly earnings of union members compared with non-members was 19.8 per cent for public sector employers and 7.0 per cent for private sector employees.

It is important to note, however, that while the average level of remuneration may increase where a collective agreement is in place, it may result in worse outcomes for some. Specifically, economic theory suggests that (all else equal) demand falls as price increases, implying that the establishment of minimum remuneration terms may lead to a reduction in demand for authors and performers by exploiters, specifically those authors and performers whom the exploiters do not value sufficiently to be willing to offer a contract under the collective agreement. This may mean that some individuals would not secure a contract under collective agreements whereas they may have done so in the absence of such agreements (albeit on worse terms and for lower remuneration). For some, therefore, collective bargaining agreements may lead to worse outcomes by effectively excluding them from the market.

Furthermore, the extent to which collective bargaining agreements would affect remuneration depends in part on whether such contracts or agreements are legally binding.

As discussed in chapter 1.3, collective bargaining agreements are not legally binding in some countries (e.g. the UK) but are binding in others (e.g. France). Collective agreements will have a stronger influence on remuneration outcomes where they are legally binding: in principle, such agreements could be ignored by exploiters where they are not binding. In contrast, where agreements are legally binding, exploiters are unlikely to renege because of the risk that they would be subject to legal challenge, with potentially damaging long-term effects for the business as well as the short-term financial punishment.

Non-binding agreements lack a credible threat against those that would wish not to comply with the agreements and hence the chance that individual authors' and performers' remuneration would be covered by collective agreements is lower where they are non-binding. Moreover, where agreements are non-binding, it is likely that those authors and performers that would receive the minimum level of remuneration would be those that would earn at least as much in the absence of the collective agreement. If the exploiter considers that the value of the creator's work is below the collectively agreed minimum remuneration, they would simply choose to not use the collective agreement and remunerate the creator for less than the non-binding minimum. This could again result in lower remuneration for some creators.

Notwithstanding the above, it is possible that some exploiters would voluntarily choose to apply the non-binding minimum level of remuneration (e.g. because it will help their public relations or corporate social responsibility). There is evidence of this practice in other fields, such as the willingness of some employers to pay the 'London Living Wage' which lies above the national minimum wage for the UK. It is possible

that a similar effect could arise under non-binding agreements in the music and audiovisual sectors.

Overall, collective bargaining agreements may or may not include issues associated with remuneration. Where remuneration is a subject of the collective bargain, it may specify a minimum level of remuneration or may leave the level of remuneration to free negotiation. The former is more likely to have a positive impact on the remuneration of authors and performers than is the latter while binding agreements are more likely to have a positive impact on remuneration than would non-binding agreements.

4.4 The legal framework

In previous sections we have explored the effects of rules on the form of payment and collective agreements on levels of remuneration but have not explored the extent to which other elements of the legal framework might also play a role. The legal analysis presented in the previous chapter identified that the following features of the legal framework are likely to have the greatest impact on the remuneration of authors and performers:

- The structure of the rights conferred by law:
  - the ownership of rights; and
  - the nature of the right: exclusive right or remuneration right.
- The existence of statutory provisions to protect authors and performers as weaker parties to a contract:
  - the fulfilment of formalities;
  - limits on the scope of transfer with respect to future modes of exploitation and future works or performances; and
  - the waivability or unwaivability of the remuneration right.
- The use of collective bargaining and the role of trade unions.

We discuss the economic implications of each of these factors in turn.

4.4.1 The structure of the rights conferred by law

The ownership of rights

The legal framework will dictate the ownership of the rights to a work or a performance. Where an author or performer is considered legally to be the sole owner of the right they have more control and, in terms of remuneration, will (abstracting from any negotiation with the ultimate exploiter of the rights) be the sole recipient of any earnings from the work. In contrast, where the ownership right is shared, the income earned on the piece of work will have to be shared (as a minimum) with the other owners. All else equal the author or performer will therefore achieve greater remuneration if they have sole ownership for the creation.

The nature of the right: exclusive right or remuneration right

Given an exclusive right, the rights holder can choose to license, assign (or not) these rights in whichever way he chooses. In essence, exclusive rights are the property of the rights holder and the rights holder chooses how best to use these rights. This means that the rights holder can also allow or prohibit the exploitation of the right and can then license or assign in more or less favourable terms.

In contrast a remuneration right simply ensures that creators receive payment for the exploitation of their creations. As described earlier in the report, remuneration rights are typically managed by a third party, generally a CRMO, which collects revenue for the rights and remunerates the rights holder.

The terms and conditions of remuneration rights are generally common for all relevant authors and performers (e.g. the remuneration arrangements of CRMOs are generally not subject to individual negotiation). This means that the CRMO presents a 'take it or leave it' option to each author and performer and the remuneration arrangements specified by the CRMO has a direct influence on the income of the author or performer.

The nature of the right will affect the level of remuneration as the method through which the right is excised is different. It is not clear, however under which system the creator would be better off. To deduce this it would require an assessment of the relative bargaining power of the individual versus the exploiter and how an outcome achieved under this negotiation would differ to the outcome received under the CRMO route.

4.4.2 The existence of statutory provisions to protect authors and performers

Fulfilment of formalities

In contexts where there is a requirement for the contractual agreements to be specified in writing, authors and performers (all else equal) are likely to benefit. The fulfilment of formalities not only increases transparency, but concluding the contract through a written agreement provides both parties with greater protection in the exercise of the agreement. This is particularly true for remuneration when such formalities include the specification of the remuneration to be received for individual modes of exploitation.

Limits on the scope of transfer with respect to future modes of exploitation and future works

Limiting the scope of transfer with respect to future modes of exploitation and future works ensures that the creator retains control over the way in which their creation is exploited as new technologies and business models develop. This could be beneficial to a creator, by allowing them to renegotiate when a new mode of exploitation becomes available or when they produce new material, and at a point when they are potentially in a stronger bargaining position (because the demand for their works is clearer than it was prior to the negotiation of the original contract). However, having to renegotiate more frequently could delay new exploitation (and therefore the

realisation of additional earnings[154]) and could create potentially significant administrative burden for exploiters (when considering the cumulative effect in particular). The scale of such impacts would determine the extent to which the benefits of such limits are offset by the potential for lower levels of exploitation (caused by the additional costs to exploiters).

In other words, if the creator transfers the right for all modes of exploitation known and un-known to the exploiter ex ante, if the exploiter does not think that they will make money from pursuing new modes of exploitation they simply will not invest in doing so. Therefore a creator that does not transfer the right to exploit their works under any future mode of exploitation may not be able to negotiate a new contract, but will be no worse off than if they had transferred their rights. In contrast, a successful creator will be better off, if he is able to renegotiate.

To see this more clearly, consider the example of limits on transfer of rights of future works. Such limits should ensure that the author / performer has the opportunity to establish a new contract for future works and so would prevent them from being tied into a low-value contract even if their former works were unexpectedly successful. This should ensure that the author / performer can benefit from their prior success as it will affect the relative bargaining power of the creator in the case of future works: the creator will be in a stronger negotiating position if he can demonstrate prior success than if transfers of future works were agreed prior to the market testing of the first work.

In addition, the rules on the transfer of rights limit the extent to which exploiters can benefit from their possession of information that is hidden to the creator, particularly with respect to the likely future success of the creators' work (see above discussion on the information problem facing both the creator and exploiter). While the impact of rules on the transfer of rights on the remuneration of authors and performers will depend on the degree to which the creator is well-informed about the market potential of his work, the rules might be particularly effective for authors and performers that are in the early stages of their careers (who will in general be those with less bargaining power). Such creators are likely to be less well informed that the average exploiter and hence would face the greatest information problem in respect of their works and so be most at risk of signing a contract that would lead them to receive lower remuneration than would be the case under a situation of perfect information on the value of the work.

If the rules on transfer of rights are of most benefit to inexperienced creators, this may have a dynamic effect on the creative industries: individuals may be more likely to become an author and performer if they consider that the law is protective of them. In essence, however such rules could be seen as lowering a barrier to entering the music and audiovisual sectors, which in itself might be expected to lower the returns to participating in the sector (if demand does not increase in line with such growth in the supply).

[154]The extent of any such effect would depend upon the extent to which the new mode of exploitation would create the opportunity for the creator to reach new audiences. The greater the potential to reach new audiences, the greater the potential additional revenue.

The waivability or unwaivability of the remuneration right

Where a right is considered to be waivable, an author or performer in a relatively weak bargaining position may be persuaded to waive their right to remuneration. In contrast where this right is unwaivable, if this right is transferred to an exploiter, the author or performer will be required to receive remuneration for it. As such, all else being equal, an unwaivable right to remuneration should result in better outcomes for authors and performers.

4.4.3 The role of trade unions[155]

Traditionally, microeconomic theory has regarded trade unions as being a negative influence on economic efficiency because of the fact that they distort labour markets and create deadweight losses to society by raising the level of remuneration for their members above that which would obtain in a competitive market. In recent years, however, this traditional conclusion has been re-examined and there is now mixed evidence on the extent to which trade unions have a positive or negative impact on society. Given the presence of trade unions for authors and performers in many countries, it is therefore appropriate to consider how, from an economic perspective, they might be expected to affect the remuneration of authors and performers (aside from their role in collective bargaining, which was discussed above).

In this context, a recent study has found evidence that good labour relations, as fostered through unions, is likely to lead to superior effort and performance by those covered by the agreements.[156] In this sense, trade unions can potentially help to incentivise their members to exert effort even where the remuneration per hour, or per unit of work, is fixed. To some extent this may seem surprising: why exert effort when you are paid a fixed amount? The answer lies in the outside options: if conditions are less favourable in non-unionised industries (as is typically the case) then individuals will be keen to retain their roles within a unionised environment and hence will be willing to exert effort even if there is no direct benefit to them. It is possible, therefore, that unions could help to overcome some of the incentive problems associated with lump-sum payments (discussed above) and thus can play a somewhat positive role for both creators and exploiters under the reasonable assumption that greater effort will typically be associated with greater sales.

In addition to their role in remuneration, trade unions can play a role in many other issues that affect their members. For example, Khan (2010) emphasises the role that trade unions can play in securing training for their members, citing a study from the UK which found that 39 per cent of unionised workers had received training in the previous three months compared to 26 per cent of non-unionised employees.[157] Khan notes that unions themselves provide vocational education programs at a low cost and help to increase awareness of policies and regulations amongst their members.

[155] We refer to trade unions but this general heading also encompasses CRMOs when they are carrying out trade union-type activities for their members.
[156] Addison, J. T. (2014), "The consequences of trade union power erosion", University of South Carolina, USA, University of Durham, UK, and IZA, Germany.
[157] Khan, M. T. (2010), "Role of Labour Unions beyond Collective Bargaining".

In this context, unions can, and do, play a role in helping to translate complex legal information into language that authors and performers can more easily understand. In principle, this should help to reduce the information asymmetries that are present between creators and exploiters and in theory this should help creators to make more accurate judgments on the values of their works and to assess the extent to which the proposed remuneration reflects that value. In practice, the impact on remuneration may be less significant than theory might suggest because of the fact that the creator will still typically be in a weaker bargaining position than the exploiter and that there are many other (potentially offsetting) influences on remuneration, as discussed above.

4.5 Conclusions

As illustrated in this section, there are a number of factors that will contribute to determining the remuneration an individual author or performer receives for their creations. It is important when analysing actual levels of remuneration to consider all these factors together. This is why developing this theoretical framework to identify the potential drivers is a key stage in the analytical process and must be conducted prior to an examination of the data. In particular, not accounting for all possible factors could result in drawing erroneous conclusions as to the impact of the national approach to ensure remuneration. Thus, while we are primarily focussed on the role of the national legislative context and use of collective bargaining agreements etc., we have also included in our framework the role of other factors, such as the valuation of the creation and the bargaining power of each party. The detailed theoretical framework illustrated in Figure 4.3 illustrates the potential influences on negotiation outcomes.

We have discussed in this section the likely impact each of these factors will play in determining the rate of remuneration authors and performers achieve in their contracts. We summarise in the table below these relationships and indicators of the factors described in the theoretical framework and collected as part of the survey (discussed further in section 5.1).

Table 4.1: Influences on remuneration and potential indicators of their existence/strength

Influence on remuneration	Source	Expected impact on remuneration	Indicator
Creator's expected value	Experience of creator	+	Number of years in industry; whether used representative in negotiations
Creator's bargaining power	Creator's prior success	+	Income from music / TV; income from other sources; professional awards (local, national, international)
	Negotiating ability	+	Level of education; age; experience; whether a representative used
	Collective bargaining	?	

Influence on remuneration	Source	Expected impact on remuneration	Indicator
	agreement	+	Presence of agreement (from legal review)
	Presence of outside option		Whether negotiated most recent contract with more than one potential exploiter
Exploiter's bargaining power	Exploiter's prior success / relative size	–	Type of counterparty to contract; large or international
Expectations for contract terms	Model contract	?	Whether union has model contract and whether used
Legal framework	Sole ownership of rights	+	From legal review
	The nature of the right	?	From legal review
	Fulfilment of formalities	+	From legal review
	Limitations on transfers of rights	+	From legal review
	Unwaiviable right to remuneration	+	From legal review
	Role of trade unions	+	From legal review
Degree of risk sharing	Nature of contract	?	Proportion of remuneration from lump-sum payments; proportion of remuneration from recurring payments

[a] This is not the expected impact on total remuneration but on the rates applied in the contract – the total remuneration will be dependent on sales, i.e. for a constant level of sales remuneration would be affected in the following way.

Note: It was not possible to specify indicators of the exploiters' expected value because only creators were potential respondents to the survey. Our theoretical framework shows that the exploiters' expected value will be hidden information to the creator and hence we could not secure such information through the survey.

5 Approach to Statistical Analysis

5.1 Data collection

The discussion in the previous chapter presented a theoretical framework within which it is possible to analyse the factors that determine remuneration outcomes. It also identified potential indicators of these factors and so it was important to gather primary data on remuneration outcomes, contract terms, and the characteristics of creators if we are to put the theory to work.

More specifically, the ITT required that data be gathered on the actual levels of remuneration, online and offline, for selected categories of authors and performers, broken down by several different categories, as depicted in the figure below.

Figure 5.1: Breakdown of remuneration estimates



Note: For the sake of clear exposition, the figure takes the example of a featured music artist.

To facilitate the gathering of these data we developed an online survey in consultation with DG Internal Market. The draft survey was reviewed by several European stakeholders (unions and CRMOs) and their comments were taken on board. The final questionnaire is included in the Appendices to this report.

The overarching aim of the survey was to collect data on the amount of remuneration received by different types of authors and performers. We sought to gather information on both levels of remuneration, the sources of remuneration and the breakdown of remuneration between categories such as online/offline, lump-sum/proportional and so on. More specifically, the key topics covered in the survey were:

- background information (Member State, age, experience);
- total income (annual earnings and breakdown by activity);
- structure and sources of income (counterparty to negotiations, lump sum / follow-up earnings broken down by product and online/offline);

- remuneration contract (negotiation process, indicators of bargaining power, use of model contracts); and
- indicators of success and negotiating ability (education level, professional awards).

The survey was uploaded onto the EU Survey platform and was distributed to authors and performers in a sample of Member States[158] via those CRMOs and unions that offered to assist us with our research. In total, 39 unions and CRMOs distributed the survey to their members.

To encourage responses to the survey we translated the questionnaire into the native language of the countries chosen for the study and ensured that, if there were any questions that respondents were unable or unwilling to answer, they could skip that question and continue to complete others. We also clearly communicated that responses would be treated confidentially and that individuals would not be identifiable to the study contractors or the European Commission.

5.2 Characteristics of survey respondents

This section describes the composition of the sample of respondents of our survey. In particular, it focuses on describing the breakdown of respondents by country of origin and by their stated primary profession.

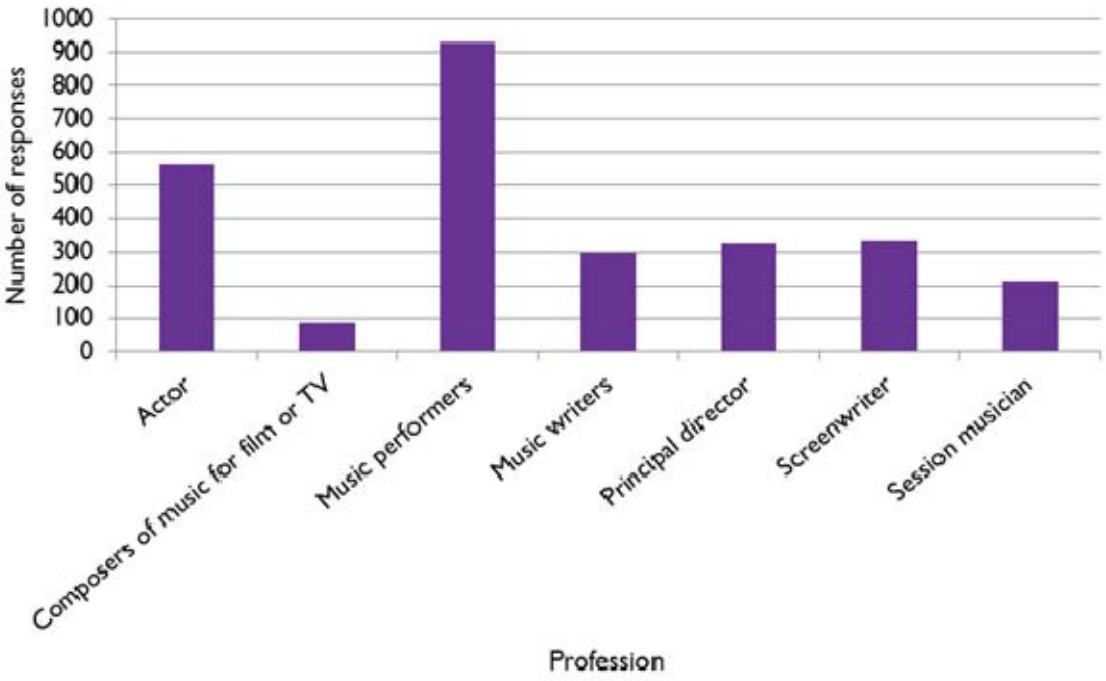
For the purposes of our analysis, the primary professions of respondents have been determined as follows:

- music performers include featured artists and singer/songwriters;
- music writers include composers, lyricists and songwriters;
- session musicians;
- actors include both film and TV actors;
- principal directors;
- screenwriters, and
- composers of music for film or TV.

The following figure illustrates the breakdown of responses by the type of profession of respondents.

[158] The Member States covered for the data gathering are Denmark, France, Germany, Hungary, Italy, Lithuania, Netherlands, Poland, Spain, and the United Kingdom.

Figure 5.2: Number of respondents by type of profession

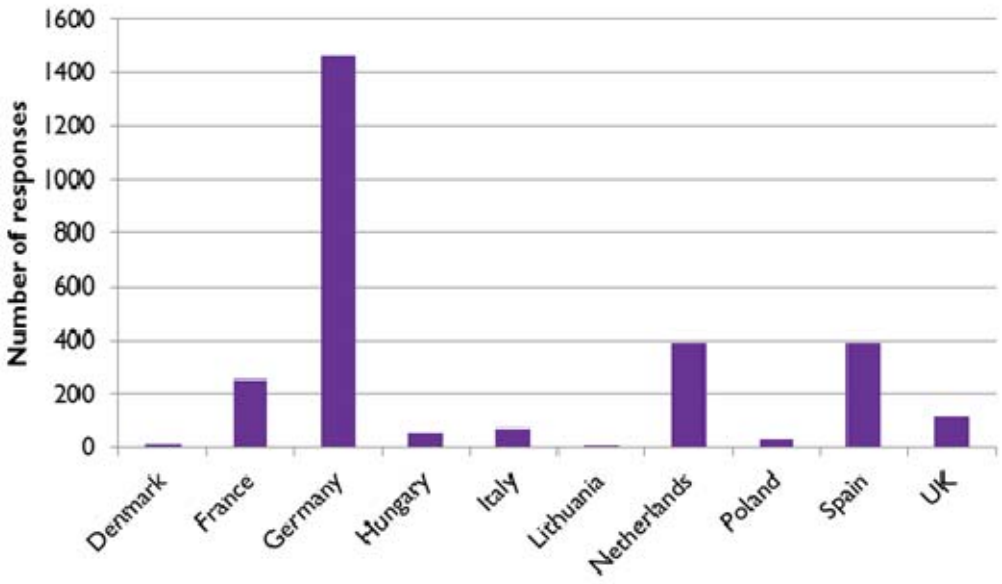


Note: some respondents may engage in more than one profession but our analysis is based on the profession that the respondent considers to be the most important. In particular it was more common for musicians to indicate that they work in more than one activity than for respondents from the audiovisual industry.

All types of professions have more than 200 responses with the exception of composers of music for film or TV. The highest number of responses can be found in the music performer and actor categories (929 and 562 respectively).

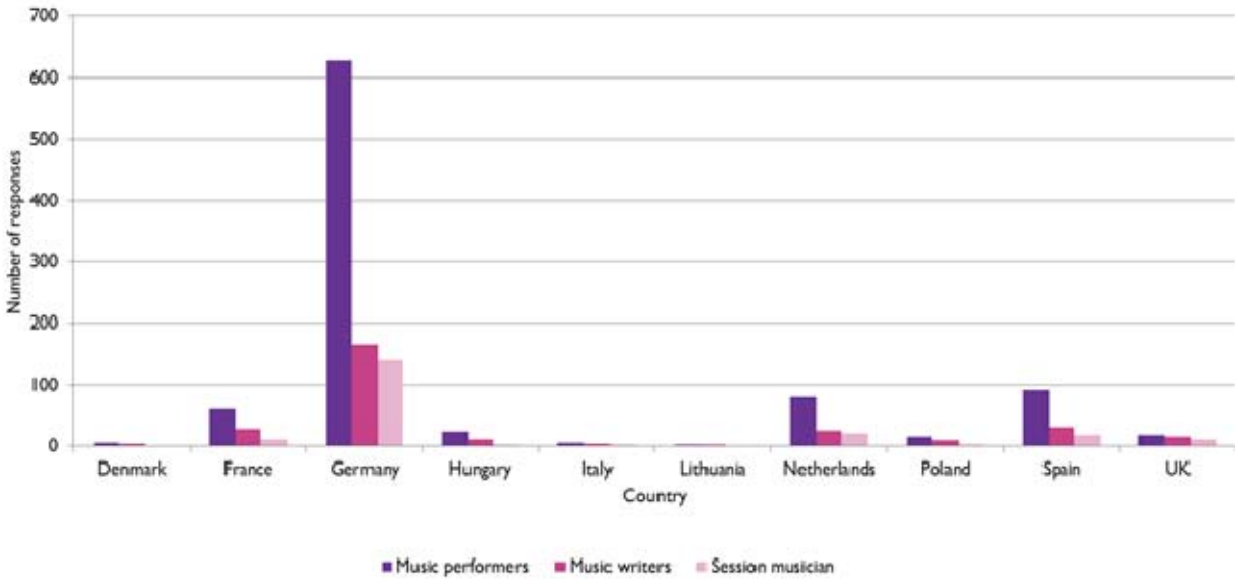
The following graph illustrates the number of respondents by their country of origin. Germany, Spain and the Netherlands are the countries with the highest numbers of respondents (1464, 390 and 394 respectively). The countries with the smallest number responses are Denmark (13 responses) and Lithuania (six responses).

Figure 5.3: Number of respondents by country



It is also important to visualise the distribution of responses by country and profession. This information is presented, first for the music industry, in the figure below.

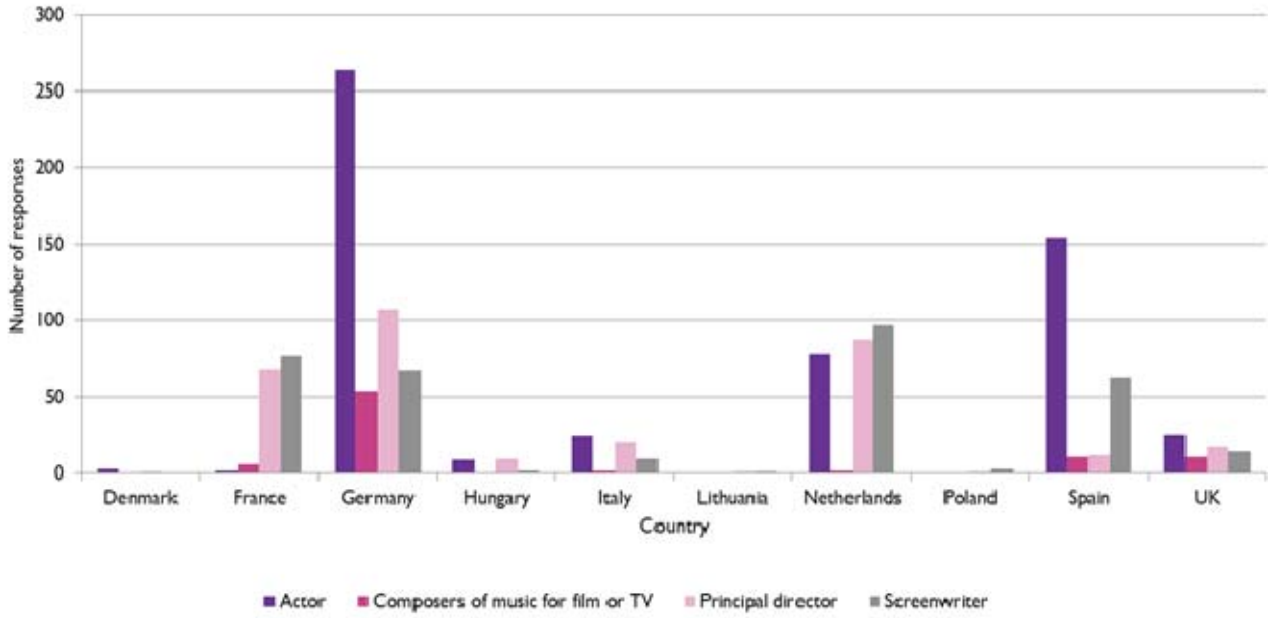
Figure 5.4: Number of respondents by country for the music industry



No single profession has more than 100 responses in a particular country, with the exception of Germany. Italy has very few responses in all professions; Lithuania only has two responses for music writers and music performers while Denmark has very few responses for music writers and performers with no responses for session musicians. Response numbers from music writers and session musicians are usually smaller compared to music performers.

The number of responses in every country for the different professions of the audio-visual industry is presented in the next figure.

Figure 5.5: Number of respondents by country for the audio-visual industry



Response rates for the audio-visual industry are very low for Denmark, Hungary, Lithuania and Poland, with all categories of professions having fewer than 20 responses. The UK and Italy are very close to these countries but surpass 20 responses for actors. Responses are fairly evenly distributed in the Netherlands, with the exception of composers of music, with all professions having more than 70 responses. In Spain, the vast majority of respondents are actors (155), followed by screenwriters (62) while the other two professions have considerably fewer responses. In Germany, responses are primarily dominated by actors (264) followed by principal directors (107), screenwriters (67) and composers of music for film or TV (54).

Overall, response rates to the survey differed significantly between countries and types of author and performer. The feature of the survey responses presents some challenges for the statistical analysis, as described in greater detail in section 5.5.

5.3 Approach to statistical analysis

A key challenge for this study is to explore the effects of the current systems of the selected Member States on authors and performers (as identified in the legal review and survey responses) using the following approaches:

- simple statistical analysis to test whether remuneration levels differ between countries and the relationship between remuneration and, say, the presence of protective measures in national law; and
- regression analysis, where feasible, to identify the extent to which individual characteristics and aspects of the legal systems are associated with differences in levels of remuneration.

The simple statistical analysis of survey responses is concerned with estimating descriptive statistics such as the average level of remuneration for different types of creator in each Member State, broken down by the criteria such as online/offline, lump-sum/proportional contract etc.

The statistical analysis identifies the countries in which the current systems lead to higher levels of remuneration for authors and performers. Given this knowledge, our analysis then explores the potential reasons for such differences and, in particular, seeks to identify the extent to which remuneration outcomes are influenced by the legal framework and the extent to which they are influenced by other factors.

For example, we may find that musical performers in one Member State appear to earn substantially more than those in a second Member State. To understand the reasons for this, we have developed econometric models in which the level of remuneration is the dependent variable to explore the extent to which any differences can be explained by:

- The legal framework that underpins the systems present in the Member States. We may find, for example, that a mandatory collective management is in force in the first Member State but not the second; this is a potential explanation for the difference in outcomes.
- Economic influences. For example, it may be that the average value of music purchases per capita is greater in the first Member State than the second. This would suggest that the revenue earned on a song is greater in that Member State and hence expected remuneration would be greater, all else being equal.
- The negotiation framework. As discussed above, the agreed terms of a remuneration contract would reflect a number of influences and we would consider how each of these influences differ between Member States, as evidenced by the indicators, and what impact these factors appear to have on remuneration outcomes.

As discussed further below, the models include numerous explanatory variables to capture these impacts.

5.4 Approach to econometric analysis[159]

When estimating econometric models, there are two broad strategies that can be used: a 'general to specific' strategy and a 'specific to general' strategy. If the former strategy is adopted the econometrician starts with a model that contains 'many' potential explanatory variables and eliminates those that are not significant (either from a statistical or economic perspective) to develop a simpler model that is capable of 'explaining' the dependent variable at least as well as a more complex model but is preferred to this one because it requires fewer explanatory factors. On the other hand, if the latter strategy is adopted, the econometrician starts with a simple model (usually one with a single explanatory variable) and adds additional variables until adding further variables no longer provides additional information to the model.

There are theoretical reasons why it is usually preferable to adopt a 'general to specific' approach to econometric modelling. However this is, in practice, not always possible because many of the automated procedures that implement this strategy start with the observations available when the full model is estimated and then keep the same set of observations for the following steps of the procedure. This implies

[159] We provide in this section an overview of our approach, the actual models used are discussed in greater detail in the Technical Appendix.

that if an observation is missing at the beginning of the procedure because, say, we do not have data on the number of employees for a particular firm, then that observation would not be used in the models.

Therefore we adopted a 'mixed' strategy. We first developed basic models that include a limited number of explanatory variables that we would expect a priori to have an effect on remuneration, including indicators of the strength of the legal framework and collective bargaining agreements. We then attempted to add additional explanatory variables, such as experience, population and household cultural expenditure, one at the time and checked which of them provided additional explanatory power to the model using the Akaike Information Criterion and the Schwarz-Bayes Criterion.[160] We also ran a number of diagnostic tests to check whether adding additional variables had an impact on the extent to which the estimated model satisfied the assumptions of ordinary least squares regression.[161]

First, we sought to develop a model in which the level of remuneration was the dependent variable and the key explanatory variable of interest was a dummy variable identifying whether or not the individual is based in a particular Member State (nine such dummies were included in the models while the tenth country would serve as the base case).[162] The coefficient on this dummy variable measures the effect of differences in the legal framework between countries on levels of remuneration, but would also capture other country-specific effects. Therefore, this model does not allow inferences to be drawn on the extent to which the legal framework specifically affects remuneration levels.

Additional explanatory variables were also included in the model to control for differences between individuals, as reported in responses to the survey. The selection of control variables was an element of the econometric analysis; the variables reported in the table below were candidates for inclusion in the model as individual-level controls.

[160]The Akaike Information Criterion and the Schwarz-Bayes Criterion allow non-nested models (i.e. models that may have entirely different sets of explanatory variables) to be compared and provide information on the extent to which each model fits the data. Nested models (i.e. those for which the explanatory variables of one model are a subset of those of a second model) can also be compared. The interpretation of the criterion is identical: a model with a lower value of AIC is a better fit and, similarly, a model with a lower value of SBC is a better fit. The difference between the criteria rests in the formulae on which they are based. AIC = - 2 lnL + 2k where lnL is the maximized log-likelihood of the model and k is the number of parameters estimated. BIC = - 2 lnL + k lnN where N is the sample size.

[161]The diagnostic tests included: testing for homoscedasticity of residuals (using estat imtest and estat hottest in Stata); testing for multicollinearity (using collin in Stata); tests of model specification (using linktest and ovtest in Stata).

[162]'Dummy variables' take a value of either zero or one. For example, a dummy variable indicating whether or not the individual is based in a certain country would take a value of one for all respondents that are from that country and zero for all other respondents.

Table 5.1: Candidate control variables (individual-level)

Personal characteristics	Experience and success	Contracting
Number of years in industry	Professional awards	Type of counterparty to contract
Level of education	Number of pieces per year	Whether used model contract
Age		Whether used representative in negotiations
		Whether negotiated most recent contract with more than one potential exploiter

Unfortunately, the coverage and completeness of the survey data were insufficient to develop models of this type that would lead to meaningful results.

To understand the extent to which economic and legal differences between countries are associated with differences in remuneration we added relevant control variables to the models. With respect to economic factors, these variables included indicators of the per-capita value of music and audiovisual purchases in a given year (proxied by per household expenditure on recreation and culture in terms of Purchasing Power Standards, PPS) and population (to capture the size of the market). With respect to legal factors, we developed an index of the overall strength of the legal framework and a separate index of the strength of collective bargaining agreements (see discussion in the Technical Appendix on how these indicators were constructed).

Given these indictors, we established a set of models that included two additional variables to account for legal strength and collective bargaining strength. While the 'strength' indicators do not capture the impact of specific legal factors on levels remuneration, they do provide the first clear indication of the impact of the legal framework as a whole. Given the concerns about response coverage and completeness outlined above, we omitted the Member State dummy variables from our econometric models and hence our results are based on a pooled set of observations, controlling for differences between countries in terms of legal strength, union strength, population and cultural expenditure.

Having explored the impact of the legal framework as a whole, we then developed models which included a set of dummy variables that indicate whether a particular feature of law is present in the legal system of the country in which the individual author or performer is located. These models focussed on the general features of copyright law and included dummy variables for one or more of the following (as determined by our diagnostic tests):

- formalities for the transfer of rights;
- rules on form of payment (e.g. lump sum, royalties etc.);
- limitation on scope;
- limitation on future forms;
- limitation on future works; and
- "best seller" - type clause.

The results of this class of model identify the extent to which the remuneration of the author or performer is associated with each economic and legal factor. For example, the results identify the extent to which the existence of formalities for the transfer of

rights is associated with the level of remuneration of authors and performers (a positive coefficient would indicate that remuneration is higher where such formalities exist). The individual control variables would again identify the extent to which remuneration is influenced by personal characteristics, experience and so on. Again, given the concerns about response coverage and completeness outlined above, we omitted the Member State dummy variables from our econometric models and hence our results are based on a pooled set of observation, controlling for differences between countries in terms of legal strength, union strength, population and cultural expenditure.

5.5 Summary of statistical and econometric analysis

The statistical analysis did not yield many clear patterns across different types of authors and performers and some of the patterns that were identified are to some extent counter-intuitive. While we would not necessarily expect the strength of the legal framework and collective bargaining to have identical impacts across different types of authors and performers, we would expect there to be greater consistency than is evident in the results of our analysis and this may indicate a weakness in the data on which the analysis is based (see further discussion below on this point).

For example, we would expect that stronger legal frameworks would be associated with higher levels of remuneration, both in absolute terms and per unit of work. While this pattern is evident in some cases (e.g. music performers) rather different patterns are observed in other cases (e.g. actors, screenwriters and principal directors). Interestingly, there is consistency amongst those in the audiovisual sector in respect of the surprising finding that average net income per unit of work tends to be greatest at the high and low levels of the legal strength indicator and lowest at the central values.

A similar lack of consistent findings was apparent in our econometric analysis. The table below summarises the key findings. When considering these results it is crucial to bear in mind the significant caveats to the analysis outlined in the previous section and, in particular, the fact that the data on which the analysis is based are not representative of all authors and performers in the countries covered by this study, as discussed in greater detail below.

In the table:

- a '+' symbol indicates that the legal feature (or indicator) is estimated to have a significant positive effect on remuneration per unit of work while a '-' figure implies the opposite; and
- a '?' symbol indicates that one model has identified a significant effect but a second model has found no effect.

Table 5.2: Summary of key econometric results

	Session musician	Music performer	Music writer	Actor	Principal director	Screen-writer
Collective bargaining strength						
Total remuneration		?				
Lump-sum remuneration	?		?	+		
Royalty remuneration from CRMOs		+		+	+	+
Royalty remuneration from publishers					+	+
Legal strength						
Total remuneration				+		+
Lump-sum remuneration	+			+		+
Royalty remuneration from CRMOs	N/A	N/A	N/A	N/A	N/A	N/A
Royalty remuneration from publishers		-			+	+
Formalities for the transfer of rights						
Total remuneration					-	+
Lump-sum remuneration	+	+				+
Royalty remuneration from CRMOs	N/A	N/A	N/A	N/A	N/A	N/A
Royalty remuneration from publishers	+				+	+
Limitation on scope						
Total remuneration		-				
Lump-sum remuneration	+					
Royalty remuneration from CRMOs	N/A	N/A	N/A	N/A	N/A	N/A
Royalty remuneration from publishers				-		-
Limitation on future forms						
Total remuneration		-		+		
Lump-sum remuneration	+		-			
Royalty remuneration from CRMOs	N/A	N/A	N/A	N/A	N/A	N/A
Royalty remuneration from publishers						

Note: All remuneration variables are per unit of work.
Note: This table is based on a significance level of 10 per cent.

Based on the dataset available for our analysis, collective bargaining appears to have little impact on the remuneration of authors and performers in the music industry (or at least no consistent impact), although it does appear to be associated with higher royalty income in the audiovisual sector. Equally the strength of the legal framework seems to have a more consistently positive impact in the audio-visual industry than

the music industry where its role appears much less significant. A stronger legal framework appears to result in higher total remuneration for actors and screenwriters, as well as higher royalty payments for screenwriters and principal directors.

The presence of formalities for the transfer of rights is found to have different impacts on different types of authors and performers that responded to our survey. While they appear to be associated with higher total remuneration for screenwriters, the opposite is true for principal directors. Formalities are also found to have a positive relationship with lump-sum remuneration for session musicians, music performers and screenwriters as well as a positive relationship with royalty remuneration for session musicians, principal directors and screenwriters.

As for other legal influences, there are differences in the effect of limitations on the scope of transfer on different types of author and performer that responded to our survey. For music performers, we find that total remuneration is lower in countries that have limitations on the scope of transfer. This element of the legal system does not appear to have an impact on the total remuneration of any other category of author or performer but it does seem to affect the level of income received from different sources. More specifically, limitations on the scope of transfer appear to be associated with higher lump-sum remuneration for session musicians but lower royalty incomes from producers for actors and screenwriters.

Finally, based on the available data, limitations on future forms / future works appear to be associated with lower total remuneration for music performers but higher total remuneration for actors. For all other types of authors and performers, limitations on future forms do not affect total remuneration but we find evidence of an impact on certain sources of income for session musicians and music writers. In particular, limitations on future forms are found to have a negative relationship with lump-sum remuneration for music writers while they are associated with higher lump sum remuneration for session musicians.

5.6 Data weaknesses and the treatment of statistical and econometric analyses in this report

The data on which our statistical and econometric analyses are based were obtained through an online, self-completion survey of authors and performers in the music and audiovisual sectors. The survey was distributed to authors and performers in 10 EU Member States by CRMOs and trade unions in those countries. We identified trade unions and CRMOs in those Member States and invited them to take part in the study by distributing the survey to their members. The number of organisations that agreed to distribute the survey differed between countries and this is likely to have affected the number of responses achieved. Individual members could then choose whether or not to respond to the survey and the willingness to participate also appears to have differed significantly across countries (e.g. we have been informed that there have been numerous recent surveys of authors' and performers' income in Denmark and hence they may be growing tired of surveys on this topic).

While this approach to distributing the survey was the only feasible approach, it did create a number of difficulties for analysing the data that were provided. These include:

- The distribution method meant that we have no control over representativeness of sample, both across countries and within each country. The impacts of this weakness are that there are significant differences in the response rate across countries and we are unable to assess the extent to which the responses received from each country are representative of the population of authors and performers in that country. This potential lack of representativeness is an important consideration when interpreting the results of our statistical and econometric analysis, particularly for those countries for which we have a relatively small number of responses (since outliers from the population would have a greater influence on the nature of the sample distribution in such cases).
- Related to the above point, we are concerned that the opt-in nature of the survey may have created a bias in responses towards those with 'time on their hands' and we may miss some of the most active authors and performers. Particularly in the music sector, this concern is increased by the fact that two-thirds of the time over which the survey was open for responses coincided with the festival season.
- Due to the complexity of some of the questions in the survey we chose to make certain questions non-mandatory. Many respondents chose not to answer some or all of those questions which created many missing values in our dataset. The problem is most pronounced for the more complex questions and, in particular, the question that asked respondents to break down their royalty payments by type of right. The prevalence of missing values in that question meant that it was not possible to undertake any meaningful analysis of that question.
- Given a requirement for simplicity in the questionnaire, the data collected refers to annual net income for the previous year. In the music and audiovisual industries, income may be subject to high degrees of variation and hence the data reported by respondents may not reflect their typical annual income.
- We are also aware that the level of detail contained in remuneration statements differs from country to country. Partly as a result, it is possible that respondents would have responded to some mandatory questions on the basis of their 'best estimate' rather than hard data. Therefore, there is a potential lack of accuracy in some responses but we are unable to verify that concern.
- We also have concerns about the quality of some responses in terms of internal consistency. For example, we found numerous cases in which reported percentages do not sum to 100 when the question structure was such that they should have done. In addition, there was inconsistency between levels of total income and the breakdown between categories in numerous cases.

While it was possible to address some of the issues described above through data manipulation, it was not possible to address the majority of the concerns. Therefore, we consider that there are significant weaknesses in the results of the econometric and statistical analysis, driven by the many problems with the data on which the analysis is based.

Most importantly, our results can be interpreted as identifying the factors that are associated with remuneration for those that responded to our survey but it cannot be

claimed that these results are necessarily representative of the population of authors and performers in the 10 Member States that participated in the survey.

Some additional caveats apply to the results of the econometric analysis. In particular, we were unable to control for cross-country differences using a Member State dummy variable but it has not been possible to include such variables, as explained above. In addition, since the models were estimated at the individual level there may be unobserved individual characteristics that affect an individual's remuneration (even after controlling for factors such as personal characteristics, experience and the nature of the contract). Ideally, we would have a panel dataset which would allow unobserved individual characteristics to be controlled for by using a fixed effects approach. However, we only have observations for a single time period and hence cannot control for such effects. This issue should be borne in mind when interpreting the regression results presented in the Technical Appendix.

Our concerns with the data are such that we consider it would not be appropriate to present the detailed results in the main body of this report, although we have summarised the key results in the preceding section. Moreover, we do not rely on the results of our statistical and econometric analyses when defining our recommendations and policy options.

6 Policy Recommendations

6.1 Key findings

In the previous sections we identified the key legal provisions for the remuneration of authors and performers and the relationships that determine their remuneration. We also presented a conceptual model to describe the way in which different factors, including the legal framework, impact on the remuneration of authors and performers in the music and audio-visual industries. We used this conceptual model as a basis for exploring statistically the factors driving remuneration and specifically the role of the legal environment in determining remuneration. We present here the key findings of this analysis.

6.1.1 Transparency

Individual authors and performers are free to work in any Member State of the European Union and so can choose to locate in whichever country or legal system best reflects their preferences. To make effective choices, authors and performers require information on factors such as the contractual arrangements that are typically established (e.g. including the duration of a contract and the extent to which authors and performers can benefit from the unexpected success of their work) in the Member States. If authors and performers can effectively exercise this freedom, it could be stated that the Internal Market functions effectively with respect to contractual relationships between creators and exploiters.

The extent to which individuals can make effective decisions depends on the extent to which there is transparency with respect to their current remuneration arrangements and the potential arrangements in other countries. These are discussed in turn.

Transparency of remuneration arrangements

Within individual Member States, in the music industry particularly, there appears to be a lack of transparency in how authors and performers are remunerated in relation to the rights transferred.

Authors and performers in the music industry deal primarily with their publisher and/or producer, while also engaging with CRMOs for the exploitation of specific rights (see section 3.2). These relationships have been made even more complex by technological developments, which have opened up a variety of new ways to exploit a work or a performance. These new methods of exploitation are often associated with new business models, in which the method and calculation of remuneration can vary. The digital exploitation of works can also alter the nature of the interactions between stakeholders, and introduce additional players to the system (see chapter 3). All this

can make it hard for authors and performers to understand what remuneration they are owed for the exploitation of the various rights they hold.[163]

Even if authors and performers understand how much they should earn for each of the rights that they hold they may not have access to information that would enable them to verify whether or not they receive the correct payments (e.g. because they may not receive annual reports on their remuneration broken down by individual right).

Under EU law, the author's and performer's exclusive right of reproduction and of communication to the public (including the right of making available), can be divided at will, particularly with respect to the modes of exploitation, duration, and geographical scope. If the scope of an initial transfer of rights from the author or performer to the publisher, producer or CRMO is too broad, it not only risks depriving the creator of an eventual income in the event that the rights are not exercised, but it also risks depriving him of the freedom to either exercise those rights personally or choose another contracting partner who might make a better use of the rights. More importantly the amount of remuneration paid to the author or performer should in principle be stipulated in the contract and related to the scope of the rights transferred. However, where remuneration is intended to be proportional to the exploitation of the work or performance, the contracts do not always specify for which rights the remuneration is in fact being paid (see section 2.2.3). This situation is especially prevalent with respect to the exercise of the right of making available: this right encompasses many forms of exploitation, like digital downloads, streaming services, subscription services and other on-demand services, for which the remuneration is generally not indicated separately in the contract.

There are some examples of policy at the national level to address this problem. For example, the copyright act of a number of Member States, including France and Spain, requires that an author's or performer's contract set out explicitly, for each mode of exploitation, the creator's remuneration, the geographical scope and the duration of the assignment (see section 2.2.2). This measure is meant to empower authors and performers to exercise their rights more efficiently and to receive a more transparent remuneration. A similar measure has also been put in place with respect to the exploitation contract signed between CRMOs and their members, pursuant to the recently adopted Collective Rights Management Directive.[164] This measure is accompanied in the Directive by an obligation on the CRMO to make available, at least once a year, to each right holder whose rights it manages certain elements of information, regarding notably the rights revenue attributed to the right holder and the amounts paid per category of rights managed and per type of use. This new obligation on CRMOs will, once implemented in the national legislation, constitute a welcome improvement in the situation of authors and performers as it will provide

[163] This is less likely to be the case for session musicians who are usually paid a lump sum for a fixed performance as part of a fixation of a piece of work, and generally negotiate individual contracts for each performance.

[164] Directive 2014/26/EU, art. 5(7): 'In cases where a rightholder authorises a collective management organisation to manage his rights, he shall give consent specifically for each right or category of rights or type of works and other subject-matter which he authorises the collective management organisation to manage. Any such consent shall be evidenced in documentary form'.

them with information on the amount and the source of the payments they receive from the CRMO. The current lack of transparency in this area is corroborated by the results of our survey (where individual authors and performers found it difficult, if not impossible, to break down their remuneration according to the different rights and even in many cases by source) and feedback from the small number of organisations that operate in the music and audiovisual industries that actively sought to participate in an interview for this study.

Transparency seems marginally less of a concern in the audio-visual industry, due to the relative simplicity of the supply chain and the general trend for lump sum payments and salaries (which make it easier for an author or performer to observe and understand the value of the rights transfer). The contractual practice in the audiovisual sector is more straightforward revolving around the figure of the producer. The producer tends to concentrate all economic rights in an audiovisual work, which means that he represents a 'one-stop-shop' for the clearance of rights. CRMOs generally play a role in granting licences and distributing the royalties collected from the cable retransmission right. So far there is no indication that the pivotal role of the producer in today´s audiovisual contractual practice has changed under the structural changes brought about by digitalisation. However, we have found that often there is legal uncertainty arising from the lack of specification of rights in the presumption of transfer from the creator to the producer.

Cross-border transparency

Although the rights of authors and performers have been harmonised to a significant degree across European Union, the exercise of these rights and the corresponding remuneration paid to creators are still largely determined by national legislation and industry practice. For different reasons, the national implementation of at least three rights poses noticeable cross-border transparency problems: the cable retransmission right, the right of making available and the rental right (see section 2.1.3).

With respect to the cable retransmission right, the broadcasting organisations and cable operators in certain Member States argue that since no retransmission of signals initially broadcast by another organisation occurs through 'direct injection' anymore, the rules of the Satellite and Cable Directive on mandatory collective administration do not apply. The use of 'direct injection' technology in the transmission of broadcast signals creates uncertainty regarding the qualification of the act taking place – whether it constitutes an act of cable retransmission or making available to the public. As a consequence of this uncertainty, it is also unclear who, the producer or the CRMO, is the transferee of the right and who is liable for the payment of remuneration. The outcome of these two questions may vary per country, bringing with it a variation in the nature and level of remuneration.

The right of making available has in principle been implemented as an exclusive right for authors and performers across the Member States. Two countries have diverging systems for music performers: Spain, where all performers enjoy an unwaivable right of remuneration for acts of making available, and France, where the right of making available has been interpreted by the courts as not requiring separate prior authorisation from the performers once they have authorised the fixation of their

performances on a commercial phonograms.[165] Generally speaking, however, the respective boundaries of the right of communication to the public and of the right of making available, e.g. between acts that are purely interactive and those that are solely non-interactive or mixed, give rise to varied interpretation in almost all Member States, especially in view of the rapidly changing technology. The consequence of the resulting uncertainty, again, is that the nature of the right and the identity of the transferee are unclear, creating a lack of transparency across Member States.

Similarly, the rental right is generally granted to authors and performers on an exclusive basis. The variations between Member States relate to the existence in most Member States, but not in all, of an obligation to exercise this right through mandatory collective management. Once again differences in the systems across Member States, where such differences are not understood or clear to authors and performers this limits their ability to understand how their remuneration might be affected in different Member States (potentially exacerbating disparities in remuneration across Member States).

In short, not only are there differences between Member States in the qualification of some specific authors' and performers' rights, but there are also discrepancies between the parties entitled to exercise these rights: in some countries the rights are deemed transferred to the producer, while in other countries the same rights are exercised either individually or through a CRMO. As a result, the remuneration is paid sometimes by the producer or by a CRMO, depending on how each right is structured at the national level. The structure of the rights and the identity of the party bearing the burden of the payment have, in turn, significant impact on the form and level of remuneration paid to authors and performers.

The information problem facing individual authors and performers about their likely remuneration in other countries can be pronounced. This lack of transparency for individual authors and performers within Member States limits the ability of authors and performers to understand the level of remuneration which could be earned in other countries. This absence of information represents an implicit barrier to their movement across jurisdictions (non-tariff trade barrier). In other words, a lack of transparency with respect to contractual arrangements and likely earnings has an adverse effect on the functioning of the Internal Market.

6.1.2 Scope of transfer

Certain groups of authors and performers are likely to be in a weaker bargaining position than others. Specifically, authors and performers that are new to the industry, and as such will be relatively unknown to the public, may face more pronounced information asymmetries in their dealings with producers/publishers, and

[165] Cour De Cassation – 1ère Chambre Civile, 11 Septembre 2013, Spedidam C/ Sarl Itunes & A., N° De Pourvoi: 12-17794 where the Court ruled that in the SPEDIDAM decision, the French Supreme Court upheld the ruling of the Court of Appeal whereby it considered that (commercial) online downloading was already covered by the prior authorization granted by a performer for commercial publication through physical media. That is, the court considered that no separate authorization was required for the commercial on-demand (digital) exploitation.

are less likely to have many outside options. Also, authors and performers who have experienced limited success are likely to be in a relatively weak bargaining position. However, this in itself is not an issue.[166] Problems however arise if such individuals get locked into long contracts with relatively unfavourable terms if they become successful. They cannot negotiate new contracts when their position improves (and exploiters have had the chance to recoup any upfront investment made that directly contributed to the success) so that they can earn better returns on new pieces of work. For example in the UK and Netherlands there is currently no limitation on the scope for transfer of rights.

This issue is also pertinent when considering the scope for new modes of exploitation to develop as a result of new technologies and new business models. The ability to negotiate remuneration for a new mode of exploitation ensures that the agreement reflects the specificities of the business model associated with that mode of exploitation.

The freedom of authors and performers in the music industry to exercise their rights personally or to deal with another – more suitable – contracting partner may be seriously impeded where the transfer of rights to the producer/publisher is so broad that it includes future modes of exploitation and future works or performances.

The situation is the same in the audiovisual industry especially regarding future modes of exploitation. In some circumstances, this practice has even been seen as a restriction on trade contrary to the rules on competition law.[167] To alleviate this problem, the laws of a number of Member States (including France, Germany, Hungary, Italy, Lithuania, Poland and Spain) expressly regulate the transfer of rights relating to forms of exploitation that are unknown or unforeseeable at the time the copyright contract was concluded, as well as the transfer of rights relating to future works (in France, Hungary, Italy, Lithuania, Poland and Spain).

The regulation of transfers of rights with respect to future modes of exploitation and future works takes different forms in the Member States' legislation, ranging from a strict prohibition of such transfers (e.g. Poland in the case of future modes), to a restriction in time (for example a transfer valid for a maximum period of time, as in Germany with respect to future works), to an obligation to pay additional remuneration should a novel mode of exploitation emerge (e.g. in the Netherlands). These measures aim to ensure that the author and the performer retain control over the exploitation of their work or performance and that they are not penalised by a long-term contractual arrangement with a publisher or a producer. This issue is not only relevant for the contractual agreements binding authors and performers to

[166] A lack of bargaining power that stems from the fact that an individual is unproven in their abilities is to be expected. Intervention is only required where a lack of bargaining power is the result of a market or regulatory failure. For example, information asymmetries between authors and performers and exploiters represent a market failure and can place authors and performers in a weaker bargaining position. Intervention is therefore required to address this information asymmetry to ensure that authors and performers are not disadvantaged by the superior information of the exploiters. Equally, if exploiters enjoy market power (i.e. the market is not a competitive one), this would represent a market failure and would put authors and performers in a weak bargaining position. Again intervention would be required.

[167] Clifford Davis Management Ltd. V. VVEA Records Ltd., [1975] 1 All E.R. 237, 241.

publishers or producers, but also for the exploitation contracts set out by CRMOs. While the latter contracts, almost as a rule, cover future works and future modes of exploitation, the potential drawbacks of this practice for authors and performers have not expressly been addressed by the new Collective Rights Management Directive. Indeed Article 5(7) of the Directive provides that 'In cases where a rightholder authorises a collective management organisation to manage his rights, he shall give consent specifically for each right or category of rights or type of works and other subject-matter which he authorises the collective management organisation to manage. Any such consent shall be evidenced in documentary form'. However, this provision does not expressly regulate transfers of rights with respect to future works/performances or future modes of exploitation.

6.1.3 Role of trade unions

As explained in section 4.4.3, trade unions (and CRMOs that fulfil similar functions in some countries) play an important role and can have a significant influence on both the level of remuneration received by their members and other aspects of the relationship between their members and those with which they contract. This observation is particularly true with respect to authors and performers in the audiovisual sector. Besides providing support for the negotiation of remuneration agreements (including both direct support and the assistance provided through the union's involvement in preparing and promoting model contracts), unions can also be effective in enforcing agreements. Nevertheless, unions of authors and performers have not been set up in all Member States or, where they have, for all categories of authors and performers. Moreover, collective redress is generally difficult to bring about under the private law of most Member States, as is the common recognition of the presumably unfair character of certain clauses in authors' and performers' contracts.

A traditional role for trade unions has been to engage in collective bargaining on behalf of their members (see sections 2.3 and 4.3). Such actions are designed to increase the level of remuneration received by their members above the level that they would obtain on the basis of individual negotiations. In this sense, trade unions can help to overcome issues associated with the relatively weak bargaining position of individuals in respect of their remuneration arrangements.

In this context, the recent decision of the CJEU in the FNV-KIEM case[168] may signify a shift in the role of trade unions in the future in the negotiation of remuneration agreements for self-employed authors and performers. In this case the Court ruled that a person can be classified as an employee within the meaning of EU law if his independence is merely notional, thereby disguising an employment relationship. In other words, whenever an author or a performer finds himself in a situation comparable to that of employed individuals, a provision of a collective labour agreement will not be deemed anti-competitive in the sense of Article 101(1) TFEU even if it sets minimum fees for those self-employed. Germany and France are among

[168] C-413/13, Court of Justice of the European Union, decision of 4 December 2014 - FNV Kunsten Informatie en Media European Court Reports 2014 page 00000, Celex No. 613CJ0413

the few Member States that have addressed the problem of collective bargaining by self-employed workers in their national legislation. The laws of both countries on collective bargaining agreements make special arrangements each for certain categories of authors or performers. In line with the CJEU decision in the FNV-KIEM case, the laws of both countries grant protection to self-employed authors and performers of specific sectors, if it can be established that the self-employed persons are in a situation of economic dependency, without need to prove the existence of a link of subordination.[169] These provisions are believed to serve the public interest by awarding protection to a group that economically and socially deserves it in the same way as employees.

Aside from collective bargaining there is some evidence from a recent study that unions can help to overcome some of the incentive problems associated with lump-sum payments (i.e. that individuals that are paid a fixed fee have little incentive to exert effort) and thus can play a somewhat positive role for both parties under the reasonable assumption that greater effort will typically be associated with greater sales (see section 4.4.3).[170] This effect arises because of the relatively favourable remuneration arrangements that can be secured by unions compared to the outside options.

In addition to their role in remuneration, unions can, and do, play a role in helping to translate complex legal information into language that authors and performers can understand. In principle, this should help to reduce the information asymmetries that are present between creators and exploiters and in theory this should help creators to make more accurate judgments on the values of their works and to assess the extent to which the proposed remuneration reflects that value.

6.1.4 Other internal market issues

As noted above, at the level of contractual relationships between creators and exploiters, Internal Market issues are associated with a lack of transparency in national systems which may impact on the ability for authors and performers to move between Member States.

In addition, existing differences between national laws applicable in the music and audio-visual sectors also create barriers to the functioning of the Internal Market at the level of exploitation of works and provision of services, which may in turn affect distribution models.

These differences between the Member States may create legal uncertainty and lead to greater transaction costs for parties active in the licensing of music and audio-visual content. In particular, search and information costs involved in arranging licensing contracts in different Member States are likely to be significantly greater than under a harmonised regime. Legal uncertainty and transaction costs are

[169] Cour de Cassation, 2e Civ., 25 mai 2004, *Bull.*, 2004, II, n° 233; Cour de Cassation, 2e Civ., 13 décembre 2005, *Bull.* 2005, II, n° 318; see M. Zylberberg, La distinction travail indépendent/ salariat – Etat de la jurisprudence, Cour de cassation, Bulletin du droit du travail, 3e trimestre, 2008.

[170] Addison, J. T. (2014), "The consequences of trade union power erosion", University of South Carolina, USA, University of Durham, UK, and IZA, Germany.

imperfections in the market and may have an impact on the decision of whether or not to participate in the market for licensing music and audiovisual content. The lack of a proper EU-wide licensing framework clearly hinders the development of new business models in the EU. While these problems associated with transaction costs and legal uncertainty arise clearly in relation to licensing practices of online service providers in the music and audiovisual field (a subject which is outside the scope of this study), they do not affect the legal and contractual practice between authors/performers and publishers/producers.

6.2 Policy options

Based on our findings we have developed five overarching policy options for consideration. These are presented and discussed below. For some of the issues identified, an EU level approach may be more appropriate, for example where there is a specific Internal Market issue. For others, it may be more appropriate for policy intervention to occur at the national level.

The policy options are as follows:

- Policy 1: Specification of remuneration for individual modes of exploitation. This policy option links with the problems identified with respect to the transparency of remuneration arrangements for individual authors and performers.
- Policy 2: Improve cross border transparency of the national systems. This policy option addresses the problems identified with respect to cross-border transparency in our key findings.
- Policy 3: Limit the scope for transferring rights for future works and future modes of exploitation. This policy option addresses the issues discussed in our key findings on the scope of transfer.
- Policy 4: Create a more conducive environment to support role of trade unions. This policy option is based on our findings with respect to the role of trade unions (and CRMOs where they perform a similar function) in the music and audio-visual sectors.
- Policy 5: Facilitate the exercise of the right of making available. This policy option effectively represents a fall-back in the event that the other policies fail to protect authors and performers sufficiently and can be broken down into three possibilities.

We discuss these policy options in turn.

6.2.1 Policy 1: Specification of remuneration for individual modes of exploitation

This policy option would require contracting parties, by law, to specify in writing in the contract 1) the scope of transfer of rights and 2) for each mode of exploitation, to specify the level of remuneration to be paid to the author or performer and/or 3) the proportional remuneration arrangements that would apply. Contracts that do not contain a specification of rights transferred with the appropriate remuneration would be considered null and void under the law.

This policy option does not seek to ensure that all authors and performers receive the same, pre-determined level of remuneration for each mode of exploitation. Rather, the level of remuneration for each mode would continue to be a key point of discussion during contractual negotiations between creators and exploiters and could continue to be set by CRMOs for the rights that they manage. Accordingly, the specific terms of the contract would continue to rest with the contracting parties.

The focus of this policy option is transparency: the level of remuneration (as agreed by the contracting parties) should be specified for each individual mode of exploitation in writing, and as such an intervention may be effective at national or at EU level (the latter may also improve cross-border comparability). This would provide greater transparency to the authors and performers in respect of their terms of payment which should reduce the information deficit they face and thereby improve their bargaining position. In turn, this may lead to somewhat better contractual conditions for authors and performers (see also the discussion of information asymmetries and reporting requirements below). Moreover, the resulting increased awareness of authors and performers could help to ensure that they can benefit from ex-post exploitation arising from new technological developments since they will be more aware of the forms of exploitation that are covered by their contract (see also policy option 3).

The feasibility of specifying remuneration for individual modes of exploitation will depend on the required level of granularity.

Such a policy raises a number of issues for consideration, in particular:

- The potential for increased administrative costs for exploiters, and the impact such costs may have on remuneration.
- The need to ensure that contracts remain up-to-date as technology changes and creates changes in business models and modes of exploitation, and the potential costs associated with such efforts (also an issue for policy option 3 – see later).
- The ability of individual authors and performers to negotiate remuneration for each mode of exploitation given the potential information asymmetry between individuals and the exploiters, and the potential for contracts to become overly complicated and undermine any benefits in terms of transparency and monitoring.
- Should this measure be combined with a reporting, transparency requirement for publishers and producers?

We consider each of these in turn.

Increased administrative costs

By introducing such a requirement, the goal is to increase the information that is available to authors and performers as they are often at an informational disadvantage compared to exploiters. The information asymmetry is tackled through the increased awareness of the terms and conditions that are being agreed on and the improvement in the capabilities for future monitoring of income flows. In practice, the legal obligation to specify the rights transferred gives authors and performers a more solid basis to claim the payment of remuneration and to enforce it in court. French courts have over the years reiterated on numerous occasions the mandatory character of the relevant provision, often ruling in favour of the author or performer.

Imposing such a requirement, however, gives rise to a number of considerations that would need to be addressed. Firstly, an increase in administrative burden will be observed correlating with the increasing granularity in the definition of mode of exploitation. Exploiters will need to incur initial one-off costs in order to bring their processes up to speed with the new specifications. The scale of these one-off costs will depend on the divergence of the contracting parties' current contracting practices compared to the required level of disclosure. Moreover, there will be ongoing administrative costs associated with accurately representing the required detail information in communications to each author/performer.

The "cost pass-through" is in essence an understanding of who bears the burden of any cost increase. An ideal scenario for a seller of a product or service would be to pass the increased costs completely to the buyer in the form of higher prices. This is possible only in so far as such a price increase does not depress demand to an extent that outweighs the benefits of charging a higher price (i.e. revenue does not fall below what it would be in the absence of cost pass through).[171]

Hence, the negotiation of an author or performer with the exploiter will be significantly affected by the exploiter's ability to pass through any increased costs that arise (such as the administrative costs mentioned above) in the form of an increased final product price. If the exploiter is unable to pass the additional costs on to users and has a strong bargaining position vis-à-vis the author or performer, then the latter is likely to bear the burden of the additional costs in the form of lower remuneration. If the exploiter is able to pass through the costs or the author/performer is in a strong bargaining position it is unlikely that their remuneration would be adversely affected by the additional administrative costs.

The cost of updating contracts

Costs would also derive from the frequency with which the contracts need to be renegotiated. As discussed earlier in the report, the online exploitation of audio-visual and music works is playing an increasingly large role in authors' and performers' remuneration. Consequently, given the dynamic nature of online exploitation business models and the pace of technological advances, contractual requirements have an increased risk of becoming outdated. This would generate a need for regularly updating contractual terms, creating higher costs. The greater the detail in terms of the specifications, the more frequent such renegotiating would be.

The use of broader categories for mode of exploitation would ease this burden. However, this could result in a failure to improve substantially the transparency for authors and performers, or to successfully capture business models in any of the existing categories, inaccurately categorise business models into wrong categories, and/or result in remuneration specifications that discourage distribution through particular channels.

[171] In a report prepared for the Office of Fair Trading (OFT) the main determinants of cost pass-through outcomes were identified as the cost change idiosyncratic or industry wide, the price elasticity of demand and supply and the presence of competition across the supply chain. RBB Economics (2014), "Cost pass-through: theory, measurement and potential policy implications", Report for the Office of Fair Trading, February 2014.

Information asymmetries

It is important to determine whether authors and performers are in a good position to negotiate individual remuneration for each mode of exploitation. An information asymmetry is present, whereby exploiters are better placed to understand/know the current potential of an author's or performer's work as well as the development (or creation) of business models.

This informational disadvantage of authors and performers can lead to sub-optimal contractual allocations for them as it puts them in a weaker bargaining position. Thus, merely ensuring that different individual modes of exploitation are explicitly covered in a contract does not guarantee superior outcomes for authors and performers' remuneration, as the monetisation of the additional channels of remuneration may not be optimum for them. Trade unions could play a role in offsetting such informational asymmetries. In particular, they could disseminate information on the different exploitation methods including information on sales data etc.

An additional challenge arises from the complexity of legal language which can result in considerable jargon which cannot be comprehended by the authors and performers who possess no such expertise. In essence, overcomplicating a contract would undermine the authors' and performers' ability to understand, negotiate and monitor their remuneration. This would be an offsetting factor as far as the benefits of specifying remuneration terms for individual modes of exploitation are concerned. The extent to which this would in reality be a problem is unclear, but the scale of the problem would be greater for authors and performers that do not have access to legal representation. In this context, a requirement that additional specifications or the key contractual information should be presented in a user-friendly manner could be considered (as is done in areas of the financial services industry, specifically Key Investor Information Documents (KIID) under UCITS IV)[172].

Reporting and transparency requirements

While increasing transparency through the written specification of individual remuneration should help authors and performers to gain a better understanding of their remuneration, in the absence of information on sales and the amount received from that source, it is difficult for them to monitor their income to ensure that they are receiving the correct amounts. Therefore, it could be useful to introduce requirements on exploiters to provide breakdowns to reflect the revenue streams from the different sources specified in the contract. This should include information on both the revenue earned by exploiters from each of digital downloads, streaming, sale of physical CDs/DVDs etc., the percentage of revenue that should be paid to the creator (as per the contract) and the amount of money that has been paid to the creator. This information would allow the creator to verify that the exploiter has complied with the

[172]The revised Undertakings for Collective Investment in Transferable Securities (UCITS) Directive puts in place a comprehensive framework for the regulation of harmonised investment funds within Europe. The Key Investor Information Document (KIID) is a stand-alone, pre-contractual, 2-page document containing the essential features of the fund and is to be systematically provided to investors before they decide to invest. The KIID was introduced by Directive 2009/65/EC on UCITS IV and Commission Regulation 583/2010. See Official Journal of the European Union, 23/203L, 17.11.2009, Directive 2009/65/EC of the European Parliament and of the Council.

terms of the contract, for example by paying the correct proportion of sales revenue to the creator.

This, however, would clearly imply a cost for exploiters, though the scale of this cost would depend on the nature and granularity of the information to be provided. If it is information already collected and monitored by the exploiter (such as sales data), beyond the additional time to provide this to the individual, the costs should be minimal. Where the costs are larger, consideration would need to be given as to who would ultimately bear the burden of these additional costs.

Technological developments that facilitate the monitoring of the actual use of works and performances would allow publishers and producers to make a more accurate assessment of the remuneration owed to authors and performers for the use of their work. The increasing availability of such technology to publishers and producers could lower any cost impact on them.

6.2.1 Policy 2: Improve cross-border transparency of the national systems

We noted above that the absence of information on the legal system within individual Member States undermines the ability of creators to know if they would be better off in another country. This information barrier has an adverse effect on the functioning of the Internal Market with respect to the free movement of individuals.

One option would be to require relevant organisations (e.g. CRMOs, trade unions) in each Member State to publish user-friendly information on, for example, the typical earnings of authors and performers in that country (broken down by activity), key legislation, the structure of the industry in that country and typical contractual arrangements.

Such information would lower the information barrier and make it easier for authors and performers to understand whether or not they might be better off by relocating to a different country. The potential benefit of such information would be greatest if the same information were provided in the same format across all Member States. This would help to reduce search costs to a greater extent than would be the case if the information provided differed across Member States and would also allow more effective comparisons to be drawn between the different Member States.

However, this option comes with a number of drawbacks. First, monetary costs will be incurred by the information provider both in compiling the information and in disseminating it. Second, there is a limit on the amount of information that can be included in any user-friendly document and hence some relevant information may not be included. There has to be a balance between accuracy and accessibility of the published information.

An alternative, more drastic intervention could be to more extensively harmonise the legislative framework across Member States, thereby removing the cross-border transparency issues. As our findings demonstrate, these issues arise largely from a different implementation or interpretation in the Member States of the cable retransmission right, the right of making available and the rental right (see section 6.1.1). The cross-border transparency could be improved if there was a greater

harmonisation regarding the nature of these rights. Such harmonisation effort could bring the laws of the Member States closer together.

Of course, a known problem associated with harmonising the right of making available and the right of communication to the public is the rapid pace of technological developments. Any legislative action will be a snapshot of the technological reality of the time but may not be representative of future developments. However, harmonisation can provide greater legal certainty for stakeholders and reduce transaction costs.

6.2.2 Policy 3: Limit the scope for transferring rights for future works and fixations of performances and future modes of exploitation

Another aspect that could have an impact on the remuneration of authors and performers concerns the regulation of transfers of rights with respect to future forms of exploitation and to future works and performances. To ensure that authors/performers have the ability to negotiate terms specific to a new mode of exploitation, a contract may provide only for such fields of exploitation which are known at the time of its conclusion. The transfer of rights relating to future works and performances should also be restricted in terms of its duration (for example only the rights for works created over the next five years are transferred) and in terms of genre of work covered by the transfer.[173] As mentioned previously, the issue of the scope of transfer should be addressed not only in respect of the contractual agreements binding creators to publishers and producers, but also in respect of the exploitation contracts set out by CRMOs. This matter could be more easily addressed at the national level but only EU intervention could deliver additional benefits in terms of a harmonised approach across Europe.

It should be noted that limitations on future modes of exploitation and future works and performances are likely to be less relevant for authors and performers that are generally paid a lump sum fee for an individual piece of work or performance and have a specific contract in place for that piece of work or performance, as this model intrinsically ensures their ability to renegotiate for each individual piece. This would apply particularly to session musicians in the music industry and actors in the audio-visual industry.

Germany offers an interesting illustration of this kind of policy; a strict prohibition on the transfer of rights in 'unknown' or 'unforeseen' forms of exploitation existed until 2002. Until 2002, German courts were required to develop criteria to assess whether a mode of exploitation was 'known' or not at the time when the parties signed the contract. As a result 'future or unknown forms of exploitation' were defined as those

[173] To note that the duration of the transfer of rights on existing works does not need to be limited in time and can be separate from the time limit to bind the author/performer for future works or fixations of performances: i.e. a clause may effectuate the transfer of rights on existing works or fixations of performances for the duration of the copyright protection on it (life of author + 70 years after his death), but another clause may limit the transfer of rights only with respect to works or fixations of performances to be produced in the course of the next five years, for example.

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 was deemed to be new, when it is a clearly distinguishable economic and technical mode of exploitation of a work.[174]

Future modes of exploitation

The exact nature of new exploitation, namely that they are unknown and unforeseen, is the source of the problem in this instance. It is hard to predict ex-ante the optimum way to design a contract to cover all potential future modes of exploitation. Also, it would be inappropriate, as it would be difficult to determine an appropriate level of remuneration if the mode of exploitation and associated business model are not yet clear. Ensuring that the author/performer has an opportunity to negotiate the remuneration for a particular source of income when a new mode of exploitation becomes available, means that they also have the opportunity to negotiate better terms if their bargaining position has improved (for example due to their works being successful in other modes of exploitation). Further, those who have achieved less success than anticipated when the original contract was signed may secure less favourable terms for the new mode of exploitation than they would have had it been set at the time of the original negotiation. As such, this policy may result in a transfer of wealth from authors and performers who have under-performed against expectation to those who have over-performed.

There is also a cost associated with such a process, however; specifically, that of negotiating an additional contract (or addendum) for the new mode of exploitation. This involves the time spent in the negotiation process and the administrative process of drafting the contract etc. Even if it is the publisher or producer that bears the cost of drafting the contract, both parties will need to commit time to the exercise, the author or performer may also need to pay for their lawyer to review the document. Where the ultimate cost incidence will rest will, however, depend on the nature of the market and the price sensitivity of consumers and exploiters. This may vary across industries and Member States.

Moreover, restricting the extent to which the exploiter can earn returns on the investment made in the author/performer without engaging in a separate contractual negotiation may reduce the incentives for exploiters to invest in the first place. For example, the exploiter would have less incentive to engage in marketing activities to promote a record if it will not necessarily reap the full rewards of his investment (e.g. because he may not receive revenues from new modes of exploitation).

An alternative policy design may be to allow the transfer of rights for future modes of exploitation subject to the author or performer receiving adequate remuneration for the additional modes of exploitation, and with an option for the author or performer to revoke their rights if they are unsatisfied with the remuneration offer. This is the approach that has been adopted in Germany since 2002. Evidence should be gathered on the success of the change in policy in Germany so as to help assess the impact of such a policy and the most appropriate formulation.

[174] BGH, 11 October 1990 (Videozweitauswertung I), GRUR 1991, p133, English translation in IIC 1991, p574; BGH, 26 January 1995 (Videozweitauswertung III), GRUR 1995, p212; see also: BGH, 13 May 1982 (Altverträge), GRUR 1982, p727.

Future works and fixations of performances

The time period set over which any new work or performance will be transferred to the exploiter has important implications for both the exploiter and the author/performer. A relatively short contract which only covers works created over the period of say a year creates a high degree of uncertainty for the author/performer. From the exploiter's perspective the incentive to investment in the author or performer to develop and promote the individual is weaker if the contract covers only a limited portfolio of their work/performances. Setting the duration to be very short may provide very limited incentives for the exploiter to invest in promoting the author/performer and creating a 'brand' since the exploiter would know that one of its competitors could free-ride on this investment in the future. In contrast, where the contractual agreement for future works/ performances extends over a longer time horizon and by implication a greater number of creations, the incentive to invest in the author/performer is greater, as they will have a larger body of creations and thus a larger potential revenue stream if the author or performer is successful.

The implications for the author or performer will vary depending on their relative success. Longer contract durations with respect to future works or performances, can act favourably for authors or performers whose early work is less successful than anticipated, as they would be in a weaker bargaining position had they to negotiate a new contract for their later works. In this instance, they will have locked in preferable contractual terms compared to having to re-negotiate a new contract, based on their recently unsuccessful track record. On the contrary, longer contract durations, with fixed and non-negotiable remuneration arrangements, may impede individuals from exploiting their potential success, or an increase in their knowledge of the industry, which would both serve to increase their bargaining power in potential re-negotiations.

There is a very fine balance in identifying the appropriate duration that would incentivise exploiters to invest in the author or performer while at the same time ensuring that new information on the author/performers' quality and potential can be exploited by the author/performer and the exploiter in a meaningful and timely manner in contract re-negotiations.

In addition, the cost of renegotiation, either in the form of actual costs to conduct the negotiations or in the form of costs associated to potential foregone income due to delays, is important when it comes to determining a contract's duration.

6.2.3 Policy 4: Create a more conducive environment to support the role of trade unions

A measure at national or EU level that could contribute to the reinforcement of the authors' and performers' contractual position vis-à-vis the exploiters, and to reduce information asymmetries in particular, could be to create a more conducive environment to support the role of trade unions. Trade unions can indeed support authors and performers in at least three different ways that are most useful for securing remuneration: supply of information, collective negotiation and enforcement.

First, trade unions can play an important role in providing authors and performers with information regarding the general conditions of contracts signed in the field, and more specifically with respect to the scope of the rights granted to them under the law, the modes of exploitation of works or performances that fall within the scope of these rights and the (range of) remuneration usually paid in the market for these forms of exploitation. Trade unions can also provide useful information with respect to other conditions covered by the contract, for instance about the duration of an agreement with an exploiter, or the emergence of new forms of exploitation. Making information available on the rights and the customary terms in the market would put authors and performers in a much better position to assess whether they agree with the terms presented to them by an exploiter. Increasing access to information for the weaker party to contractual negotiations often leads to increased bargaining power, as demonstrated for example in consumer protection law. Trade unions in the music and audio-visual sectors commonly offer their members legal advice or documentation which increases the capacity of authors and performers to negotiation on a more equal footing with exploiters. Where trade unions in these sectors are not already active in supplying relevant information to their members, they could be encouraged to do so more dynamically through information campaigns, workshops etc. No amendment to the legal framework would be necessary to achieve this.

Second, trade unions can improve authors' and performers' bargaining position vis-à-vis exploiters by engaging in collective negotiations them, or their associations, on behalf of their members over the scope of transfer of rights and the corresponding remuneration to be paid. Collective bargaining can result in the elaboration of model contracts or in the signature of binding agreements between union members and an (association of) exploiter(s). Trade unions already active in representing the interests of their members in the music and film industry have sufficient knowledge, ability and skills to make a significant contribution in this sense. However, even if self-employed authors and performers organise themselves into dynamic trade unions, competition law can pose a major obstacle to their collective action. Indeed, such agreements are commonly frowned upon as a form of prohibited concerted practice between undertakings, which has as its object or effect the prevention, restriction or distortion of competition on the Internal Market contrary to Article 101(1) TFEU. The rules of competition law generally preclude the collective negotiation of remuneration contracts for self-employed creators.

The recent decision of the CJEU in the FNV-KIEM case[175] may signify a shift in the role of trade unions. Commentators must still reflect on the consequences of this important decision. At first glance, the decision would seem to open the door slightly wider to the possibility for associations of freelancers to legally negotiate collective bargaining agreements with associations of employers, within the limits of the rules on competition law.

While further research would be needed to determine precisely where the public interest lies between the application of the rules on European competition law and the protection of self-employed creators, the adoption at European level of a provision

[175] C-413/13, Court of Justice of the European Union, decision of 4 December 2014 - FNV Kunsten Informatie en Media.

similar to those of the French and German acts explained in Section 6.1.3 could be considered.

Third, trade unions could become a more dynamic ally in the authors' and performers' enforcement of collectively bargained terms. As frequent in consumer protection law, unions of creators could be legally enabled, like consumer associations, to instigate court proceedings asking the courts to declare certain contract clauses as abusive. The significance of the tools at a trade union's disposal is evident in the domain of enforcing the agreed contractual terms between exploiters and authors/performers. A more conducive environment for the functioning of trade unions could empower them through activities such as class actions or test cases before the courts, through which a credible threat is created that can incentivise exploiters to adopt fair (e.g. non-abusive) contractual obligations. But because trade unions may not in law be regarded as having sufficient legal interest to collectively represent creators in such court proceedings, the rules of civil procedure law may be need to be adapted to allow trade unions to engage in such legal actions.

Aside from any cost associated with necessary legislative changes, any expansion in the activities of trade unions is likely to come at a cost (e.g. in terms of additional employees, additional costs of external advice, additional resources etc.). The cost of any additional activities would depend on the nature of the activity itself; information provision, collective bargaining or enforcement. The more time and the more skilled the individuals required to undertake the additional roles, the higher the costs are likely to be. As such the cost of providing information and ad hoc support is likely to differ from the cost of engaging in complex negotiations with exploiters to secure collective agreements, or indeed representing members in class actions against exploiters. As trade unions are typically financed by their members (e.g. through membership fees), any cost increase is likely to be borne by the authors and/or performers that belong to the union.

Equally the benefits of different types of activities are likely to vary, both in terms of the scale of the benefits and the beneficiaries. For example a more coordinated approach such as collective bargaining would be expected to create greater benefits for authors and performers, both in terms of outcomes and the number of authors and performers affected, than the provision of ad hoc advice or support in negotiation procedures on an individual basis. Collective agreements and enforcement activity would equally be likely to result in farther reaching benefits by creating general improvements in the sector, beyond the trade body membership, through the standardisation of contract terms and disincenitivising unfair behaviour.

The balance between the additional costs and the potential benefits for individuals' remuneration would need to be considered to determine whether increasing the scope of trade union activities would represent a net benefit to the authors and performers.

6.2.4 Policy 5: Facilitate the exercise of the right of making available

The aim of this policy is as a backstop to our earlier policies (1-4) (i.e. in the event that they are ineffective) to ensure that authors and performers are able to secure

remuneration commensurate with their skill and the quality of their work. The inclusion of this policy responds to our analysis of the music and audiovisual industries, which show the shifts in the industry value chains along with the increasing importance of digital business models that are gradually becoming viable business propositions. As a result of these economic and technological developments, the making available right covers an increasingly wide array of forms of exploitation. Hence, its weight in the overall bundle of rights held by authors and performers is also larger. This option would need to be considered on a country by country basis, its application being most relevant in those Member States where other policy initiatives have been unsuccessful in protecting authors and performers.

Facilitating the exercise of the right of making available could be achieved in different ways:

- through the voluntary collective management of the right of making available;
- through the recognition of an unwaivable right to obtain equitable remuneration from the producer/publisher in exchange for the transfer of that right; or
- through the recognition of an unwaivable right of equitable remuneration to be administered by a CRMO upon the transfer of the right to a producer/publisher.

These options go along a spectrum that ranges from liberal to restrictive, in terms of the structure of the right of making available and its form of exercise. Only one of these, option 5b, does not involve remuneration being licensed or collected by a CRMO. Options 5a and 5b could be set as alternatives to each other: either a creator would voluntarily assign his right of making available to a CRMO or he would have an unwaivable right to receive remuneration from the producer/publisher upon transfer of the right. Option 5c builds on option 5b to place the role of administering the right of making available (once it has been transferred to the producer/publisher) with the CRMO.

Option 5a: Voluntary collective management of the right of making available

As mentioned in section 2.1.1, the Information Society Directive grants both authors and performers an exclusive right to make their works or performances available to the public. In several countries the CRMOs representing the rights of music authors, like PRS for Music, BUMA, have concluded agreements with services, like YouTube, iTunes, Spotify and others, for the making available of works. This form of voluntary collective management ensures that music authors receive remuneration, via the CRMO, each time their work is used on the interactive channels with which the CRMO has concluded a licensing agreement. In practice, the CRMOs representing other categories of authors and performers than music authors have either received a limited mandate from the law or have had so far lacked the logistics to be able to effectively manage the right of making available. Therefore, these authors and performers are generally limited to exercising their exclusive right individually, which most often entails its transfer to the producer. In this Option 5a, authors and performers would have the choice in both sectors to transfer their exclusive right of making available to the CRMO, which would license to and negotiate with online services like YouTube, Netflix etc.

One benefit of the voluntary collective management of the right of making available is that members of a CRMO in principle have the flexibility to grant or withdraw their

authorisation to or from the CRMO, should conditions in the market or in the creators' personal situation evolve so as to allow them to get a better deal directly from the producer. Ensuring such flexibility for the members of CRMOs is indeed one of the cornerstones of the recent Directive on Collective Rights Management. Article 5 of the Directive poses as a principle that right holders must have the right to authorise a CRMO of their choice to manage the rights, categories of rights or types of works and other subject-matter of their choice, as well as to terminate the authorisation to manage rights, categories of rights or types of works and other subject-matter granted by them to a CRMO, or to withdraw from a CRMO any of the rights, categories of rights or types of works and other subject-matter of their choice.

A key issue in this context is that voluntary collective rights management is not a common practice among audio-visual authors in particular, and among performers in general. Exclusive rights of authors and performers in the audio-visual sector are most often transferred to the producer, either by means of a legal presumption of transfer or by contract, which in practice eliminates the possibility to voluntarily assign the same rights to a CRMO. Nevertheless, double transfers of rights in favour of producers and CRMOs are not entirely uncommon in practice, as reported in the Netherlands with respect to the cable retransmission right. But this is an undesirable situation that gives rise to legal uncertainty. To make this option workable in practice, a solution would have to be found to address the problem of the presumption of, or actual, transfer of rights to the producer and to allow audio-visual authors and performers to voluntarily entrust their right of making available to a CRMO.

The implication of this option in the audio-visual sector would be that as a result of the transfer of the authors' or performers' right of making available to a CRMO, the exploitation of the work or performance would only be possible with the permission of the CRMO and of the film producer who would still be able to exercise his neighbouring right on the first fixation of the film or in respect of the original and copies of the film, pursuant to article 3(2)c) of the Information Society Directive. This would increase transaction costs for users who would have to negotiate licences for online exploitation both with the producer and the CRMO. Remuneration from the online exploitation of the audio-visual work or performance would be paid to the authors and performers via the CRMO.

In the field of music performances, where the voluntary collective management of the right of making available would probably improve the situation the most, the current legal framework in most Member States would perhaps not give unequivocal support to the performers' voluntary collective rights management. In any case, more research would need to be done to investigate how this would affect money flows and transaction costs for users in the music sector. CRMOs engaged in the collection of remuneration in application of the national implementation of article 8(2) of the Rental and Lending Rights Directive generally have a very narrowly defined statutory mandate, limited to collecting the remuneration due for the broadcasting and the communication to the public of commercial phonograms. The laws that confer these organisations their mandate do not usually provide the possibility to extend the organisations' mandate through voluntary contracts. This option would require an intervention from the legislator to allow these CRMOs to accept voluntary mandates from their members. In certain Member States, however, separate CRMOs have

started representing the rights of music performers for the making available of their performances, such as in the Netherlands through the CRMO, Norma. This practice could be encouraged and where needed, CRMOs could be set up to perform this task. New CRMOs would of course need to comply with the legal requirements set out in the recent Directive on collective rights management.

Giving the possibility to authors and performers to voluntarily transfer their right of making available to CRMOs could constitute the necessary incentive to ensure that producers pay them 'equitable remuneration'. Such an incentive, however, would rely on a scenario where producers (and potentially CRMOs) compete in the market for specific authors and performers, as this would ensure that authors and performers have a "real" choice.

Option 5b: Unwaivable right to obtain equitable remuneration from the producer/publisher

As alternative option to the voluntary collective management of the right of making available, the law could recognize an unwaivable right for authors and performers to obtain equitable remuneration from the producer (in whatever form, lump sum, royalty payments or a combination of the two) once the right of making available has been transferred. The benefit of introducing this unwaivable right would be that authors and performers in a weak bargaining position would not be able to transfer their rights without receiving some form of remuneration. This was the rationale behind the adoption in the Rental and Lending Rights Directive of the unwaivable right of authors and performers to obtain equitable remuneration once they transferred their rental right to a producer.

The implication of this option in both sectors would be that as a result of the transfer of the authors' or performers' right of making available to the producer, the producer would remain the sole entity capable of exercising control over the exploitation of the work and performance. Remuneration from the online exploitation of works or performances would be paid to the authors and performers directly from the producer.

A key issue in this context would be how to monitor the application of such a policy – it is not feasible for every contract to be checked to ensure that it really complies with the legal obligation. Insofar as the law does not impose a monitoring obligation on any party or organisation, the practical application of this provision would risk remaining a dead letter. Compliance would need to derive from challenges made by the individual author/performer themselves (or potentially their trade body on their behalf). As individual authors/performers are often wary of jeopardizing an ongoing relationship with their producer, cases are seldom brought before the courts to challenge the validity of contractual clauses.

Equally the benefits of such an option may be limited if rights transfer occurs for a nominal amount. However, a performer, for example, might be willing to accept such a low remuneration in exchange for future ancillary business (e.g. marketing, touring possibilities). Imposing a minimum threshold for the transfer of rights to avoid a potential 'nominal amount' scenario, would, therefore, distort the market and would only be appropriate in a context when there is a concern over the extent of competition in a market (and thus the ability for a producer to abuse a dominant

position – in which case recall to competition law and structural remedies or regulatory intervention may be required).

A requirement for an unwaivable right of remuneration must, however, be balanced with requirements on the scope for the transfer of rights. If the scope of transfer is effectively limited the need for such a requirement for an unwaivable right of remuneration is less obvious; a well-crafted statutory provision would allow a successful author or performer to benefit from their success through their stronger bargaining position in the negotiation of subsequent contracts reducing the need for additional protection via an unwaivable right of remuneration.

Option 5c: Unwaivable right to equitable remuneration administered by a CRMO

An alternative model for addressing the difficulty in exercising the right of making available would be for the law to impose an unwaivable right of remuneration for authors and performers once the right of making available has been transferred to the producer or publisher. The tariffs setting and collection of the remuneration owed to authors and performers from the exploitation of this right would be entrusted to a CRMO. In other words, the producer would retain full control over the exploitation of the work or the performance and would receive licensing fees directly from the user for the act of making available, which represent the royalties for the exploitation of his own neighbouring right. For authors and performers, the determination of the level of remuneration and the payments thereof would come from the CRMO.

It may well be that with the development of technology the means to monitor the actual use of works will improve and be even more broadly accessible to exploiters allowing them to make a more accurate assessment and payment of the remuneration owed to authors and performers for the use of their work or performance. This would eliminate the need to implement an unwaivable right of equitable remuneration administered by a CRMO.

This system would have the benefit of ensuring that all authors and performers received remuneration for their rights; though it would create additional costs for CRMOs. The scale of such costs would depend to some extent on the degree to which the CRMOs within a country are already involved in collecting remuneration for the making available right from digital service providers.

However, this approach would effectively remove the scope for authors and performers to transfer the associated rights in return for a lump sum payment. This could result in a sub-optimal outcome for authors and performers if:

- they place a greater value on current income than future income (i.e. they have a high discount rate) and have a low preference for smoothing their consumption over the period of the rights transfer (i.e. they prefer a lump sum payment to regular payments of a similar size over the period);
- they are risk averse, as they will prefer a lower income with certainty than a higher income with some uncertainty attached;[176]

[176] An individual is risk averse if he prefers to receive a guaranteed income of, say, €100 over a package in which he receives €50 with a chance of 50 per cent and €150 with a chance of 50 per cent even though the expected remuneration of these payment arrangements is identical (i.e. €100).

- the work is less successful than anticipated, as they are very likely to be better off with an upfront payment based on the anticipated success; and/or
- their ability to monitor that their monies are properly allocated is more restricted, for example if their performances are mainly exploited abroad.

Finally, this model could pose certain practical difficulties, particularly in the audio-visual industry, where so many authors and performers are involved in the production. Depending on national legislation all these authors and performers may have a claim to remuneration from the CRMO as soon as their right of making available is presumed or actually transferred to the producer. The significance of the transaction costs involved combined with difficulty of assessing what the revenues of the online exploitation are, could justify limiting the model to specific categories of authors and performers.

6.3 Recommendations

A full impact assessment should be conducted on any policies considered to properly assess the costs and benefits of different options and the potential for unintended consequences that may distort the market. Based on our initial high-level review we recommend the following policies should be considered in more detail:

- Harmonised requirement for the specification of remuneration for individual modes of exploitation — policy option one relating to the provision of written contracts with the remuneration for individual rights broken down by mode of exploitation.
- Improve cross border transparency of the national systems — policy option two relating to the ability of authors and performers to understand whether or not they are likely to be better off by working in a different country.
- Harmonised limits on the scope for transferring rights for future works and performances and future modes of exploitation — policy option three relating to the ability of authors and performers to limit the scope of any rights transfer so as to prevent them being locked into less beneficial contracts for long periods.

With respect to options four and five we would recommend conducting more detailed research to understand more fully the impact these options would have on the remuneration of authors and performers. In particular, further work is needed to understand the extent to which policy option five would be appropriate if the policies to regulate the specification and scope of transfer (policies one and three above), and the most appropriate of the variants of policy option five to implement (e.g. with respect to the extent to which they may affect the remuneration of authors and performers, the scope for distorting the market, the extent to which they are likely to be feasible to implement and the costs associated with implementation). Equally for option four, a deeper understanding of how trade unions can effectively influence the remuneration of authors and performers is required, and more specifically the impacts of other types of trade union involvement beyond collective bargaining.

In each case it will be important to consider the relevance of any policy proposal for the different types of authors and performers and the different industries. Furthermore, consideration must be given to countries where similar practices are

already in place so that the design of the policy does not entail unnecessary and potentially costly changes to national legislation.



Appendices

Europe Economics

7 Appendix 1: Music Industry

7.1 Overview of the music industry

In this section, we present a more comprehensive discussion of the recent development of the music industry. A summary version is presented in section 3.1 of the report.

7.1.1 The music industry in the pre-digital era[177]

Historically the music industry was characterised as a market for hard copies of musical sheets (sheet music). What allowed music to make the transition from an abstract artistic creation with limited commercial value to a commercially exploitable physical product with explicit economic value was the invention of the phonograph by Thomas Edison in 1877.

Another important development came in 1914 when the patent for disc held by Victor Company expired and allowed other producers to enter the market. This shifted the market from selling gramophones to selling actual records.[178]

This changed the industry dramatically. The potential to recreate, record and distribute successful hits was a lucrative business opportunity. Songwriters, who were usually poor at the time, tended to freely accept lump-sum contracts. This ensured adequate supply. The arrival of the radio changed the scene, focusing the attentions of the promoters on this new medium.

While the music industry was expanding it became evident that authors and performers and their creative intellectual property were playing a major role in the business. An important step towards the protection of authors and performers was taken in the UK through the Copyright Act of 1911. By 1924, the various CRMOs had amalgamated to form the Mechanical Copyright Protection Society Limited (MCPS) and the Performing Rights Society (PRS). The MCPS was responsible for collecting and distributing the proceeds from the reproduction of phonograms while the responsibility of the PRS was to do the same for communications to the public, live or recorded.

The situation was much more unstable in the US where there was significant resistance from radio stations to paying any royalties for playing the contents of discs they had already bought. In addition, radio stations argued that a song being played on the radio was in essence a form of advertising therefore demanded payment for it.

In the 1930s and 1940s the music industry experienced the development of the "star-system", pioneered by Decca records in 1934. The focus of Decca records shifted from the equipment used to produce phonograms to the performers themselves. Those

[177] The timeline presented in this section has used information from: http://www.scribd.com/doc/4067086/A-Brief-History-of-the-Pre-Internet-Music-Business.

[178] Source: http://www.scribd.com/doc/4067086/A-Brief-History-of-the-Pre-Internet-Music-Business.

musicians perceived as stars, or having star potential, were heavily promoted and were viewed as a vital part of the product offering.

Up to the Second World War, retail, film, radio and jukeboxes were the main avenues for promoting music. This all changed in 1948 when Columbia Records introduced vinyl, driving production costs lower and incentivising the entrance of smaller players to the market.

With the emergence of television, things changed radically again. Advertisers exhibited a clear preference for television leading to shrinking profits in radio. Radio stations were forced to reinvent themselves in order to be able to provide format-specific offerings to particular target groups.

The appearance of Rock and Roll music dealt a severe blow to record labels' market shares. As record labels considered Rock and Roll a passing trend, they were too late to embrace it and therefore lost out to smaller, independent record companies. This failure brought a wave of change in the negotiating table between performers and the record labels. According to Peterson and Berger (1975), "it was not until the mid-1960's that the search for new talent became so intense that performers could demand unprecedented artistic freedom".[179]

In the 1970s the introduction of the cassette tape, a re-recordable medium was perceived to be a threat to record companies, primarily due to piracy and recording concerns.[180] While the cassette eventually overtook vinyl, the most important development came after 1982, when the first Compact Disc (CD) became commercially available and resulted in a strong booming period for the industry.

7.1.2 The transition to the digital era

One of the most striking features of the music industry is the influence of technology in recent years. The digital age and technological advances have reshaped the industry and have created a number of alternative ways through which a creator can reach their audience. The number of formats in which music can be consumed has increased significantly from initially being restricted to vinyl, touring and the radio to a wide array of online and offline options at present.

The industry underwent a transformation from the immobility that characterised the early stages to a fully-fledged mobile service. In the very early stages, physical engagement was crucial to obtaining access to the music of one's choice. This aspect was improved with the invention of the radio and television as described in the previous section. The situation then became even more "portable" through the utilisation of the CD as a medium.

The early 2000's saw the rise of the digital dimension with revolutionary "peer-to-peer" downloading services such as Napster and LimeWire allowing users (even those with limited technological sophistication) to obtain next to instant access (depending on connection speed) to their demanded material. This created new copyright

[179] Berger, D. and Peterson, R.A. (1975), "Cycles in symbolic production: The case of popular music", American Sociological Review, 40:158-73.

[180] "A brief history of the pre internet music business" http://www.scribd.com/doc/4067086/A-Brief-History-of-the-Pre-Internet-Music-Business.

infringement issues. It was a source for concern for authors and performers whose content was widely distributed for free implying no returns for their creation. The same held true for influential record labels that experienced a decline in physical sales due to the availability of such an attractive substitute product.

A crucial step towards legal online distribution came in 2003 when Apple announced the iTunes Music Store. iTunes as an online store for music, among other things, represented the legal side of the digital market for music and served as an alternative to physical consumption and distribution. It also served as a counter measure to piracy. There was an apparent gap in the market before legal online distribution came about which becomes evident when one considers the success iTunes has had over the years. On February 6th 2013, Apple announced that the benchmark of 25 billion song downloads had been surpassed by iTunes.[181]

The online evolution of the market did not stop at online stores. Streaming services also form an important part of the market. A prime example of a streaming service is YouTube where users upload video content that can be shared with all other YouTube users. The revenue model for such a service is heavily reliant on advertising revenues which are then distributed, according to agreed terms, back to the uploading user.

Another part of the market is captured by subscription services such as Spotify. Though business models are ever changing the concept is the following:

- Free service for limited content supported by advertising revenue.
- Paid subscription for access to more content and avoiding advertising.
- Premium content for access to best content and even potential for offline play.

7.1.3 Summary of changes in the consumer experience

The previous sections offered invaluable insights into the music industry's dynamics. An individual finding themselves in demand of music before the invention of the phonograph had the following options:

- attend a live concert; and
- purchase music sheets.

However, with the evolution of technology the available options increased to include:

- purchase a physical copy of the product;
- listen to the radio;
- watch television; and
- listen to a public, recorded performance.

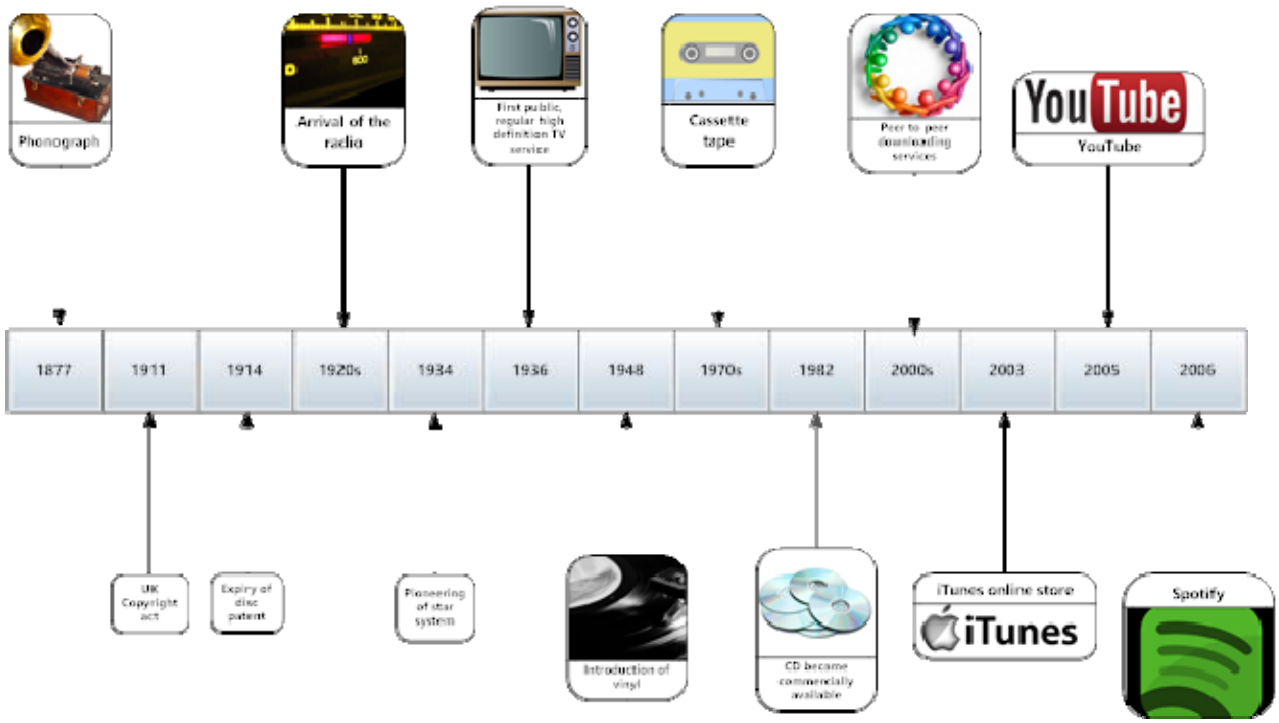
It was not until the full digital evolution of the music industry however that the full array of options expanded further to include:

- purchase a digital copy of the product;
- use a streaming service;
- use a subscription service; and
- attend a live performance.

[181] http://www.apple.com/pr/library/2013/02/06iTunes-Store-Sets-New-Record-with-25-Billion-Songs-Sold.html.

The information presented above is clearly illustrated in Figure 7.1.

Figure 7.1: Timeline of developments in the music industry



7.1.4 Impacts of technological developments

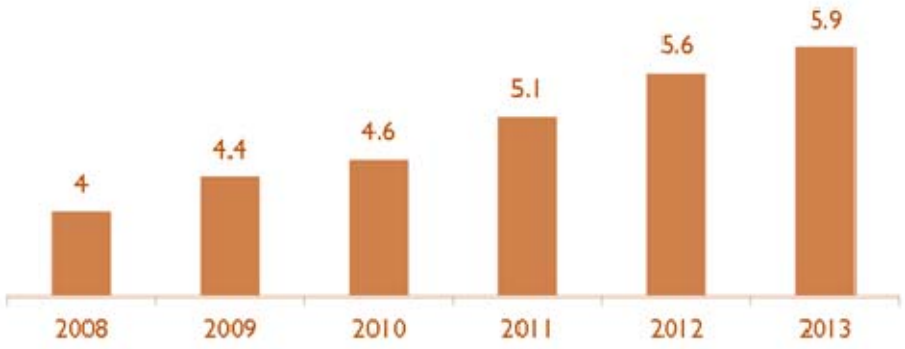
Prior to digital distribution, record labels and distributors had to make significant efforts to gain a place in the valuable "shelf-space" offered by music stores. Additionally, competition was fierce in order to obtain valuable radio or television exposure. This often resulted to marginalising some of the smaller players in the industry.

Smaller players did not have the capacity of their larger counterparts to engage in extensive and expensive promotion campaigns. Moreover, they did not possess the bargaining power that larger players had, as larger labels represented a number of musicians enabling them to offer a complete bundle. Furthermore, often the size of larger players acted as a signal of the expected quality of the promoted product. Higher expected quality can be perceived as more favourable since it would increase profit generation.

Digital technology has revolutionised the industry by alleviating the capacity concerns that were present before digital distribution.

The following figure illustrates the increasing trend in global music revenues from online distribution. It can be observed that since 2008, revenues have increased by approximately 50 per cent. Additionally, they have increased every single year from 2008 to 2013.

Figure 7.2: Record companies' global digital revenue (US$ billions)



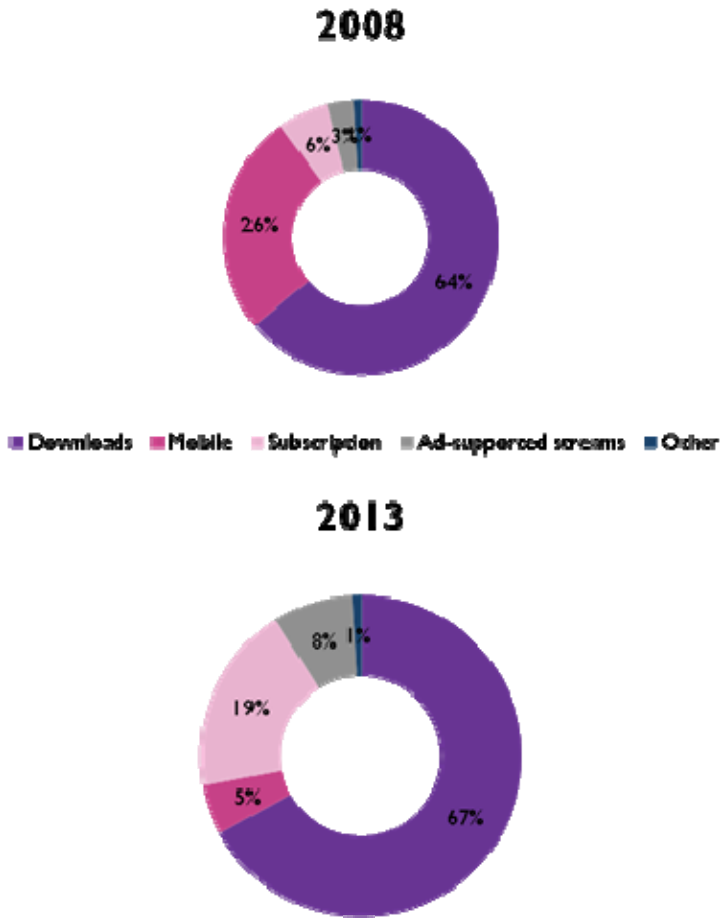
Source: IFPI.

The industry's digital sector now comprises 39 per cent of aggregate revenue, while in three of the ten largest markets this share exceeds 50 per cent. Streaming and subscription services are now stronger than ever and represent a viable business model. Competition in the industry is increasing. Users of subscription services have increased from eight million in 2011 to 28 million in 2013. These developments point to the recalibration of business models towards the access to music as compared to the ownership of music. Indeed, the proportion of digital revenue from streaming and advertisement-supported streaming has increased considerably, from 14 per cent in 2011 up to 27 per cent in 2013. [182]

Figure 7.3 illustrates the change in the sources of digital revenue from 2008 to 2013. The figure shows that downloading consistently comprises close to two thirds of aggregate digital revenue while "other" sources are stable at one per cent. The most notable changes are the increases in ad-supported streaming (from three to eight per cent) and subscription services (six to 19 per cent); these seem to have eroded the percentage attributed to mobile revenues which decreased from 26 to five per cent.

[182]IFPI (2014), Digital Music Report, p5-6.

Figure 7.3: Record companies' digital revenue breakdown by format



Source: IFPI.

The growing role of the online element of the music industry is highlighted by the fact that while online revenues grew continuously since 2008, revenues for the industry as a whole fell by 3.9 per cent in 2013 to an estimate of $15 billion. In 2013, the magnitude of revenue sourcing from streaming services grew to more than $1.5 billion, while subscription services grew by 51.3 per cent to more than $1 billion for the first time. These increases were more than enough to offset the slight decline of digital download revenues which fell to slightly below $4 billion. Despite the increase in digital revenues, physical formats still account for more than half of total revenue. Moreover, performance rights (which relate to both online and physical distribution) generate 7.4 per cent of total industry revenues while synchronisation deals account for 2.1 per cent of that revenue.[183]

7.1.5 Challenges and opportunities

A number of challenges have arisen during the digital era. First, the potential for piracy is significantly more pronounced with digital technology. Piracy prevents the

[183]This was mainly attributed to weak performance in Japan which, when excluded, leads to a decrease in aggregate revenues of 0.1 per cent. See http://www.ifpi.org/facts-and-stats.php.

effective enforcement of copyright and as such allows content to be made available without remunerating the creators of the material. This may lead to a reduction in sales of legitimate music and thus earnings for creators, and ultimately distort the incentives created by copyright protection. Piracy is, therefore, a particularly important issue for the contemporary music industry. However, the impact of piracy on remuneration is outside the scope of this study.

Digital distribution has also affected relationships between distributors, producers and creators of music. The unit cost of making a song available online is considerably lower than those associated with offline distribution. It is no longer necessary to publish the creation in a material form nor is it necessary to physically deliver it to retail outlets.

This has increased the number of options for musicians in the music industry to channel their creativity. There are now opportunities for creators to pilot their work on websites of mass access such as YouTube where no costs are involved. Other examples, such as Jamendo, allow musicians to publically share their albums through Creative Commons licensing. This type of licensing enables musicians to distribute their content, usually for non-commercial uses, without losing the rights to the underlying creation. Jamendo's business model provides significant remuneration opportunities for musicians since it allows users to make donations that go straight to the musicians, minus a small transaction fee. In addition, advertising revenue is split in half between musicians and Jamendo.

This allows them to bypass some of the traditional channels that characterise the mainstream industries and which may be cost prohibitive for them. In addition, the digital nature of data transmission creates a capability for distribution without regional barriers or time constraints.

7.2 Alternative cases

We provide examples of musicians following alternative supply chain below.

Focus Box 1: Examples of musicians following alternative supply chains

A prime example of a short term alternative approach which converged to the mainstream case once recognition was achieved is Justin Bieber. Justin Bieber is a singer-songwriter who was scouted by his manager through videos he had uploaded on YouTube. The costless distribution of his performances through YouTube acted as a means through which to obtain recognition in the short term until eventually becoming part of the mainstream supply chain and being "signed" by a record label.

Another example is that of Lorde, the 17-year old New Zealander. Lorde, through her manager, signed a development deal with Universal whereby the label invested small amounts in her training and in her supporting staff. She then began by promoting her first extended play (EP) for free through SoundCloud, an online distributor. After the first 60,000 free downloads record labels realised the value of the product and her development deal quickly turned into a proper one. An interesting point is

that, her manager, Scott Maclachlan identifies the importance of record labels as a partner but at the same time highlights the importance that digital media play for a musician to be able to promote themselves. One of the most important moments in the attempt to promote her songs was the fact that Sean Parker (the person who ran Napster) added her song to his playlist on Spotify which had more than a million followers.[184]

[184] http://www.hitquarters.com/index.php3?page=intrview/opar/intrview_ScottM.html.

8 Appendix 2: Audio Visual Industry

Contrary to the section 3.4 of the main report which presents a summary description of the recent development of the audio-visual industry, we present below a full overview of the audio-visual industry and explore the key trends that are currently shaping the industry.

8.1 Overview of the audio-visual industry

In 2011, the European audio-visual sector was estimated to generate an economic value of €107 billion, representing 2.6 per cent of EU GDP. It also provided 5.8 million jobs.[185] This sector plays an important role in fostering innovation and preserving cultural diversity with EU.

To support the production and distribution of European audio-visual products, a number of national and EU funding schemes have developed. In 1991, the MEDIA programme was created by the European Commission to support the cultural diversity and cooperation in the European audio-visual industry, as well as promoting economic development through creation of new business opportunities.[186] It is comprised of four multiannual programmes with each includes measures to support the production and distribution of EU film and TV works. By 2011, a total of €1.78 billion had been granted to the industry with at least €19 million invested in the development of more than 400 film products across the EU each year.

8.1.1 Regulatory framework governing the EU audio-visual industry

The Audiovisual Media Services Directive (AVMSD) seeks to promote coordination within the EU by establishing a common legal framework for a single market for audio-visual media services.[187] It provides rules and general principles to shape the technological development to create a level playing field for emerging audio-visual market participants. It also guarantees the independence of national media regulators. In addition to the economic goal, its social objectives include protection of children and consumers and combating racial and religious hatred.

The analysis presented in this study focuses on authors and performers in the films and television industries. While certain individuals may be active in both films and TV,

[185] MEDIA, "20 years of passion, 1991 – 2011", http://bookshop.europa.eu/en/media-pbNC3110667/.
[186] MEDIA, "20 years of passion, 1991 – 2011", http://bookshop.europa.eu/en/media-pbNC3110667/.
[187] http://ec.europa.eu/avpolicy/index_en.htm.

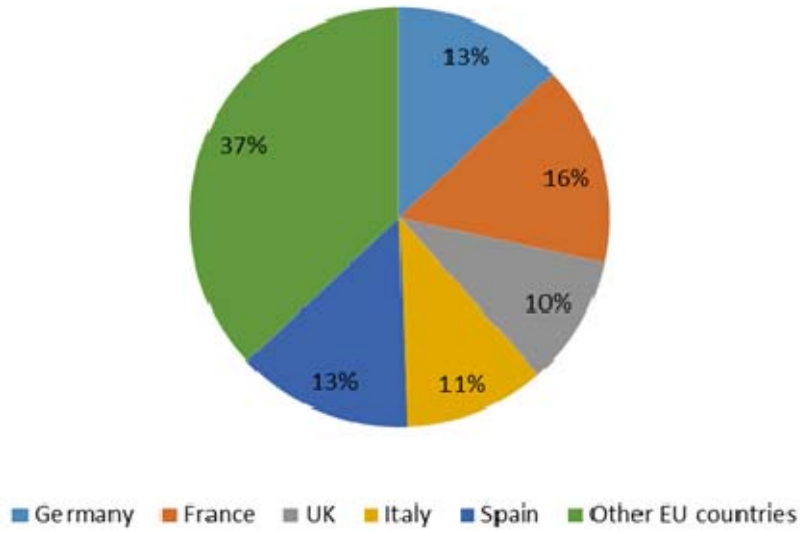
the mechanics that govern the industries may differ and, for this reason, our analysis of supply chains and payment flows is presented separately for films and television. Before presenting these supply chains, we first provide some detailed background on each of these industries.

8.2 Characteristics of the European film industry and recent developments

Within the EU, five countries – France, Germany, the UK, Italy and Spain – dominate the film production market. Indeed, the figure below shows that during 2011 the total production covered by the major countries corresponded to approximately 63 per cent of EU film production. Between 2006 and 2011, the number of films produced in the EU rose by around 28 per cent.

Within each country, film production is clustered in some specific areas, such as London and Paris, and this concentration of film production allows economies of agglomeration. This would allow production firms locating close to each other to benefit from economies of scale and could result in a significant reduction in production costs.[188] Another advantage of clustering would be that network effects help to attract more suppliers to the production process, and film talents to the area, than a single company could achieve alone. This market structure is less prevalent in federal countries, like Germany where production facilities are distributed between several locations (Berlin, Munich and Hamburg).[189]

Figure 8.1 The breakdown of the production market in EU



Source: Europe Economics analysis of European Audiovisual Observatory Statistics.

The production of film can be characterised by high sunk costs at the early stage of the lifecycle (i.e. development and production stages) and great uncertainty

[188] Edward L. Glaeser (2007), "Agglomeration Economics", the National Bureau of Economic Research.
[189] European Investment Bank (2001), "The European Audio-visual industry: an overview".

surrounding the return of the film project as it is often difficult to predict the success of the film until it is actually shown in cinemas and the consumers' preference are then revealed.

Film productions involve two categories of costs – "above-the-line" and "below-the-line".[190] The former category is the costs paid for the development of the creative elements of the films. As shown in the table below, these include payments to screenwriters, music rights holders, producers, directors and actors etc. The second category of costs covers all other operation and administrative expenses incurred in the production of a film.

Table 8.1 Two categories of production costs

"Above the line" costs	"Below the line" costs
Actors **Directors** **Producers** **Writers (screen-play, music composer)** **Music rights**	Productions costs (such as labour, technical costs, wardrobe, locations and travel expenses etc.) Post-production costs (such as film editing and sound tracks) Other direct costs (such as administration, insurance and publicity)

Source: European Investment Bank (2001), "The European Audio-visual industry: an overview".

While both U.S. and European films are available in European cinemas, the European production system is considerably different from the U.S. studio approach. The film production industry of the U.S. is largely composed of six very large studios located in Hollywood.[191] They employ a vertically and horizontally integrated approach to completing the different stages of the production process, financed by complex financial instruments. In addition, they also dominate the distribution and exploitation chains with their large network and substantial resources.

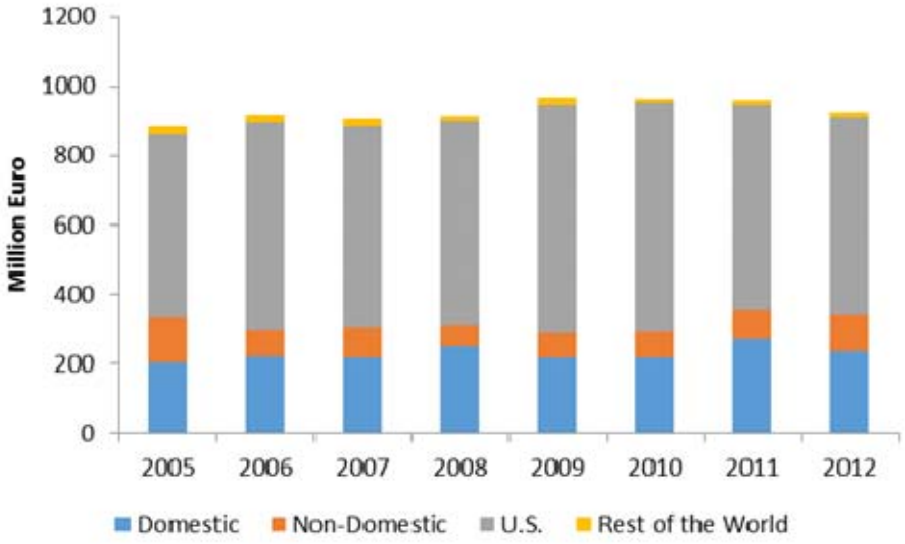
In contrast, the European film production industry is relatively fragmented and is made up of a large number of small independent production companies with the majority of them producing no more than one film per year.[192] The supply chain is vertically disintegrated and individual parties in each stage of the supply chain are exposed to some risk and uncertainty with respect to their investments or inputs. For instance, producers and screen-writers, in the early stages of a film production, would not be guaranteed that adequate finance would be obtained to put their works into action. In recent years, however, a number of larger production companies, such as Canal Plus (France), Gaumont (France) and Sogepay (Spanish), have started to adopt the Hollywood approach, particularly in the distribution of products.[193]

Due to heterogeneity in terms of cultures and languages, European consumers tend to favour US films whereas consumption of European films varies heavily across Member States.[194] Indeed, the EU has had a trade deficit with the US for film products for

[190]European Investment Bank (2001), "The European Audio-visual industry: an overview".
[191]These are 20th Century Fox, Warner Bros., Paramount, Columbia, Universal and Walt Disney Studios.
[192]European Investment Bank (2001), "The European Audio-visual industry: an overview".
[193]European Investment Bank (2001), "The European Audio-visual industry: an overview".
[194]Charles River Associates (2014), "Economic analysis of the Territoriality of the Making Available Right in the EU".

many years, reflecting the high penetration rate of American films in the EU. The market share of American films, defined in terms of cinema admissions in EU, was around 62 per cent while EU films (both domestic and non-domestic productions) only represented around 37 per cent in 2012. As shown in the figure below, films produced in the EU have struggled to overtake the significant market share of American films between 2005 and 2012.

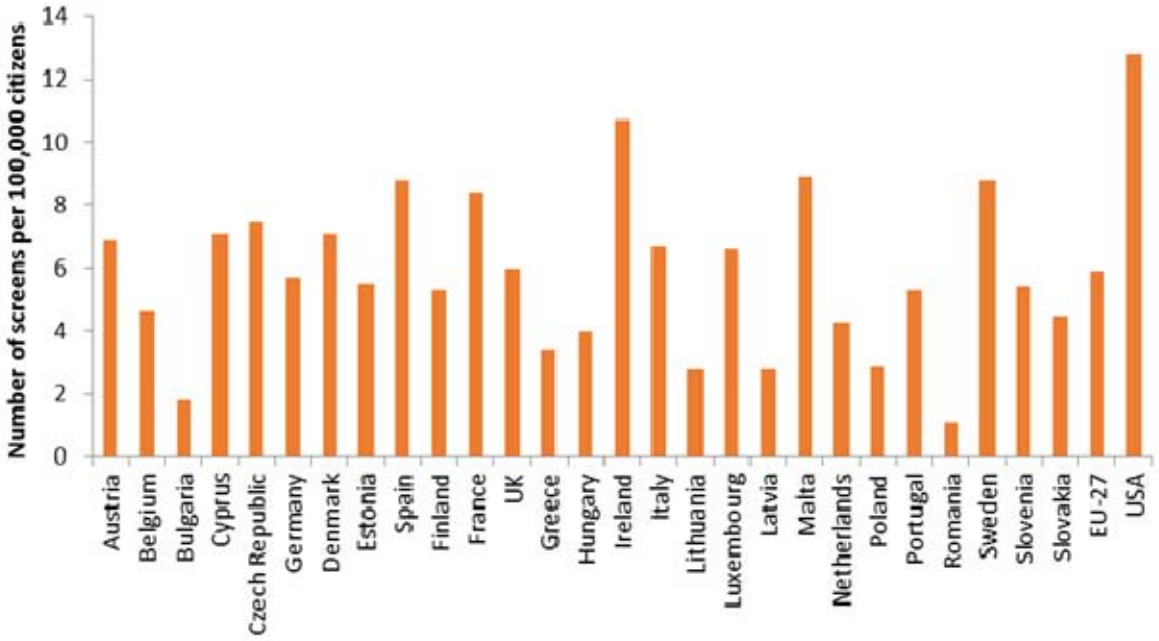
Figure 8.2 The market share of the European film market as measured by cinema admissions



Source: http://mecetes.co.uk/circulation-european-films/.

Traditionally, a key point of consumption for both US and European films has been cinemas. Despite the significant technological changes in recent years (discussed in greater detail below), there is little evidence that cinemas are becoming significantly less important as a means of film consumption. Indeed, the number of cinema screens in the EU increased from 24,000 in 1999 to 29,719 in 2011. France, Germany, the UK, Italy and Spain have the largest number of screens but, as shown in the figure below, small countries in terms of population tends to have higher intensity of cinema screens per 100,000 citizens. Indeed, Ireland, Malta and Sweden are the top three countries with cinema screens after adjusted with population size.

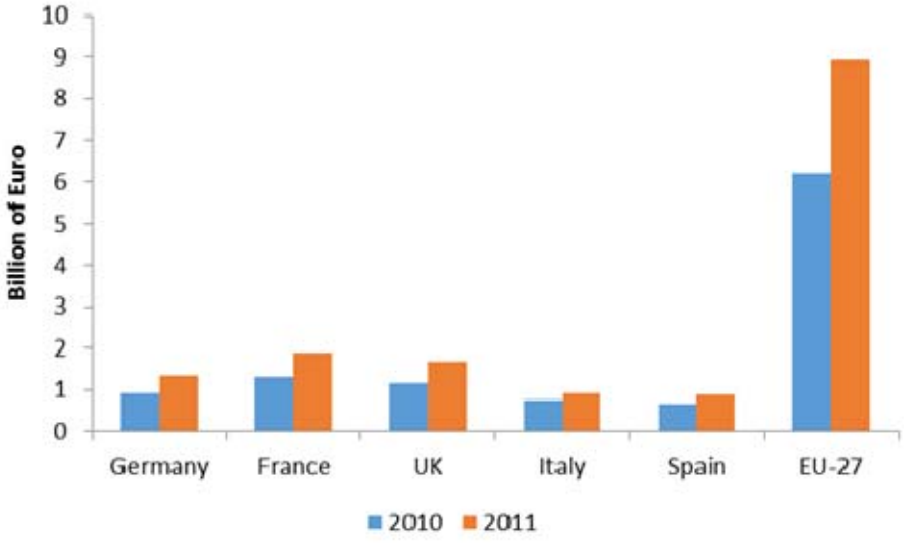
Figure 8.3 The distribution of cinema screens in EU



Sources: EAO, Eurostat (pop), Screen Digest (USA data), US Census Bureau (USA pop), Screen Digest (no of screens in Greece and Italy. Other countries and EU-27 total taken from EAO so this total is not the same as sum of individual countries).
Notes: Malta and EU-27 admissions and screens data are for 2010.

In parallel to the increase in the number of cinema screens, box office revenues increased by around 44 per cent between 2010 and 2011 to reach a total of €8.9 billion, as shown the figure below. Each of the countries with the greatest number of cinema screens experienced an increase in box office revenue during that period.

Figure 8.4 Box office revenues received by major film markets and EU



Source: Europe Economics analysis of European Audiovisual Observatory statistics.

8.2.1 The impact of technological changes

With the improvement of digital technology, in particular the internet, a number of cost-saving opportunities have opened up to the industry. The technological advances have helped to cut costs in the film production process.[195] For instance, the tedious process of physically editing and assembling a film can be avoided and it is now possible to carry out the editing process of digital movies on a personal computer. In the distribution stage, films can now be distributed in digital form to reach wide range of retailers at lower cost than physical copies, such as DVD

At the retail level, the film exhibition market has experienced significant technological advances in recent years. European cinemas have moved towards using digital technology and by 2013, approximately 70 per cent of European screens used digital technology. However, the progress of digitalisation has varied significantly between different European countries. Indeed, while the penetration rate of digital screens reached 100 per cent in Luxembourg, Norway and the Netherlands, other countries such as Greece, Latvia and Estonia have less than 20 per cent of penetration. The leading five EU markets had the following rates of digitalisation in 2013.

Table 8.2 Number of digital screens and its penetration rates in five major film markets in EU

	Digital screens	Digital penetration rates
France	5,150	0.94
United Kingdom	3,544	0.94
Germany	3,134	0.68
Italy	2,112	0.55
Spain	1,800	0.45

Source: http://euromedaudiovisuel.net/Files/2013/06/27/1372318200299.pdf.

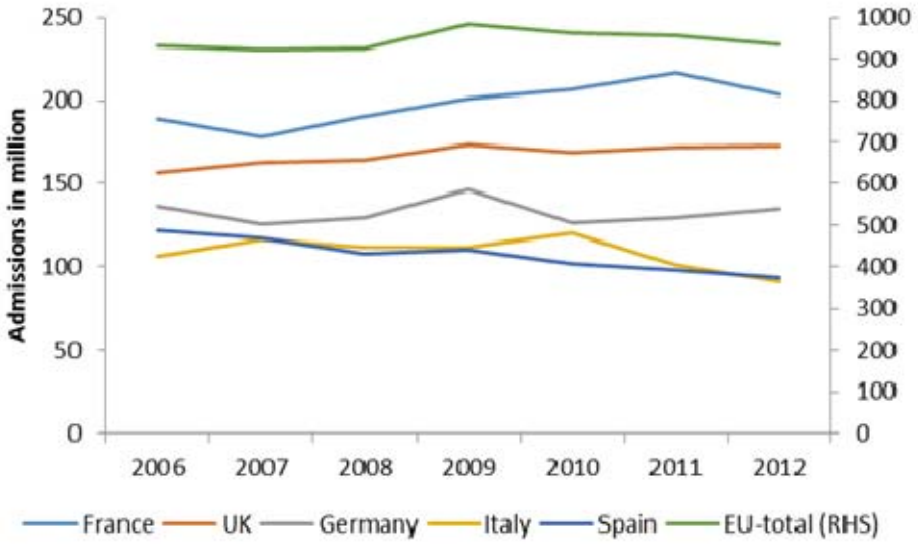
One important rationale for digitalisation was to ensure that watching films at a cinema would remain attractive to consumers despite the fact that the number of options for viewing films has increased dramatically in recent years (see below). Despite the growth in box office revenues, the cinema businesses now faces more intense substitution pressures from the introduction of Video-on-Demand (VOD) – a system which enables consumers to view their preferred films/TV programmes on demand via a set-top box or internet stream. Such technology enables consumers to obtain a digital copy with less hassle and watch at home at their own comfort. As a result, cinemas have modified their traditional business models to provide more differentiated services with value added experience, such as high-quality sound and lighting effects that consumers value. Together with the introduction of 3D technology and consumers' preference for high resolution of movies, cinemas have remained in demand by consumers as they provide an entertainment experience that is not necessarily limited to the movie itself.

The business strategy appears to have been effective since, by 2011, the number of admissions in EU had risen by approximately 13 per cent since 2000 to around 954

[195] Charles River Associates (2014), "Economic analysis of the Territoriality of the Making Available Right in the EU".

million per annum. However, as indicated in the figure below, this growth has slowed down in recent years, which may in part be explained by the economic downturn. Indeed, while France and the UK have experienced an increase in cinema admissions even during the economic downturn, Italy and Spain have had a shrinking market while Germany reflected the overall EU market by remaining broadly stable.

Figure 8.5 Evolution of cinema admissions in EU

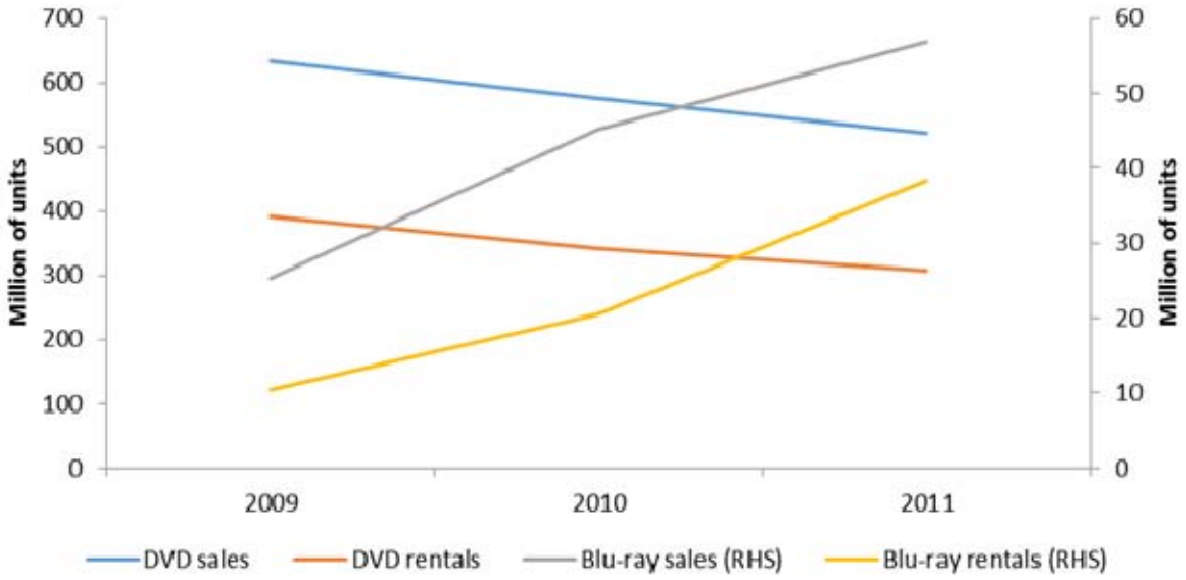


Source: Europe Economics analysis of European Audiovisual Observatory statistics.

In addition to the digitalisation of cinemas, there have been significant developments in both the physical-format video and 'video-on-demand markets' during the past decade. In the early 2000s, the European video software market was shifting from video to DVD while there has been a more recent technology transition associated with the introduction of the Blu-ray disc. In 2011, the estimated penetrations of DVD and Blu-ray hardware in TV households in selected EU-27 countries were 75.6 per cent and 3.1 per cent respectively and hence by this measure Blu-rays were niche products.[196] As shown in the figure below, however, the Blu-ray market (both sales and rental) increased significantly between 2009 and 2011 while the DVD market shrank due to the introduction the Blu-ray technology and substitution towards the VoD market.

[196]It is the median penetration rate in Ireland, Italy, Sweden, Denmark, UK, Netherlands, Portugal, Belgium, Spain, Austria, France, Germany, Hungary, Czech Republic, Finland, Greece and Poland. Source: Source: EAO and Screen Digest (2011 data).

Figure 8.6 Evolution of film retail market (sales and rentals of video products)



Source: EAO and Screen Digest (2011 data). The countries covered are Ireland, Italy, Sweden, Denmark, UK, Netherlands, Portugal, Belgium, Spain, Austria, France, Germany, Hungary, Czech Republic, Finland, Greece and Poland.

The development of technology has introduced increased competition at the retail level with number of online-service providers offering VOD and has changed the physical rental and sales markets dramatically. With the increasing use of video-on-demand (VOD), consumers no longer need to rely on a specific TV broadcast time to watch their preferred films/TV programmes or wait for the delivery of a physical DVD, but can choose to watch it at any time. A range of new devices, such as laptops, iPads and hand-held DVD players, have also developed to support VOD systems so that users can play movies when and where they want. As such, film distributors face some pressure to change their business models to ensure that the timeline of a film's delivery fits the time preference of the targeted audience rather what suits their traditional sequence of exploitation windows.

The number of VOD services providers has increased significantly over the years and the main players include iTunes, Xbox Video, Netflix, Video Unlimited, Lovefilm, Ace Lrax, Crackle, Google play, HBO (central Europe), MUBI, VoYo etc. The majority of the film services (80 per cent) are online while the remaining 20 per cent operate on TV digital platforms.[197] By 2011, the revenue generated from VOD online services for film had reached nearly €195 million; and increase of more than 1,000 per cent from 2007. It is expected the popularity of VOD services will continue to grow in the future while the physical media sales and rentals would fall as a result.[198]

The impact of digitalisation does not only limit to the cost reduction and increased competition, it has also resulted in a significant change in the economic architecture of its value chain. Instead of the traditional route via the distribution channel, producers nowadays can have the option to bypass distributors and reach consumers directly

[197] http://www.obs.coe.int/documents/205595/1540191/JTalavera+-+The+European+Market+of+VoD+Services/91b6fc6a-a1b0-431c-ab9d-c644a6a6ed74.
[198] http://online.wsj.com/news/articles/SB10001424052702304887104579306440621142958.

through the online retail platforms.[199] The tightening of the industry value chain could help to promote a more cost and time efficient distribution channel and enable a more effective feedback mechanism between the producers and consumers. This could in turn, contribute to the improvement in the quality of European films and stimulate the consumption of EU films.

Finally, although the "offline" marketing remain to be the dominate advertisement channel, the increasing use of social network offers an alternative channel to promote the films and raise the awareness of the target audience, particularly the teenagers who may not be reached by the offline advertisement, such as newspaper articles. Further, niche audiences can also to be marketed directly to boost up revenues and save significant costs from the traditional distribution and marketing approach.

8.3 Characteristics of the television industry and recent developments

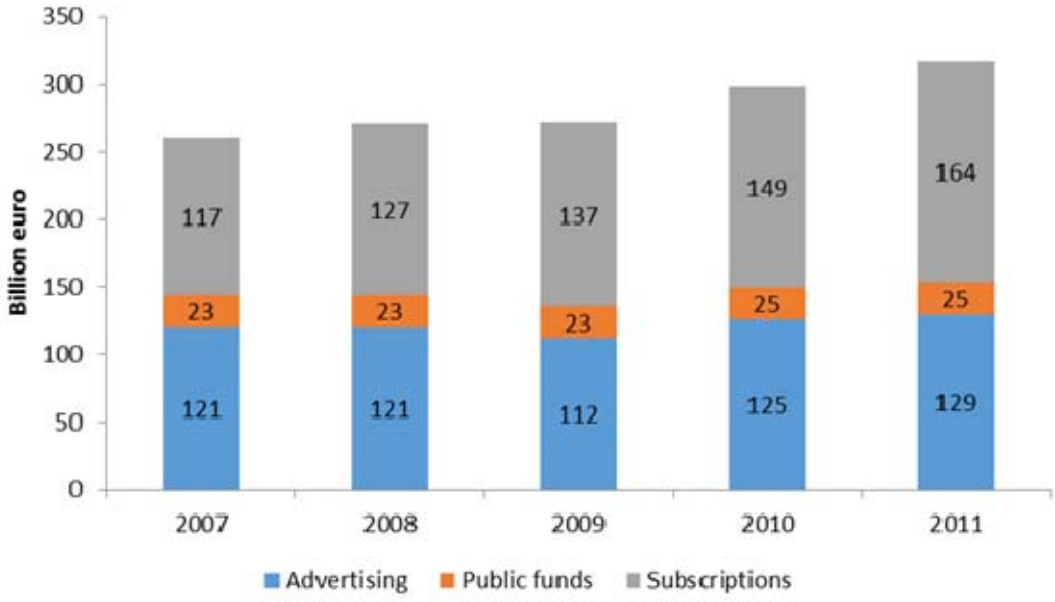
The production of TV programmes requires the same set of inputs as the film industry, including creative talents (director and actor etc.), technical and financial resources. However, whereas films are typically one-off products, there are two different types of TV programmes in the broadcasting industry:[200]

- Flow programmes are produced for immediate consumption and are programmed on a recurrent basis over a relatively long period of time. These usually correspond to light[201] and music entertainment, sports, news and talk shows etc. Unlike film production, the sunk costs of such productions are relatively low but the variable cost of buying broadcasting rights could be high. They usually generate revenue in a short period of time but cannot generally be re-exploited, i.e. broadcast more than once. Also, this type of programme tends to be produced in-house.
- Stock programmes are produced in a similar manner as films and associated with high up-front production costs and can be re-broadcast. The rights over these productions are usually acquired by the broadcaster and constitute an asset in a library for long-term exploitation. In contrast to flow programmes, the production can be out-sourced to independent producers or co-produced with other broadcasters. Similar to the film production, creative talent, such as screen-writers and actors are crucial asset to the success of the programmes and can be hired and controlled through rights.

The revenues of the television industry are made up by three key sources: advertising; public funds; and subscriptions. As shown in the figure below, the recent growth of the industry has been driven mainly by the continued growth in subscription income, combined with an increase in advertising revenues. Public funding remained relatively stable across the period and accounted for approximately 8 per cent of total revenues generated in 2011.

[199] Charles River Associates (2014), "Economic analysis of the Territoriality of the Making Available Right in the EU".
[200] European Investment Bank (2001), "The European Audio-visual industry: an overview".
[201] Light entertainment refers to a range of television performances, including comedies, variety shows and game shows etc.

Figure 8.7 Evolution of the revenues generated in the EU television industry, broken down by sources of revenue.



Source: Europe Economics analysis of Ofcom report based on data taken from PricewaterhouseCoopers Global Entertainment and Media Outlook 2012-2016.

8.3.1 The impact of technological changes

The broadcasting industry in Europe was originally dominated by public channels, i.e. state owned or controlled companies. Since the 1970s, however, transmitters no longer relied only on over-the-air signals to broadcast TV products and alternative technologies, such as satellite transmission of radio signal or cable transmission in digital format have been developed. These developments have helped to expand the capacity of the television networks such that by 2000, a large number of private broadcasters had entered into the market. With growing competition in the market, the number of public and private national TV channels increased significantly over time such that by 2011, there were 7,400 television channels based in Europe, (corresponding to an increase of nearly 1,300 per cent from the 531 channels in 2000).[202] The UK, Italy, France, Germany and Spain accounted for almost two thirds of all European channels, while more than half of EU Member States have less than 40 registered channels.[203]

During the recent economic downturn, the total number of television channels has remained relatively stable but the number of High Definition (HD) TV channels in Europe has increased significantly between.[204] The number of HD TV channels had

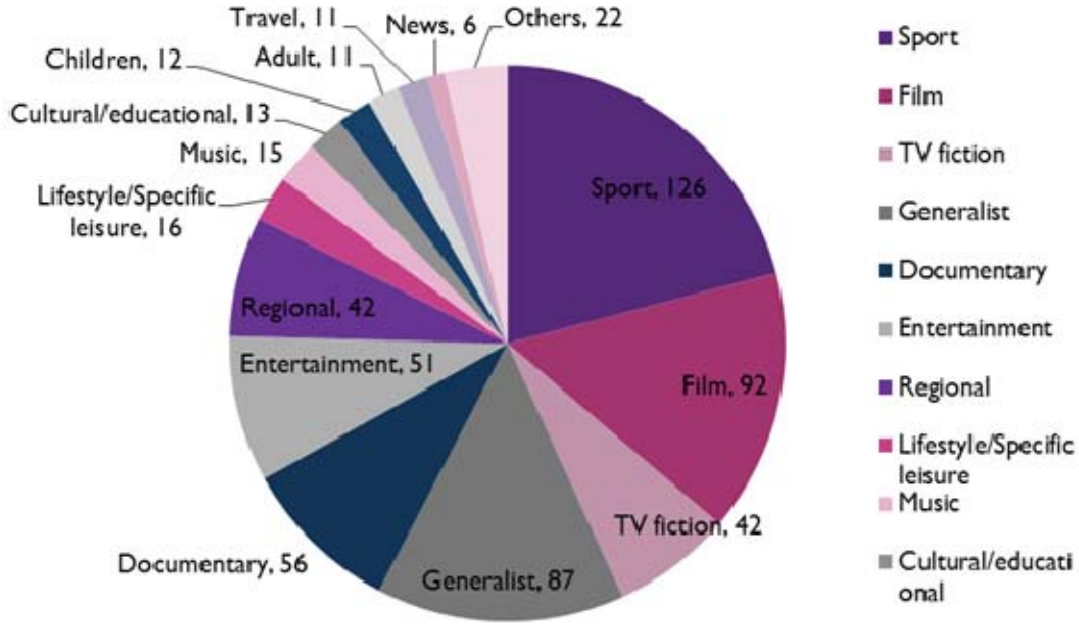
[202] European Investment Bank (2001), "The European Audio-visual industry: an overview", European Audiovisual Observatory, http://www.mediadeskuk.eu/latest-news/general-news/2012/april/number-of-high-definition-tv-channels-in-europe-increases/.

[203] Source: European Audiovisual Observatory / MAVISE, http://media-ucn.co.uk/Articles/Comparison%20of%20UK%20and%20rest%20of%20EU%20TV%20market.htm.

[204] European Audiovisual Observatory (Decebmer 2012), "Boom in HK television channels".

reached 612 by the end of 2011, an increase from 274 at the end of 2009. As shown in the figure below, sport continued to be the most important genre, accounting for approximately 20 per cent of all HD channels, followed by film and generalist content.

Figure 8.8 Number of HDTV channels by genre in EU



Source: European Audiovisual Observatory, Yearbook 2011, Volume 2.

The boom in HDTV is driven by digitalisation. Overall, 36 per cent of the EU network had been digitised at the end of 2010, but the rate of conversation from traditional analogue TV varied across the Europe. While some countries, such as Spain, UK and France had nearly 100 per cent digital conversion, with almost all households receiving digital TV in their homes at the end 2011, the progress is slower in other EU countries. In some countries, digital TV operators continued to face great competition from analogue TV operators. [205]

Despite technological advances and the significant increase in the number of television channels, the high level of concentration in the broadcasting industry persisted.[206] Since there is a strong correlation between audience share and advertising revenues, the most popular channels attract a large proportion of advertising spending. Indeed, the national markets tend to be dominated by a few numbers of broadcasters. For instance, the non-pay TV market in UK is dominated by public broadcasters, in particular the BBC. The pay-TV market has traditionally been dominated by BskyB, which has been the major buyer of major film rights and sporting rights, but other operators have become important players in recent years.

To preserve adequate diversity in the supply of programmes, the broadcasting market is regulated by various national and European legislations.[207] The major EU regulation

[205] http://stakeholders.ofcom.org.uk/binaries/research/cmr/cmr12/icmr/ICMR_Section_3.pdf.
[206] European Investment Bank (2001), "The European Audio-visual industry: an overview".
[207] European Investment Bank (2001), "The European Audio-visual industry: an overview".

is the "Television without frontier directive" which was established in 1989 and created the framework for free movement of TV broadcasting services across the EU and a single European programme production and distribution market.[208] Using the "country of origin principle", it required EU broadcasters to reserve at least half of their airtime for audio-visual works that originate in the EU. In order to support independent producers, broadcasters are also obligated to provide 10 per cent of their air time or programme budget for those producers. This framework is completed with a strand of copyright regulations (both at EU and internal level), broadcasting standards and the liberalisation of the telecommunication sector. There are also regulatory instruments addressing poor advertising practice. There is cap set on the advertising time in order to protect consumers from too frequent programme interruption and procedures for interrupting programmes.

8.4 Revenues in the audio-visual sector

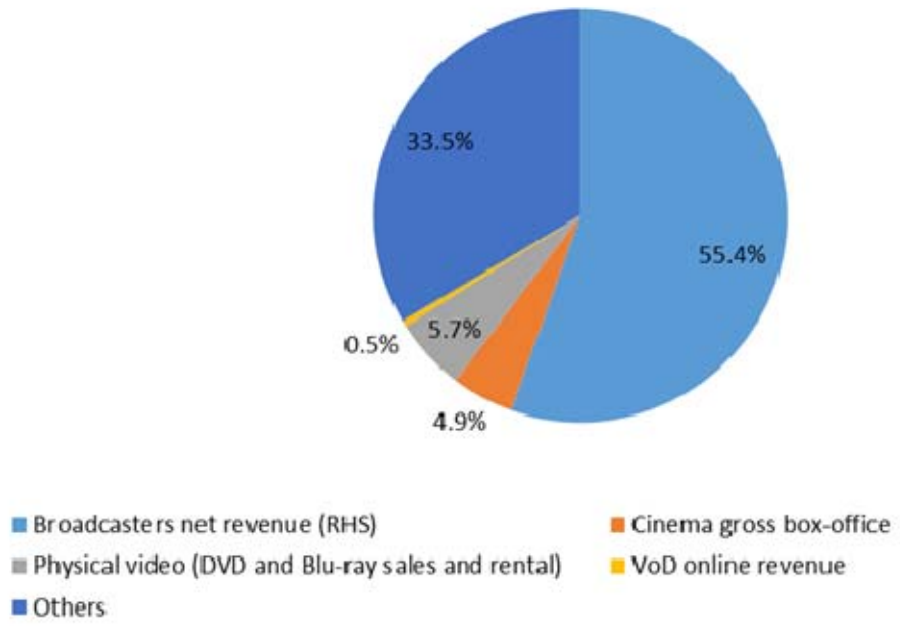
As indicated in previous sections, the turnover of the European audio-visual industry comes from a number of retail channels, including:

- cinema exhibition;
- TV broadcasting;
- video (which covers both physical and online sales and rental); and
- other multimedia such as video games (online and offline).

As shown in the figure below, in 2011, TV broadcasting accounted for over 50 per cent of the AV industry revenues while the cinema exhibition only corresponded to around 5 per cent of total revenue. It is important to note that these figures should not be taken to be indicators of the success of the film and television industries: they merely show the revenues by retail channel. For example, a significant part of the film industry's revenue is generated via retail channels other than cinema exhibition, such as physical and online sales and rentals. Indeed, the video segment is one of the key exhibition channels for film products, as described later this section and films can also be distributed to TV broadcasters and thereby obtain revenue from this additional source. Therefore, the market share of film industry in terms of revenue generated is likely to be significantly higher than suggested in the figure below.

[208] Europa – Television broadcasting activities: "Television without Frontiers" Directive.

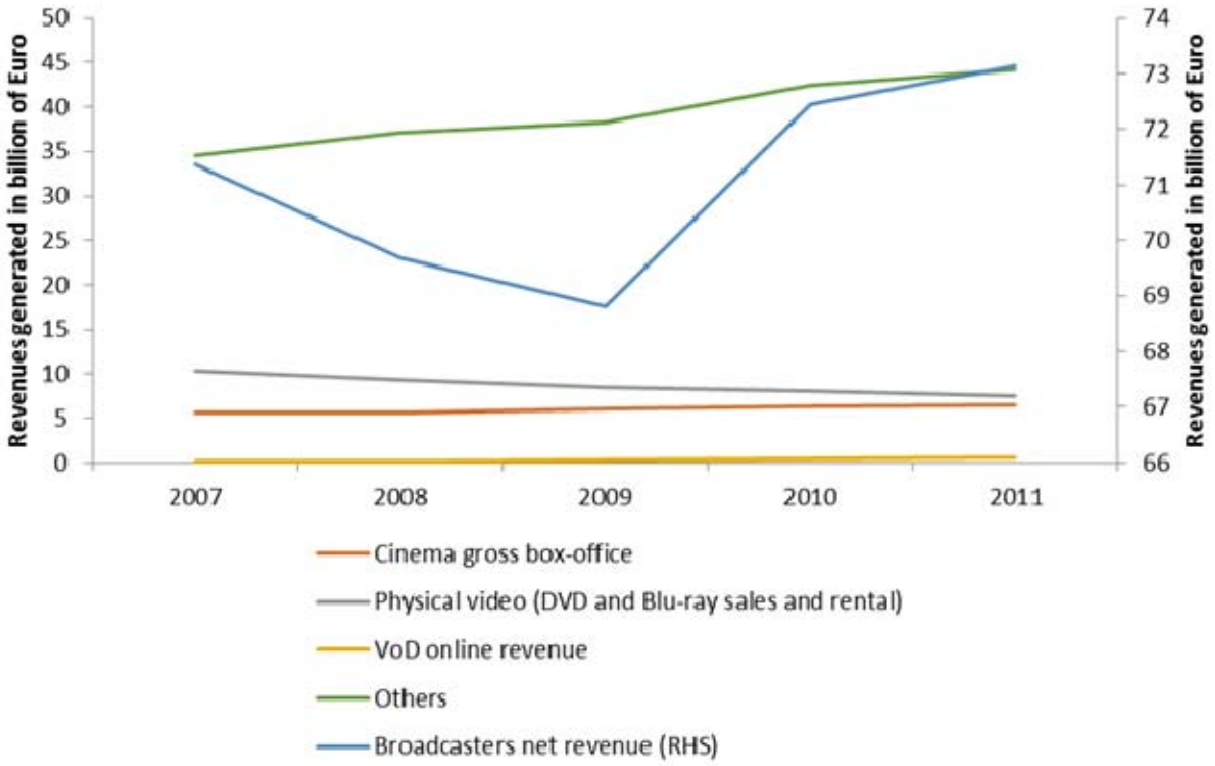
Figure 8.9 Breakdown of the EU film industry revenues by sources in 2011



Source: Europe Economics analysis of the European Audiovisual Observatory statistics.

As shown in the figure below, there have been significant changes over time in the relative importance of each retail channel with respect to industry turnover. The broadcasting segment was shrinking until its recovery in 2009. By 2011, the segment has increased by 6 per cent from 2009 level amid cut in public funding and the financial crisis which have adverse impact on producers' budgets. The revenue generated from cinema exhibition has increased consistently over time such that it grew by approximately 15 per cent between 2007 and 2011. The video-on-demand (VOD) segment performed relatively well as compared to the continued decline in revenue generated in the physical video segment. Similar to the music industry, another source of income for authors and performers is private copying levies but they are outside the scope of this study.

Figure 8.10 Evolution of EU film market revenues broken by sources



Source: Europe Economics analysis of the European Audiovisual Observatory statistics.

In the table below, we summarise the possible revenue streams that can be generated by different types of audio-visual products.

Table 8.3 Revenue streams of different audio-visual products

	Cinema	Video/DVD/ Blu-ray	Pay-TV	Free TV	Others (games etc.)	Archive for re-exploitation
Films	Yes	Yes	Yes	Yes	Yes	Yes
TV programmes (flow)			Yes	Yes		
TV programmes (stock)		Yes	Yes	Yes	Yes	Yes

Source: Europe Economics analysis based on an European Investment Bank study on "The European Audio-visual Industry: an overview" and other studies.

9 Appendix 3: Legal Correspondents

Table 9.4: List of national legal experts

Title	Name	Surname	Country	Affiliation
Prof.	Maurizio	Borghi	UK	Bournemouth University
Dr.	Till	Kreutzer	Germany	iRights. Law, Berlin
Dr.	Brad	Spitz	France	YS Avocats, Paris
	Deborah	de Angelis	Italy	DDA Studio Legale, Rome
Prof.	Pedro	Letai	Spain	Instituto de Empresa, Madrid
Dr.	Tomasz	Targosz	Poland	Traple Konarski Podrecki & Partners Law Firm, Kraków
Dr.	Rita	Matulionyte	Lithuania	Law Institute of Lithuania, Vilnius
	Maria	Fredenslund	Denmark	RettighedsAlliancen, Copenhagen
Dr.	Aniko	Grad-Gyenge	Hungary	ProArt Alliance for Copyright, Budapest
Prof.	Daniel	Gervais	US	Vanderbilt University Law School, Nashville

10 Appendix 4: Questionnaire

10.1 Introduction

Europe Economics and the Institute for Information Law of the University of Amsterdam have been commissioned by DG Internal Market of the European Commission to undertake a study on the remuneration of authors and performers for the use of their works and the fixations of their performances.

The study will make an assessment of different national rules and mechanisms to ensure remuneration for authors and performers for the exploitation of their works and performances in the music and audiovisual sectors. It will also determine whether, and to what extent, the differences that exist among the Member States affect levels of remuneration. A key element of our study, therefore, is to gather information on the remuneration of authors and performers.

To do this, we are undertaking an online survey of relevant authors and performers in the ten countries included in our study. We think that individual authors and performers are likely to have more detailed knowledge of their own remuneration than anyone else and so it is important for us to gather this information first-hand.

In order to ensure consistency, we provide the definitions of "music" and "audiovisual" below:

- Music — the creation and production of songs and instrumental music covering all genres and made available through any means (online and offline).
- Audiovisual — the creation and production of works with both a sound and a visual component and made available through any means (online and offline). Films and television programmes are examples of audiovisual presentation.

We understand that completing the survey will take up some of your time and so we have kept the survey as short as possible. Most questions have multiple-choice answers and the entire survey should only take 15 to 20 minutes to complete. We hope that you will be able to contribute to this important piece of research. Your participation will help to ensure that any recommendations for ensuring fair remuneration are targeted to the issues of greatest concern to authors and performers.

Attached to the invitation email is a letter of authority from DG Internal Market which verifies our participation in the research. However, if you wish further reassurance that this is legitimate research, please contact Ewa Biernat or Judit Fischer of DG Internal Market using these email addresses: ewa.biernat@ec.europa.eu and judit.fischer@ec.europa.eu.

Please note that all responses are confidential: neither Europe Economics, the Institute for Information Law of the University of Amsterdam or DG Internal Market will be able to identify you.

Please complete the survey by 18 July 2014,

Thank you very much in advance of your reply.

10.2 Questions

10.2.1 Background information

The information about your general background will help us better understand your answers in comparison to other respondents.

1) In which country are you resident?

Denmark	
France	
Germany	
Hungary	
Italy	
Lithuania	
Netherlands	
Poland	
Spain	
UK	
Other	

2) To which age group do you belong?

Under 18	
18-29	
30-39	
40-49	
50-59	
60-69	
70+	

3) How many years have you been earning money from each of the activities you are involved in? Please provide an answer for all activities that you are involved in.

	Years
	Music
For recording activities as	
• Session musician	
• Featured music artist	
• Lyricist	
• Composer	
• Songwriter (lyricist and composer)	
• Singer and songwriter	
Other activities	
	Audio visual
For recording activities as	

• TV Actor	
• Film Actor	
• Principal director	
• Screenwriter	
• Composer of music for film or TV	
Other activities	

10.2.2 Your total income

We would like to know about the average income you earned in the activities you indicated being involved in the section above. Please be reassured that this information will remain confidential to Europe Economics and the Institute for Information Law and can in no way be linked back to you.

4) What was your net income (i.e. after tax) from your work in music/audiovisual last year? Please include music / audiovisual incomes from all sources when responding to this question (i.e. including up-front payments, sales revenue, revenue from collective management societies etc.). Please select only one range.

Nothing	
0 - £499	
£500-£999	
£1,000-£2,999	
£3,000-£4,999	
£5,000-£9,999	
£10,000-£19,999	
£20,000-£39,999	
£40,000-£59,999	
£60,000-£100,000	
£100,000-250,000	
£250,000-£500,000	
Over £500,000	
I do not know	

5) Please indicate in the table below the percentage of your total net income last year that can be attributed to each activity you indicated being involved in question 3. Please provide an answer for all activities that you are involved in.

	%
Music	
For recording activities as	
• Session musician	
• Featured music artist	
• Lyricist	
• Composer	
• Songwriter (lyricist and composer)	
• Singer and songwriter	
Other activities	
Audio-visual	
For recording activities as	

• TV Actor	
• Film Actor	
• Principal director	
• Screenwriter	
• Composer of music for film or TV	
Other activities	

6) How many contracts, individual pieces of music/audio-visual works, or recorded performances was your income based on last year? We mean here individual activities for which you were paid. For example, this might be a contract for writing a script, a single composition, the recording of a song, a specific film, or a television show or individual episodes of a series. Please provide an answer for each activity that you have been involved in.

	Number last year
Music	
Session musician (number of sessions)	
Featured music artist (number of songs / titles recorded)	
Lyricist (number songs written)	
Composer (number of musical compositions)	
Songwriter (number of songs)	
Singer and songwriter (number of songs)	
Audio-visual	
TV Actor (number of programmes or episodes if a series)	
Film Actor (number of films)	
Principal director (number of directing roles)	
Screenwriter (number of contracts)	
Composer of music for film or TV (number of musical compositions)	

10.2.3 Structure and sources of your income

In this section, we would like to gather information on the structure and sources of your income.

Please focus on the activity in which you feel best describes you as a professional when responding to these questions. Please select the relevant activity from the following:

Music	
Session musician	
Featured music artist	
Lyricist	
Composer	
Songwriter (lyricist and composer)	
Singer and songwriter	
Audio-visual	
TV Actor	
Film Actor	
Principal director	
Screenwriter	

Composer of music for film or TV	

7) [FOR ALL BUT SCREENWRITERS AND DIRECTORS] Last year, what amount of net income (i.e. after tax) did you receive as a lump sum / up-front payment for the use of your work or recording of your performance?

Nothing	
0 - £499	
£500-£999	
£1,000-£2,999	
£3,000-£4,999	
£5,000-£9,999	
£10,000-£19,999	
£20,000-£39,999	
£40,000-£59,999	
£60,000-£100,000	
£100,000-250,000	
£250,000-£500,000	
Over £500,000	
I do not know	

8) [ONLY SCREENWRITERS AND DIRECTORS] What was your average net income (i.e. after tax) for contracts last year whether they went into production or not, excluding any recurring payments that you received?

Nothing	
0 - £499	
£500-£999	
£1,000-£2,999	
£3,000-£4,999	
£5,000-£9,999	
£10,000-£19,999	
£20,000-£39,999	
£40,000-£59,999	
£60,000-£100,000	
£100,000-250,000	
£250,000-£500,000	
Over £500,000	
I do not know	

9) a) Last year, what was your net income from **CRMOs** from additional payments / royalty payments for your works/recordings of performances?

	Net income from CRMOs
Nothing	
0 - £499	
£500-£999	
£1,000-£2,999	
£3,000-£4,999	
£5,000-£9,999	
£10,000-£19,999	
£20,000-£39,999	

£40,000-£59,999	
£60,000-£100,000	
£100,000-250,000	
£250,000-£500,000	
Over £500,000	
I do not know	

b) Last year, what was your net income from **publishers, producers, broadcasters or similar sources** from additional payments / royalty payments for your works/recordings of performances?

	Net income from publishers, producers, broadcasters or similar sources
Nothing	
0 - £499	
£500-£999	
£1,000-£2,999	
£3,000-£4,999	
£5,000-£9,999	
£10,000-£19,999	
£20,000-£39,999	
£40,000-£59,999	
£60,000-£100,000	
£100,000-250,000	
£250,000-£500,000	
Over £500,000	
I do not know	

10) For the use of which rights did you receive remuneration (recurring payment) last year? Please specify, to the extent you know, the percentage of your net income from CRMOs or producers/publishers/broadcasters that arose from each of the specific rights / uses in the table below. Please note that you may provide only an answer in only one of these columns, if necessary.

Right / use	**Percentage of your net income received from CRMOs (ensure column sums to 100%)**	**Percentage of your net income received from publishers, producers, broadcasters or similar sources (ensure column sums to 100%)**
Mechanical rights		
for online exploitation (if available)		
for offline distribution (if available)		
Making available on demand		
Streaming (if available)		
Download (if available)		
Broadcasting and communication to the public		
Cable retransmission		
Cinema / movie theatre exhibition		

Rental		
Lending		
Private copying		
Other		
I don't know		

11) Did you receive any income last year from other uses of your work or performance (e.g. synchronisation or live performance)? If so, what was the net income last year? Please note that you may provide only an answer in only one or two of these columns, if necessary.

	Synchronisation	Live performance	Other
Nothing			
0 - £499			
£500-£999			
£1,000-£2,999			
£3,000-£4,999			
£5,000-£9,999			
£10,000-£19,999			
£20,000-£39,999			
£40,000-£59,999			
£60,000-£100,000			
£100,000-250,000			
£250,000-£500,000			
Over £500,000			
I do not know			

10.2.4 Your remuneration /exploitation contract

PLEASE FOCUS ON THE ACTIVITY IN WHICH YOU FEEL BEST DESCRIBES YOU AS A PROFESSIONAL WHEN RESPONDING TO THESE QUESTIONS.

12) With whom do you have your contract?

Music Publisher	
Film or TV Producer	
Phonogram producer (e.g. record label)	
Distributors (including online platforms)	
Other (please specify)	
I do not know	

13) When negotiating your remuneration contract(s), do you do this yourself or do you use a representative (e.g. an agent)?

Negotiate myself	
Use representative (e.g. trade union	

or guild)	
Collective bargaining agreement	

14) When negotiating your most recent contract, did you negotiate with only one party, e.g. record label, music publisher , film producer or did you have others competing to sign you up?

One	
More than one	
Not applicable	

15) When negotiating your most recent contract, to which of the following categories did the party you concluded the contract with belong?

	International	Domestic
Large/Major record company, music publisher or film / TV producer		
Small/Independent record company, music publisher or film / TV producer		
Individual		
I do not know		

16) Do you use a model contract provided by your trade union or other organisation?

Never — I am not aware of one	
Never — there is no such model contract for my area	
Never — there is one but I have not found it to be useful	
Never — the party with which I conclude the contracts has their own model contract	
Rarely	
Sometimes	
Often	
Almost always	
Always	

10.2.5 Profiling skills and experience

PLEASE FOCUS ON THE ACTIVITY YOU FEEL BEST DESCRIBES YOU AS A PROFESSIONAL WHEN RESPONDING TO THESE QUESTIONS.

17) Please indicate the highest level of education you have attained.

Secondary school or lower	
Vocational qualifications	
Bachelor Degree or equivalent	
Masters/PHD or equivalent	
Other (please specify)	
No formal qualification	
Don't know	

18) How many awards have you received in the last five years? Please consider awards at a local, national and international level.

	Local	**National**	**International**
Music			
Session musician			
Featured music artist			
Lyricist			
Composer			
Songwriter (lyricist and composer)			
Audio-visual			
TV Actor			
Film Actor			
Principal director			
Screenwriter			
Composer of music for film or TV			

19) Do you have any other comments?

Thank you for taking part in this research.

11 Appendix 5: Distributors of Questionnaire

The following organisations distributed the survey on our behalf:

Table 11.1: Organisations that distributed the survey on our behalf

Organisation	
ADAMI	GVL
AGATA	LATGA
AISGE	LIRA
ALCS	Netwerk Scenarioschrijvers
BECS	NORMA
Danish Actors' Association	SACD
Danish Film Directors	SAWP
Directors UK	SCAM
ECSA	Sena
EDN European Documentary Network	SGAE
EJI	SIAE
FAGA - Forum de Asociaciones	SPEDIDAM
Federation of Screenwriters in Europe	STOART
FERA	UNI-MEI
FIA	Verband Deutscher Drehbuchautoren e.V.
Filmex	VEVAM
FilmJus	VG Bild-Kunst
FIM	Zaiks
GESAC	ZAPA
GRAMEX	

12 Appendix 6: Results of Statistical Analysis

12.1 Music performers

This section explores the levels of income of respondents who are classified under the music performer category, which includes featured music artists and singer/songwriters. In order to support our analysis of the observed levels of income of music performers we first present a statistical analysis of the survey responses followed by an econometric analysis.

12.1.1 Statistical analysis

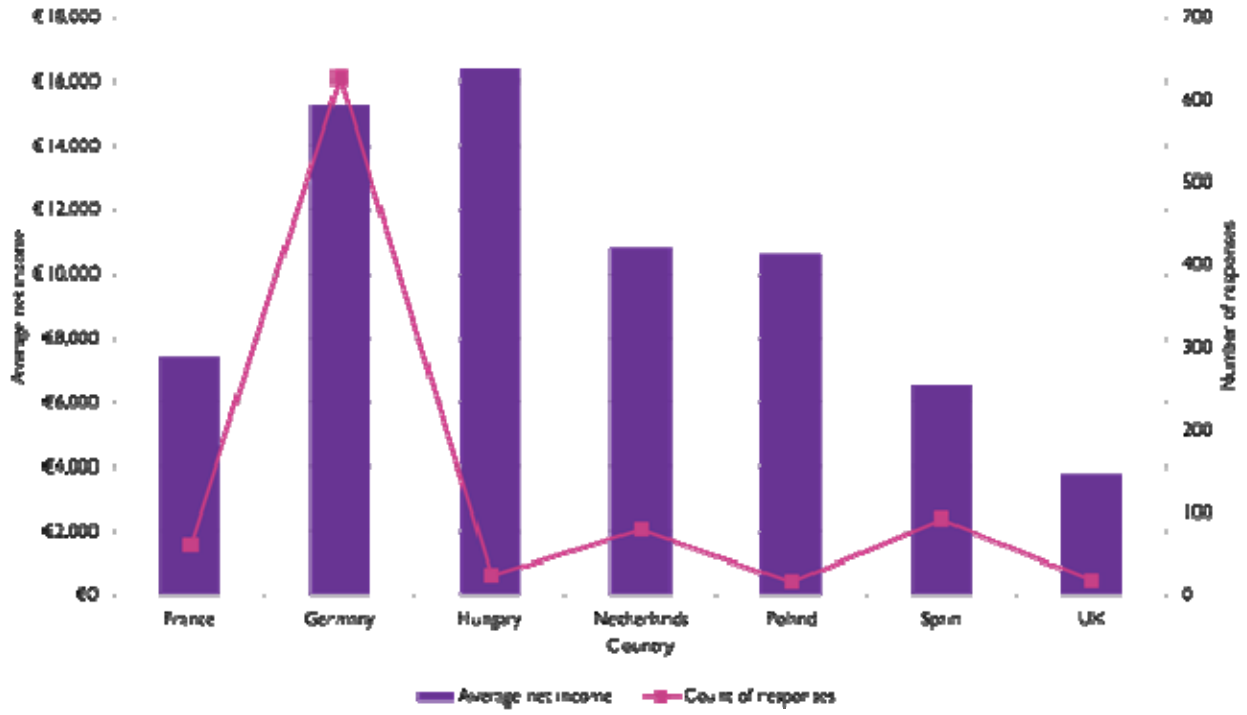
The following figure captures annual average net income for music performers across the countries in our sample on the primary axis found on the left hand side.[209] The secondary axis on the right side represents the number of responses on which the average net income is based. There can be greater confidence in the results of countries with large numbers of respondents as the average figures reported can be less affected by extreme observations (outliers).[210]

The response rates to the questionnaire were not sufficiently high across countries in order to be able to draw robust conclusions at the individual Member State level. For music performers in particular, there were seven countries in the sample with ten or more responses.

[209] Question in the survey: "What was your net income (i.e. after tax) from your work in music/audiovisual last year? Please include music / audiovisual incomes from all sources when responding to this question (i.e. including up-front payments, sales revenue, revenue from collective management societies etc.)." We used the mid-point of the income range selected by the respondent and adjusted it with PPP to produce the average net income.

[210] Only countries where ten or more responses were collected are presented.

Figure 12.1: Average net income of music performers, in the last year, by country



Note: Denmark, Italy and Lithuania are excluded from this graph as they had less than ten responses in this category.

Of the countries with ten or more responses, France, Spain and the UK exhibit the lowest levels of average annual net income. The UK is the lowest of the three with less than €4,000 while Spain is slightly greater than €6,500 and France is approximately €7,400. Poland and the Netherlands are close together at around €11,000 with Germany being the second highest at approximately €15,200. The average net income for Hungary is €16,400 and is the highest. However, the response rate for Hungarian music performers is one of the lowest and thus this estimated average could be affected by outliers. The following figure presents these results in a "per unit of work" basis.

Figure 12.2: Average net income per unit of work for music performers, in the last year, by country

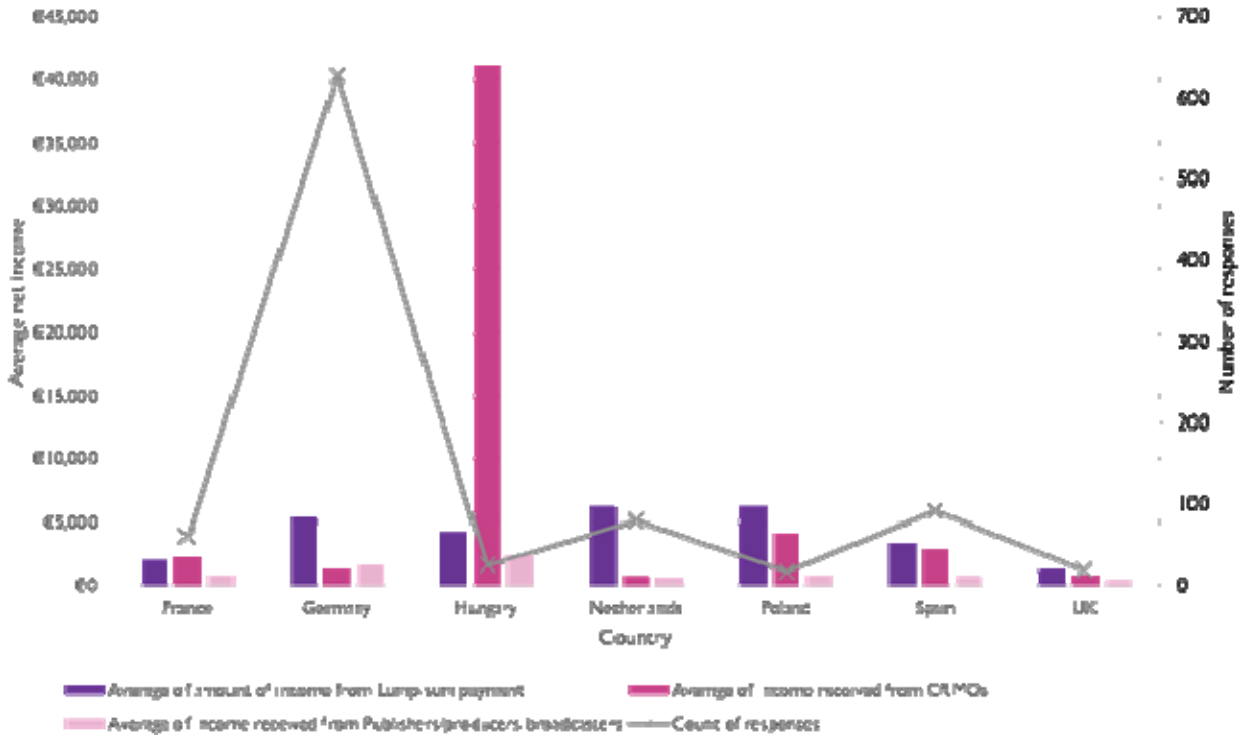


Note: Denmark, Italy, Poland and Lithuania are excluded from this graph as they had less than ten responses in this category.

The highest income per unit of work is observed in Germany and is considerably greater than its peers at €2,935. France and the UK have per-unit incomes of between €600 and €700 per unit of work while the Netherlands, Hungary and Spain have average incomes per unit of work of between €1,350 and €1,800.

The figure below shows the breakdown of net income by source: lump-sum/upfront payments; royalty income from CRMOs and royalty income from publishers. As above, Denmark, Italy and Lithuania have very few responses and hence it is not possible to conduct meaningful analysis. For the remaining countries, other than France and Hungary, a domination of lump-sum payments is observed, with the peak of such payments occurring in Poland and the Netherlands, while slightly lower levels occur in Germany. The Hungary case can be explained by the presence of a significant outlier in CRMO royalties of more than €91,000. France is the only country where the income received from CRMOs is higher than the income received from lump-sum payments. In all countries except Germany, the least significant source of income is from publishers/producers/broadcasters.

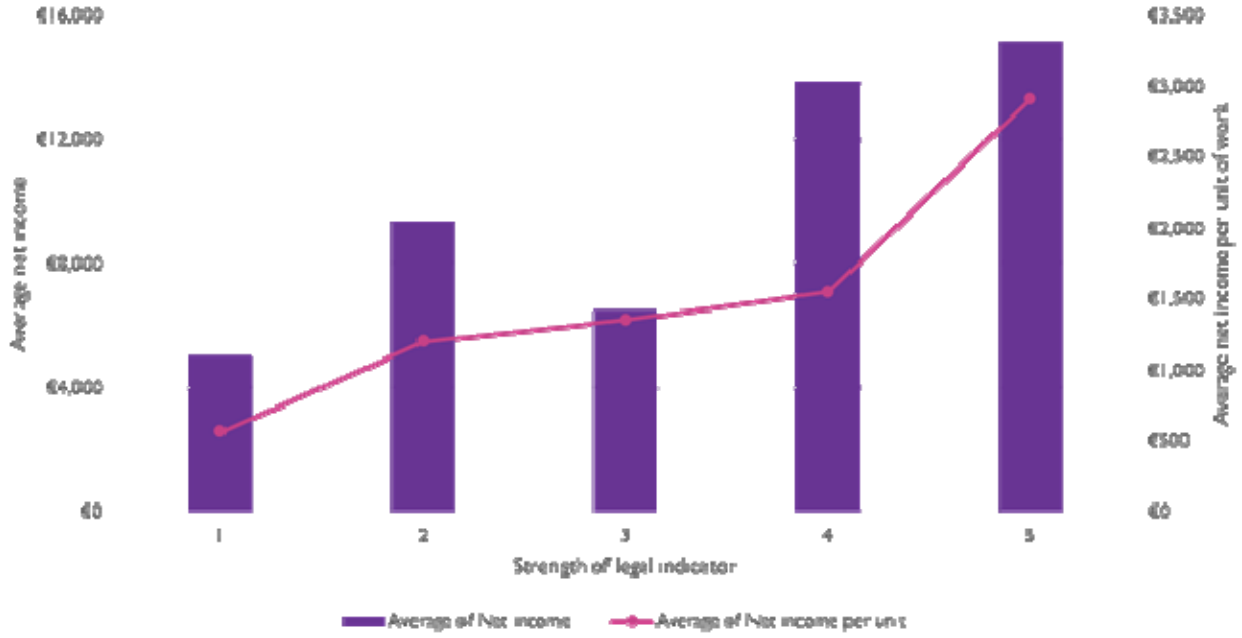
Figure 12.3: Origin of average net income for music performers, in the last year, by country



Note: Denmark, Italy and Lithuania are excluded from this graph as they had less than ten responses in this category.

Below, we present the distribution of average net income and average net income per unit for music performers by the strength of the legal indicator.

Figure 12.4: Average net income and average net income per unit of work by strength of legal indicator for music performers, in the last year



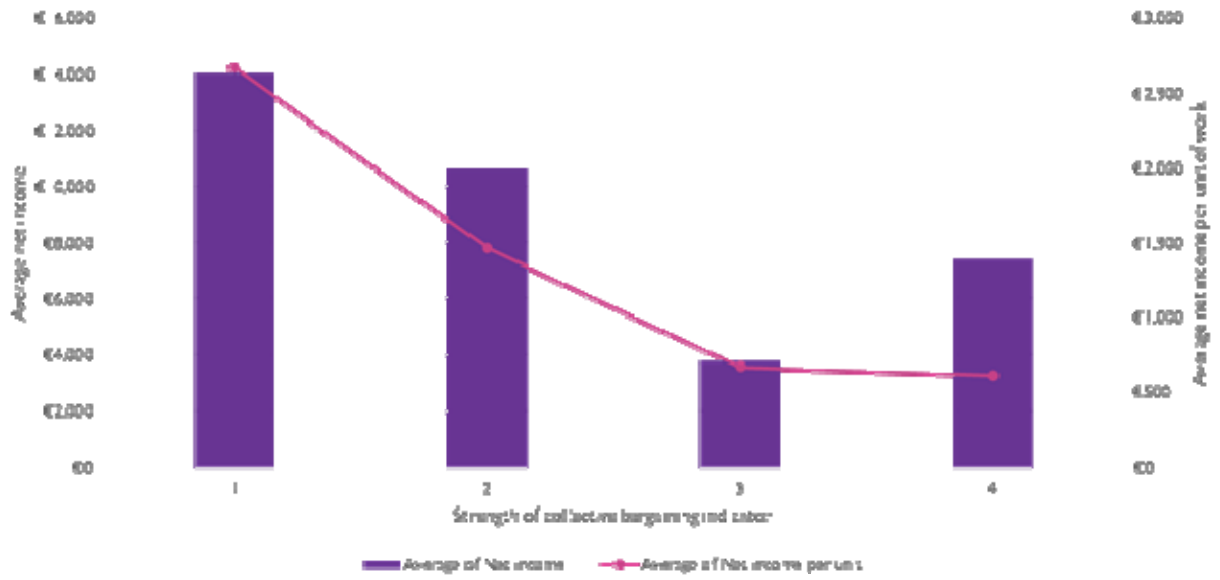
Note: The number of responses used for average net income for each level of strength are: 23 for level 1, 140 for level 2, 94 for level 3, 29 for level 4 and 643 for level 5. The number of responses used for average net income per unit of work are: 15 for level 1, 73 for level 2, 57 for level 3, 21 for level 4 and 403 for level 5.

The levels of average net income observed are higher for levels 4 and 5 of the legal indicator and are maximised at level 5 at more than €15,000. They are lowest at level 1, which is only observed in the UK and Denmark, where the average net income is approximately one-third of the level 5 income. An increasing trend appears when considering average net income per unit for music performers, with a maximum value of €2,906 attained where the legal indicator value was the highest.

It should be noted, however, that the legal indicator was based on a count of the number of legal elements that are present in each Member State, adjusted to reflect the importance of each factor in the overall framework (see discussion above). This means that the strength indicator may mask differences across countries in terms of the content of the legal framework: the provisions that led to a level 3 indicator for one country may differ from those that led to a level 3 indicator for a second country. Our econometric analysis (see below) seeks to identify the extent to which specific elements of the legal framework are associated with differences in remuneration outcomes.

Below, the breakdown of average income by the strength of collective bargaining in different countries is explored.

Figure 12.5: Average net income and average net income per unit by strength of collective bargaining indicator for music performers, in the last year



Note: The number of responses used for average net income for each level of strength are: 764 for level 1, 87 for level 2, 18 for level 3, and 60 for level 4. The number of responses used for average net income per unit of work are: 480 for level 1, 48 for level 2, 11 for level 3 and 30 for level 4.

In terms of response numbers, level 3 collective bargaining indicator countries are considerably less represented compared to the other levels. Indeed, for the average net income per unit the number of responses in only slightly greater than the minimum threshold value of ten responses.

Average net income and average net income per unit are highest for level 1 countries. Average net income falls significantly from slightly above €14,000 to below €4,000 for level 3 countries while it increases to almost €7,400 for level 4 countries. Average per

unit income exhibits a clearer pattern, decreasing as the strength of collective bargaining indicator increases.

12.1.2 Econometric analysis[211]

Two different models were run: Model 1 includes indicators for the strength of collective bargaining and the strength of the legal system; Model 2 includes a collective bargaining strength indicator but the legal strength indicator is replaced by dummy variables that capture specific features of general copyright law.[212]

The models provide no clear and consistent evidence that collective bargaining affects total remuneration per unit of work for music performers while the overall strength of the legal system does not appear to affect total remuneration per unit of work. More precisely, the collective bargaining indicator is significant in Model 2 but not in Model 1 while the legal strength indicator is insignificant in Model 1, indicating that the strength of the legal system has no impact on the level of remuneration per unit of work, all else being equal.[213]

The results of Model 2 suggest that the presence of formalities for the transfer of rights is associated with higher lump sum remuneration per unit of work. However, we find that the presence of limitations on the scope of transfer and limitations on future forms have a negative association with total remuneration. This is inconsistent with our findings in the earlier sections that these two provisions are key aspects of the legal environment in determining the level of remuneration, which we would expect to exert (as described in the analytical framework) a positive impact on the remuneration received by performers.

Instead of using the total income per unit of work as the dependent variable, we now consider: the lump-sum income per unit; the royalty income from CRMOs per unit; and the per unit royalty income from publishers, producers and similar (referred to as 'publishers' for simplicity hereafter).

When using these as the dependent variables in separate models, neither the legal strength nor collective bargaining indicators are significant in the lump sum or publisher royalty models. However, the collective bargaining indicator is significant in the CRMO royalty models and hence we conclude that there is no evidence that the overall strength of the legal system affects the remuneration of music performers whereas collective bargaining affects the level of royalty income from CRMOs.

Using the same three dependent variables for model 2, the collective bargaining indicator is not significant in either the lump-sum or publishers models (there is no

[211] The detailed econometric results can be found in section 13.7 of the Technical Appendix to this report.

[212] As noted above, it was not possible to include all features of general copyright law in this model because of collinearity problems. The selection of variables was undertaken using collinearity diagnostic tests, specifically by using variance inflation factors, (VIFs). The variables included in the final models have individual VIFs of substantially less than 10 and the mean VIF is also substantially less than 10. The final models therefore pass the 'rule of thumb' for ensuring that models are free of collinearity problems.

[213] When we refer to a variable being significant we mean that it is statistically significant. An explanation of statistical significance is provided in the Technical Appendix.

model 2 variant for CRMO income because legal factors are excluded from these models). The dummy variables that capture features of the legal system are all insignificant in the publisher model, which suggests that differences in legal factors and the strength of collective bargaining do not explain differences in levels of per unit publisher income. However, formalities for the transfer of rights appear to have a positive association with levels of lump-sum remuneration.

12.2 Music writers

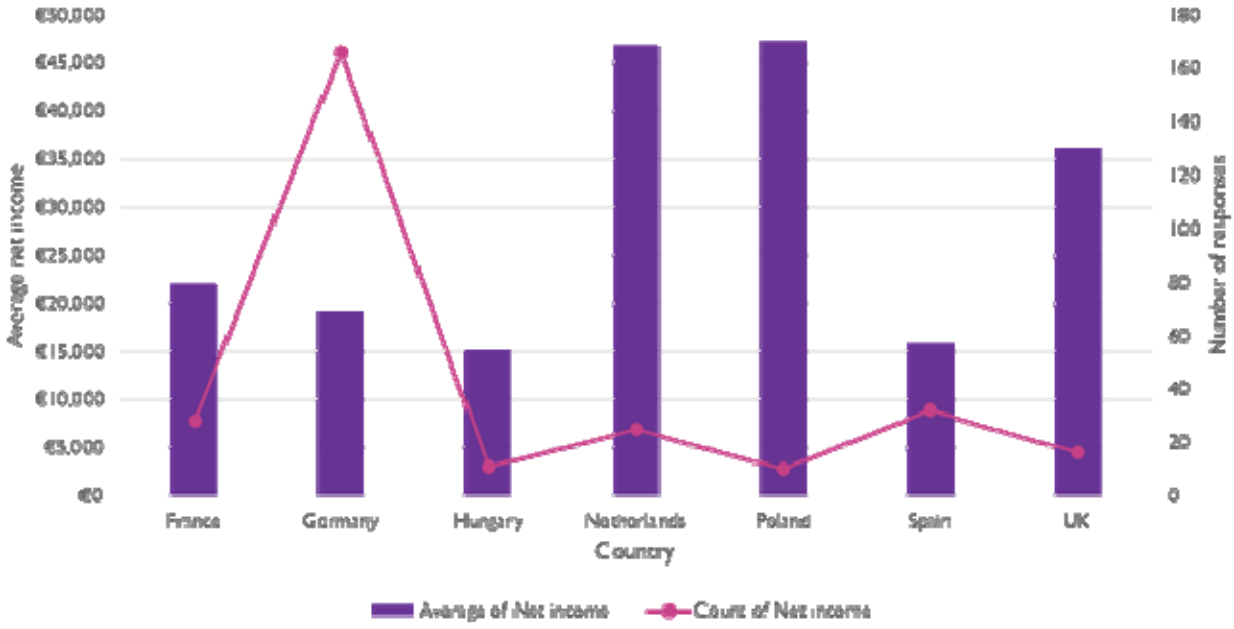
This section explores the levels of income of respondents who are classified under the music writer category. The category of music writers covers the authors of music and includes composers, lyricists and songwriters. In order to support our analysis of the observed levels of income of music writers we first present a statistical analysis of the survey responses followed by an econometric analysis.

12.2.1 Statistical analysis

Figure 12.6 presents the average net income of music writers across the different countries in our sample. Amongst the countries that have more than ten responses, Poland and the Netherlands have the highest average net income of more than €45,000 each followed by the UK at more than €36,000. These average figures are driven by three significant outliers of around €280,000 in Poland, €618,000 in the Netherlands and €330,000 in the UK. These three countries have rather low response rates and thus the influence of outliers is significant.

In the rest of the sample, Germany has an average net income of approximately €19,000 while France is slightly higher at approximately €22,000. Average net incomes in Hungary and Spain are lower at around €15,000. The results observed in Germany are the most robust as they are based on the highest number of observations (166).

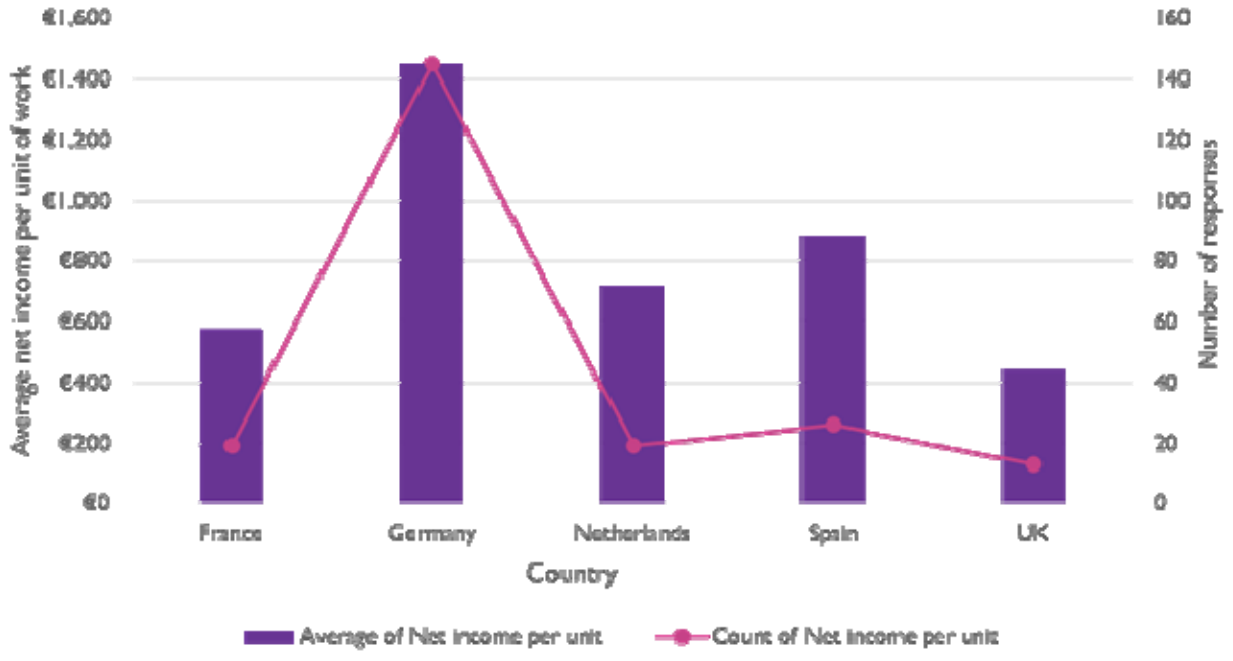
Figure 12.6: Average net income of music writers, in the last year, by country



Note: Denmark, Italy and Lithuania are excluded from this graph as they had less than ten responses in this category.

The average income per unit of work is presented in the following figure, broken down by country.

Figure 12.7: Average net income per unit of work by country for music writers, in the last year



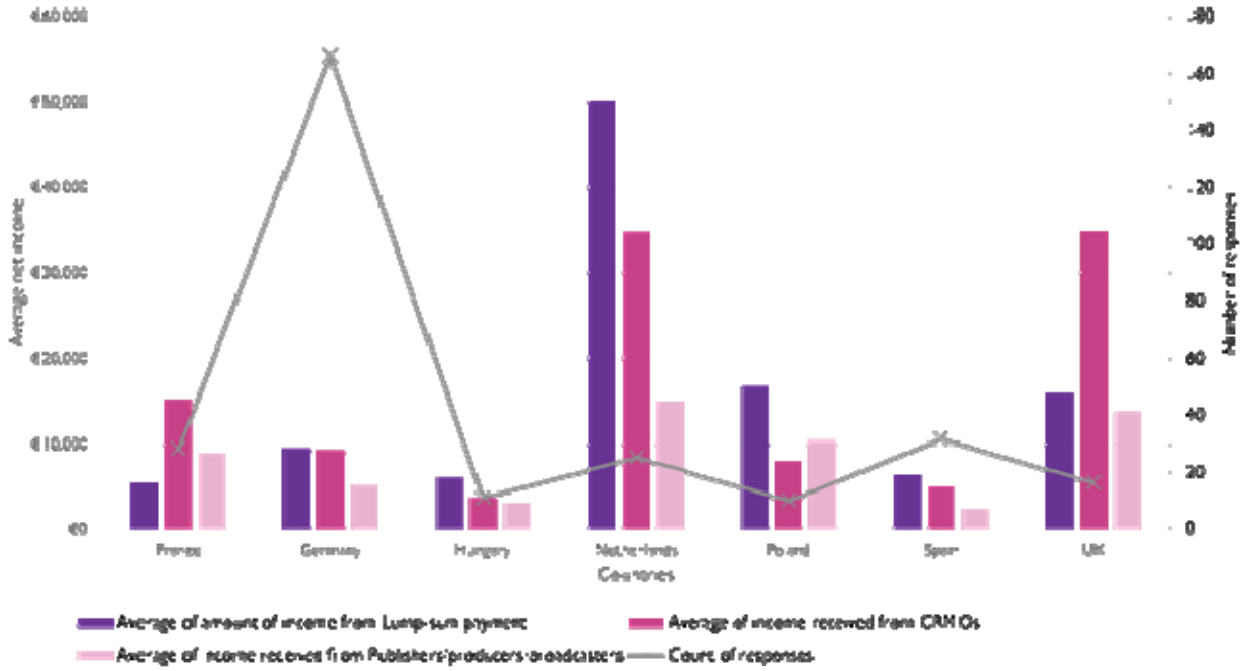
Note: Denmark, Hungary, Italy, Lithuania and Poland are excluded from this graph as they had less than ten responses in this category.

The limitations due to response rates are more pronounced in this case. Five out of the ten countries do not achieve the minimum threshold of ten responses. Of the countries that had more than ten responses, Germany has the highest average net

income per unit of work (€1,451) followed by the Spain (€884) and the Netherlands (€722).

The breakdown of the income received by music writers is also of particular importance. Respondents were asked to indicate what percentage of their income sources from lump-sum payments, CRMOs or flows indirectly to them through third parties such as publishers, producers or broadcasters. The results are illustrated in the figure below.

Figure 12.8: Origin of average net income for music writers, in the last year, by country



Note: Denmark, Italy and Lithuania are excluded from this graph as they had less than ten responses in this category.

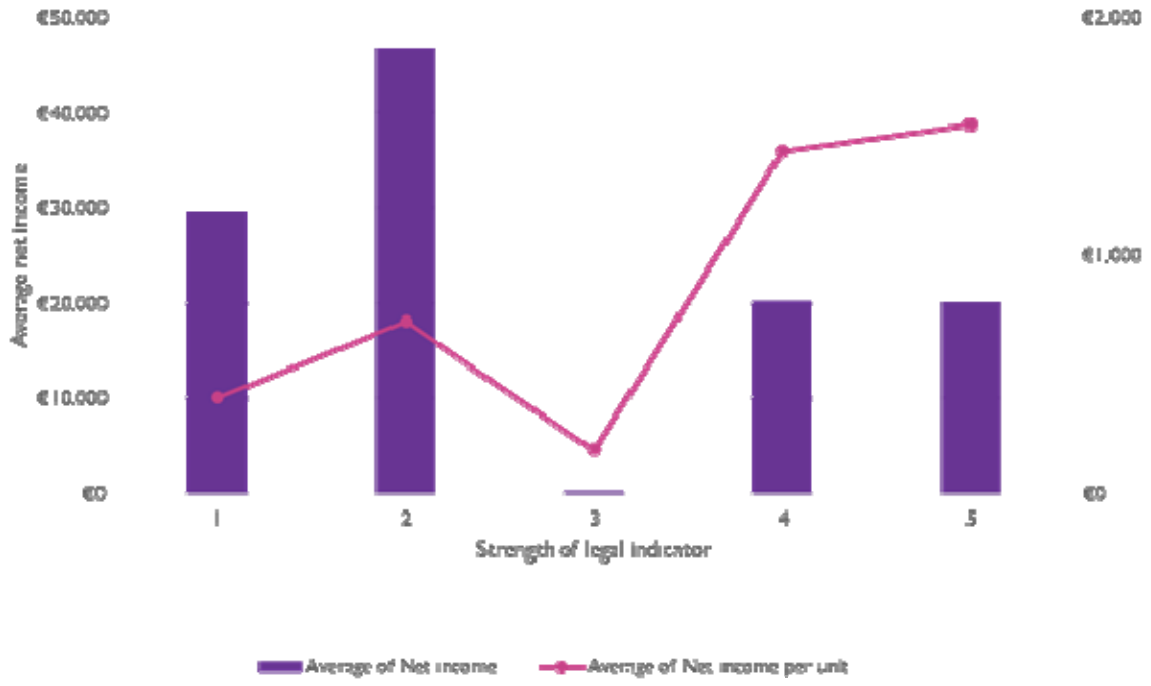
For the countries that have ten or more responses the following observations can be made:

- Only in France and the UK is royalty income received from CRMOs the most significant source of income. This income is considerably higher in the UK where it averages approximately €35,000. In both the UK and France the other two sources of income are reasonably balanced, but lump sum income is more important in the UK while publisher / producer royalty income is more important in France. The importance of royalty payments in France is consistent with the finding from the legal review that lump sum payments are formulated as exceptions to the author's basic right to proportional remuneration.
- In Germany, Hungary, the Netherlands, Poland and Spain, the main source of income for music writers is lump-sum payments. It is a particularly dominant source in the Netherlands and Poland, while in Germany and Spain the situation is more balanced with royalty income from CRMOs being quite close to lump-sum remuneration.

Next, we examine the strength of the legal framework in different countries and how this affects remuneration levels. The figure below presents average net income for

music writers, broken down by the strength of the legal indicator in the primary vertical axis (presented in bars). The secondary vertical axis represents average net income per unit of work.

Figure 12.9: Average net income and average net income per unit of work by strength of legal indicator for music writers, in the last year



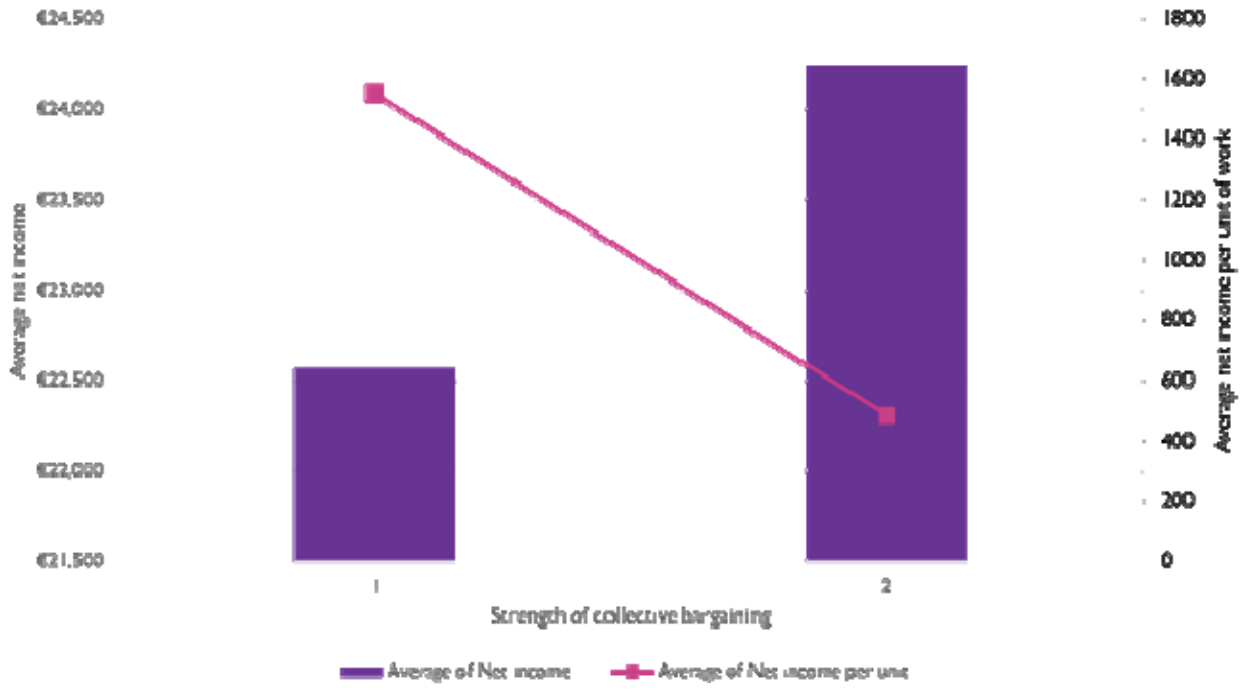
Note: The number of responses used for average net income for each level of strength are: 20 for level 1, 25 for level 2, 2 for level 3, 39 for level 4 and 212 for level 5. The number of responses used for average net income per unit of work are: 15 for level 1, 19 for level 2, 2 for level 3, 27 for level 4 and 182 for level 5.

There is not a straightforward pattern that can be observed regarding average net income: the highest value is attained for a level two legal indicator, the second highest value for level one while levels four and five have approximately equal incomes. It should be noted that the number of responses in all indicator levels other than level five are relatively low, meaning that the averages are rather susceptible to outliers. The large number of responses for level five can be explained by the fact that Spain and Germany, two of the most represented countries, have a legal indicator of five.

When considering average income per unit of work, the response rate is reduced further. Indeed, the number of responses for levels one, two and three is less than 20 each (only two responses for level 3). The number of responses for level five is still satisfactory, however, at 182. From an average per-unit income perspective, higher levels of the legal indicator (i.e. four and five) are associated with higher remuneration levels compared to lower levels (i.e. one and two).

The breakdown of average income by the strength of collective bargaining in different countries is shown in the figure below.

Figure 12.10: Average net income and average net income per unit by strength of collective bargaining indicator for music writers, in the last year



Note: The number of responses used for average net income for each level of strength is: 248 for level 1 and 50 for level 2. The number of responses used for average net income per unit of work is: 209 for level 1 and 36 for level 2.

The strength of collective bargaining for music writers was categorised as level 1 or 2 in all countries. In most countries there are no collective bargaining agreements but in the UK, France, Lithuania and Denmark there is trade union (or CRMO) involvement either in putting forward model contracts or in negotiating contractual terms for their members. The average net income of music writers is greater in countries with trade union (or CRMO) involvement (i.e. level 2 indicator) but average net income per unit is lower. This indicates that the number of units of work in level 2 countries is significantly greater than in level one countries.

12.2.2 Econometric analysis[214]

As noted above, collective bargaining is almost non-existent in the case of music writers and hence it is not surprising to find that the strength of collective bargaining does not affect the total remuneration per unit of music writers. We also found that the overall strength of the legal framework does not appear to have an impact on the total remuneration per unit of work for music writers, although there is limited evidence that stronger legal frameworks are associated with lower royalty payments from publishers.

We also found evidence that certain elements of the legal framework affect lump-sum payments. In particular the results of the model which breaks down the legal strength indicator to capture specific features of general copyright law suggest that per unit lump-sum remuneration is lower in countries in which the legal system has limitations

[214]The detailed econometric results can be found in section 13.8 of the Technical Appendix to this report.

on future forms than in countries that do not have such limitations. The presence of limitations on future forms in the legal framework does not have any impact on total remuneration per unit of work, however.

When interpreting these results, it is important to note that the countries in which there are limitations on future forms for music writers also have limitations on future works while the remaining countries do not have either type of limitation. This meant that both variables could not be included in our econometric models and hence the results identify the combined influence on remuneration of limitations on future forms and limitations on future works.

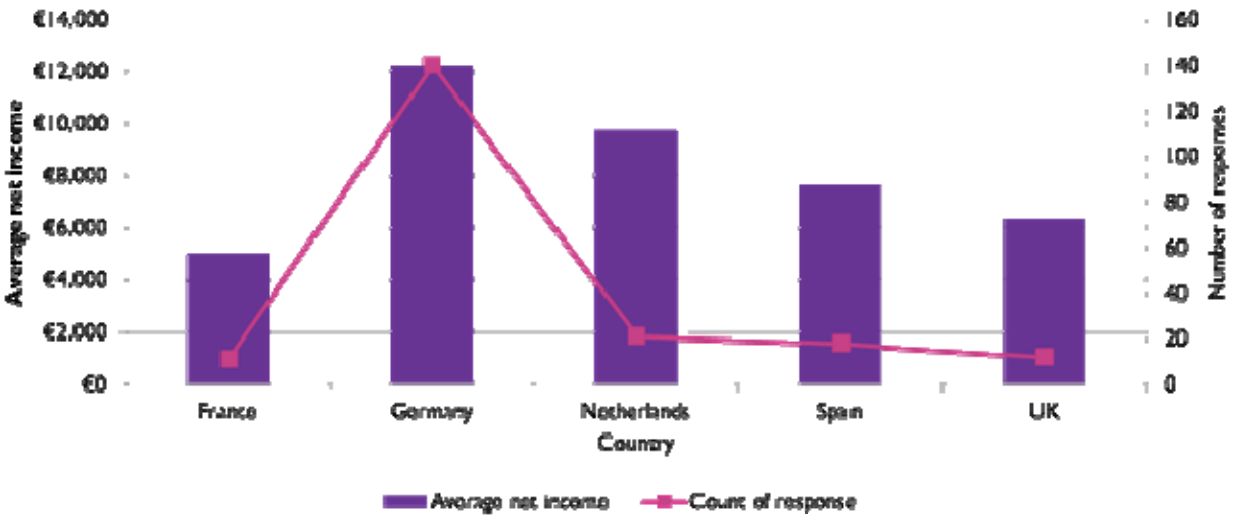
12.3 Session musicians

This section explores the levels of income of session musicians by presenting a statistical analysis of the survey responses.

12.3.1 Statistical analysis

The figure below shows the average net income of session musicians in countries for which we received more than ten responses.

Figure 12.11: Average net income of session musicians, in the last year, by country

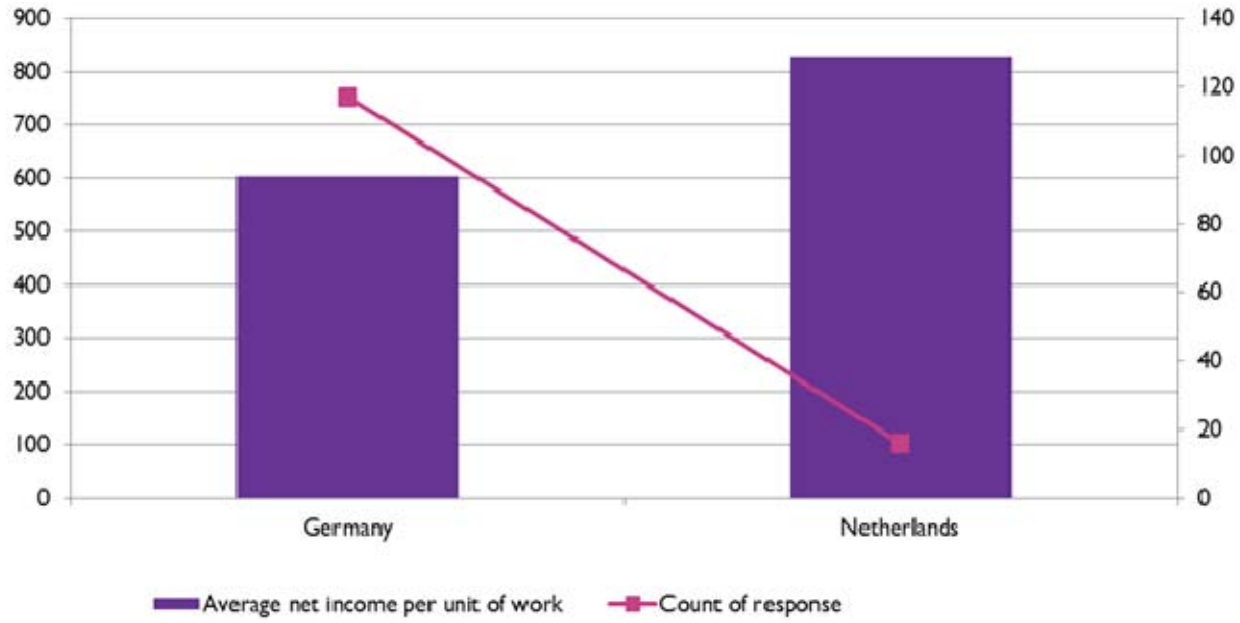


Note: Denmark, Hungary, Italy, Poland and Lithuania are excluded from this graph as they had fewer than ten responses in this category.

German respondents have the highest average income at slightly more than €12,000, followed by the Netherlands at just less than €10,000. Spain, France and the UK each have an average net income for session musicians of less than €8,000.

Only Germany and the Netherlands have more than 10 responses for levels of average net income per unit of work, as shown in the figure below. The average net income per unit of work is approximately €200 higher in the Netherlands than in Germany but it should be noted that this average is based on significantly fewer responses.

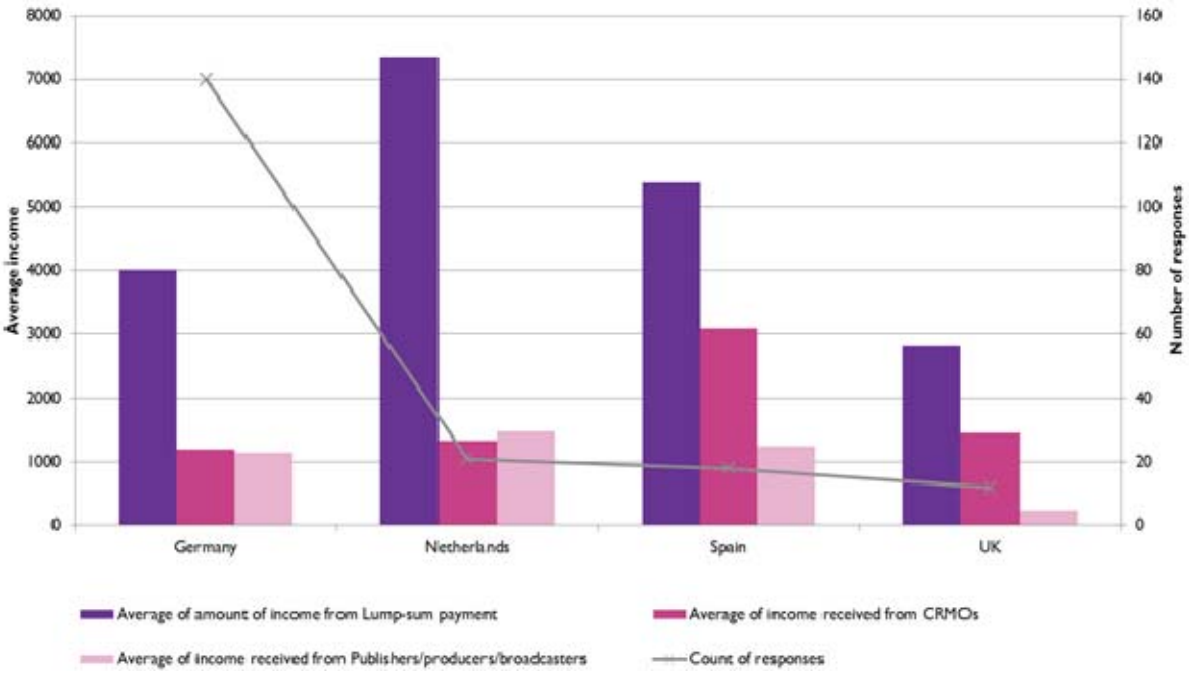
Figure 12.12: Average net income per unit of work of session musicians, in the last year, by country



Note: Denmark, France, Hungary, Italy, Poland, Spain, the UK and Lithuania are excluded from this graph as they had fewer than ten responses in this category.

When examining the sources of income for session musicians, Germany, the Netherlands, Spain and the UK had more than 10 responses and are therefore presented in the figure below.

Figure 12.13: Origin of average net income for session musicians, in the last year, by country

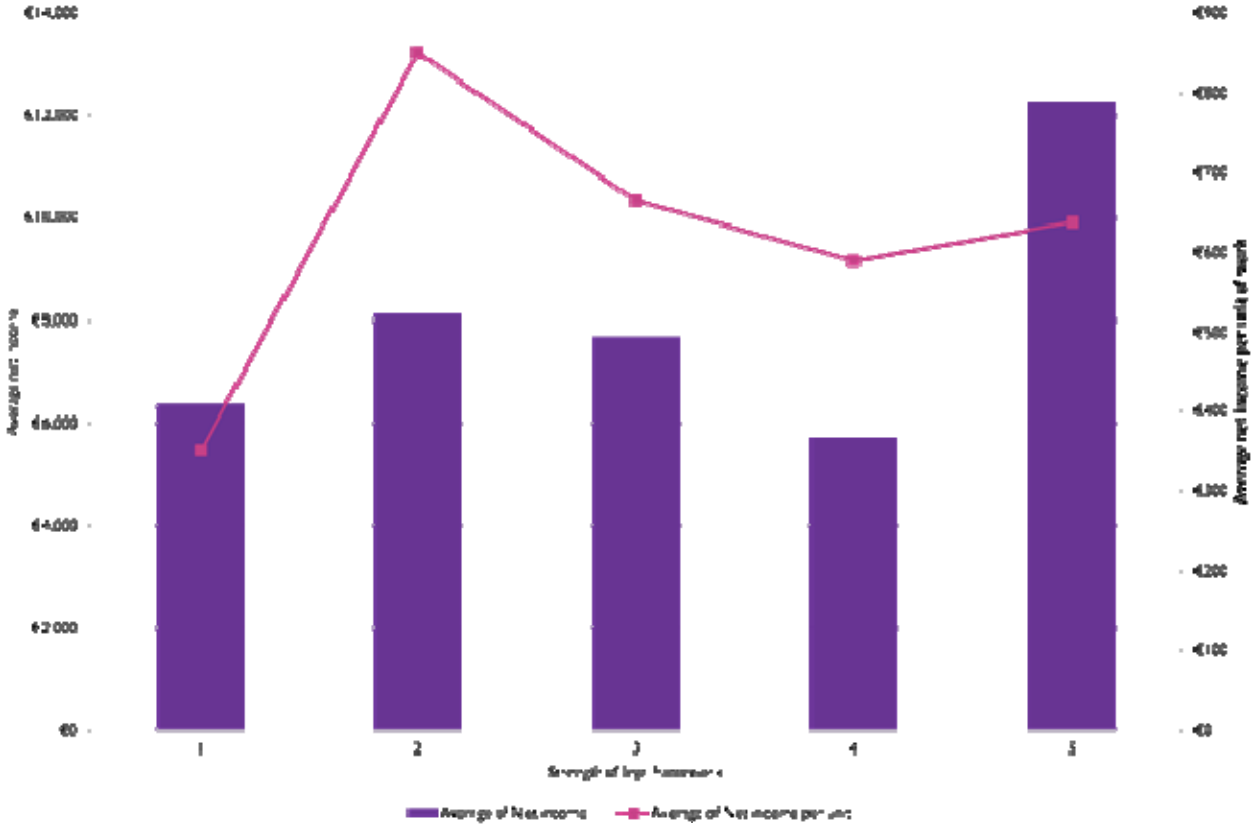


Note: Denmark, France, Hungary, Italy, Poland and Lithuania are excluded from this graph as they had fewer than 10 responses in this category.

As we would expect, in all countries the most significant source of income for session musicians is the income received from lump-sum payments. Income from CRMOs is the second most important source in Spain, Germany and the UK while it is the least important source in the Netherlands. This would seem consistent with both the strength of CRMOs in Spain, Germany and the UK and the size of the markets. It is also consistent with industry practice (CRMOs and producers) in the Netherlands.

Below, we present the distribution of average net income and average net income per unit for music performers by the strength of the legal indicator.

Figure 12.14: Average net income and average net income per unit of work by strength of legal indicator for session musicians, in the last year



Note: The number of responses used for average net income for each level of strength is: 12 for level 1, 32 for level 2, 18 for level 3, 5 for level 4 and 142 for level 5. The number of responses used for average net income per unit of work is: 9 for level 1, 20 for level 2, 9 for level 3, 3 for level 4 and 119 for level 5.

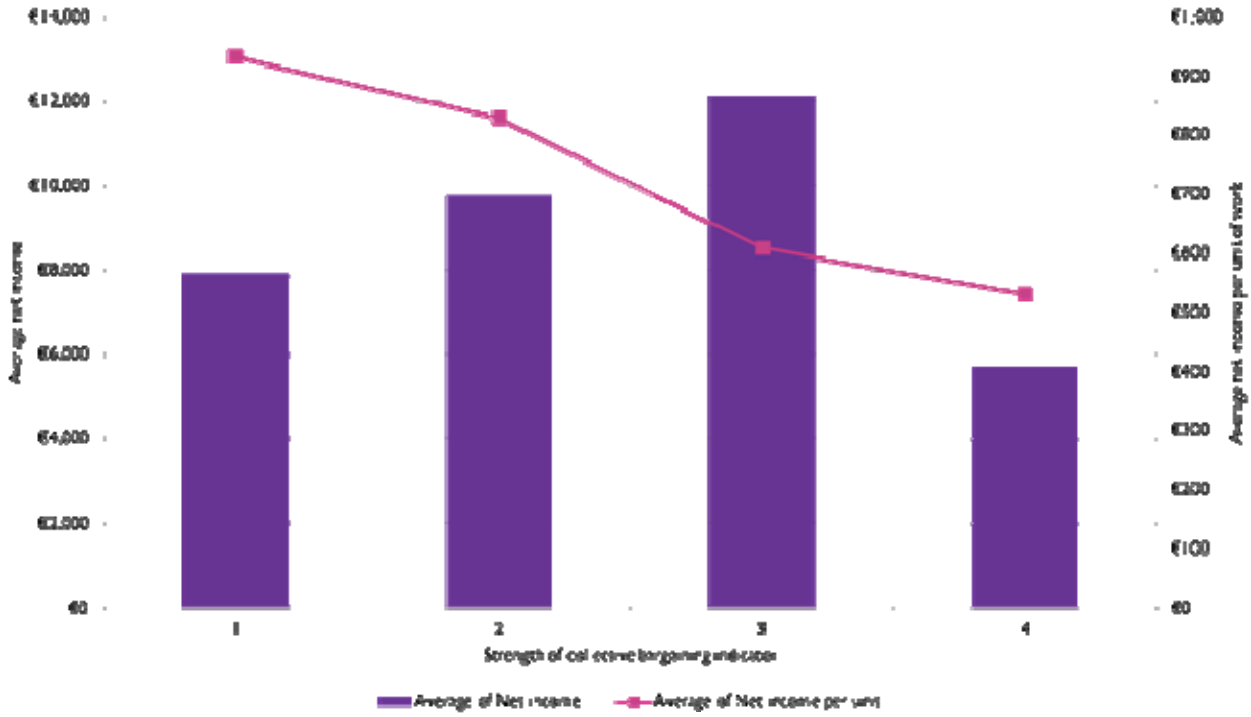
There is no clear pattern between the strength of the legal indicator and the level of remuneration. While there are more than ten observations for all but the level four indicator, the number of observations is relatively small for all but the level five indicator. Moreover, even within each indicator level there are differences across countries in respect of which legal elements are in place and led to the final indicator level. These factors might both help to explain the lack of a clear link between the strength of the legal framework and levels of remuneration.

Comparing the levels, we observe incomes that range from slightly above €6,000 to slightly above €8,000 for levels one to three. The highest average income is observed in level five countries (Germany and Poland) at more than €12,000. For average net income per unit of work, only level two and level five have more than 10 responses.

Respondents from level two countries have higher average net income per unit (€851) compared to level five countries (€637), indicating that stronger legal frameworks as defined in this study may not have a positive effect on average remuneration per unit of work.

The figure below shows that higher levels of the collective bargaining indicator (moving from one to four) are associated with lower levels of average net income per unit of work whereas average net total income exhibits an inverse "V-shaped" pattern with a maximum value of more than €12,000 attained for level 3 countries and values of less than €8,000 for level one and four countries.

Figure 12.15: Average net income and average net income per unit by strength of collective bargaining indicator for session musicians, in the last year



Note: The number of responses used for average net income for each level of strength is: 22 for level 1, 21 for level 2, 143 for level 3 and 23 for level 4. The number of responses used for average net income per unit of work is: 12 for level 1, 16 for level 2, 119 for level 3 and 13 for level 4.

12.3.2 Econometric analysis[215]

The results of our econometric models provide no consistent evidence that the strength of collective bargaining has an impact on the total income per unit of work of session musicians or any specific source of that income. While one of our models indicates that the strength of collective bargaining has a positive relationship with the lump-sum income of session musicians, our second model did not confirm the finding and hence we must conclude that there is no consistent evidence that collective bargaining has an impact on the per unit level or sources of remuneration for session musicians.

[215]The detailed econometric results can be found in section 13.6 of the Technical Appendix to this report.

Figure 12.14 presented little evidence of a clear relationship between the overall strength of the legal framework and the total income of session musicians per unit of work. The econometric results confirm the absence of a relationship with total income but indicate that stronger legal frameworks are associated with higher lump-sum remuneration of session musicians. The results of the model in which we include specific features of the legal framework as explanatory variables suggest that the presence of formalities for the transfer of rights, limitations on the scope of transfer and limitations on future forms of exploitation all contribute positively to lump-sum remuneration per unit of work. Limitations on future forms of exploitation are also found to have a positive relationship with total remuneration per unit of work (which is consistent with the importance of lump-sum remuneration in the total remuneration of session musicians) while the presence of formalities for the transfer of rights is found to be positively associated with per unit royalty payments from publishers.

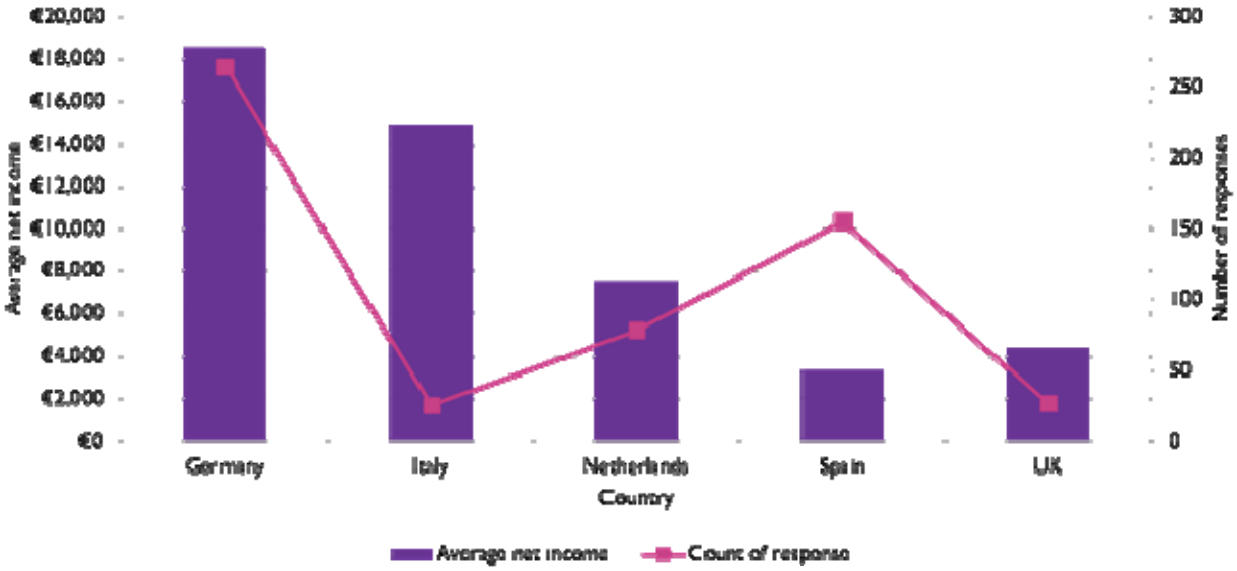
12.4 Actors

This section explores the levels of remuneration observed for actors, including both TV and film actors. In order to support our analysis of the observed levels of income of actors we first present a statistical analysis of the survey responses followed by an econometric analysis.

12.4.1 Statistical analysis

First, we analyse the average net income of actors across different countries, as reported in the following figure.

Figure 12.16: Average net income of actors, in the last year, by country

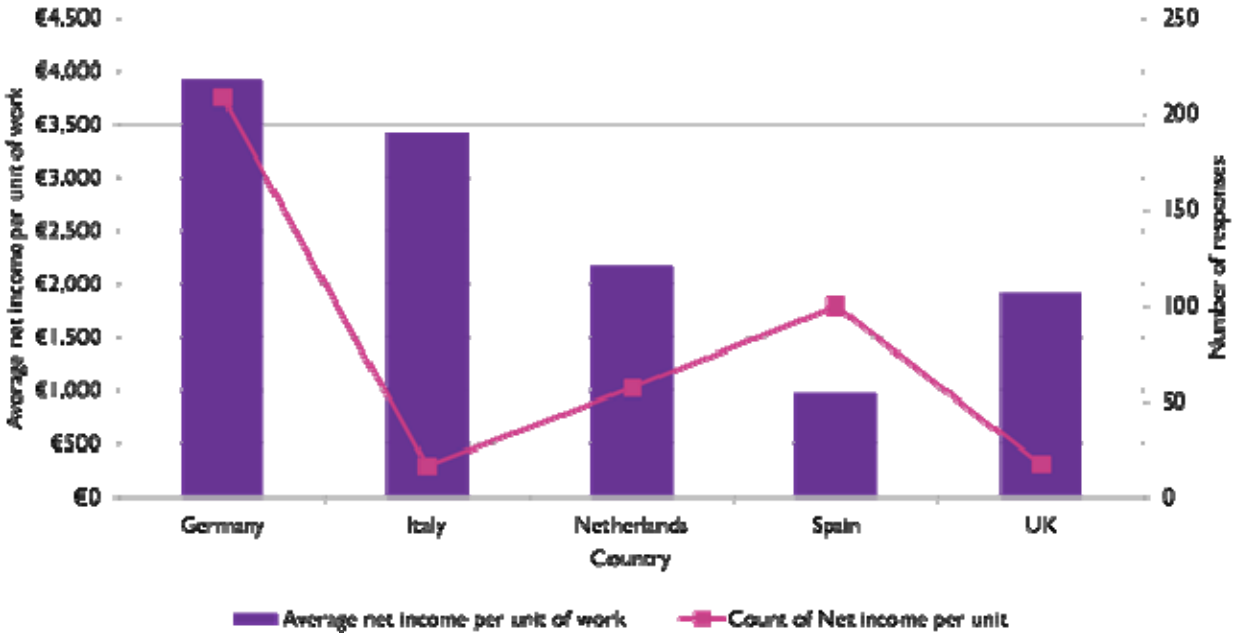


Note: Denmark, France, Hungary, Poland and Lithuania are excluded from this graph as they had less than ten responses in this category.

Only five countries had ten or more responses: Germany; Italy; the Netherlands; Spain; and the UK. For these countries, the average net income is highest in Germany (€18,565) followed by Italy (€14,891) but the number of observations in the latter is

not particularly high, thus creating suspicions of outlier influences. Income in Spain is the lowest, at around €3,300, is slightly higher in the UK (€4,400) and is considerably higher in the Netherlands (€7,579). The low figures for Spain and the UK may indicate that respondents to the survey from these countries were primarily supporting actors. The following figure presents these results on a per unit basis.

Figure 12.17: Average net income per unit of work for actors, in the last year, by country

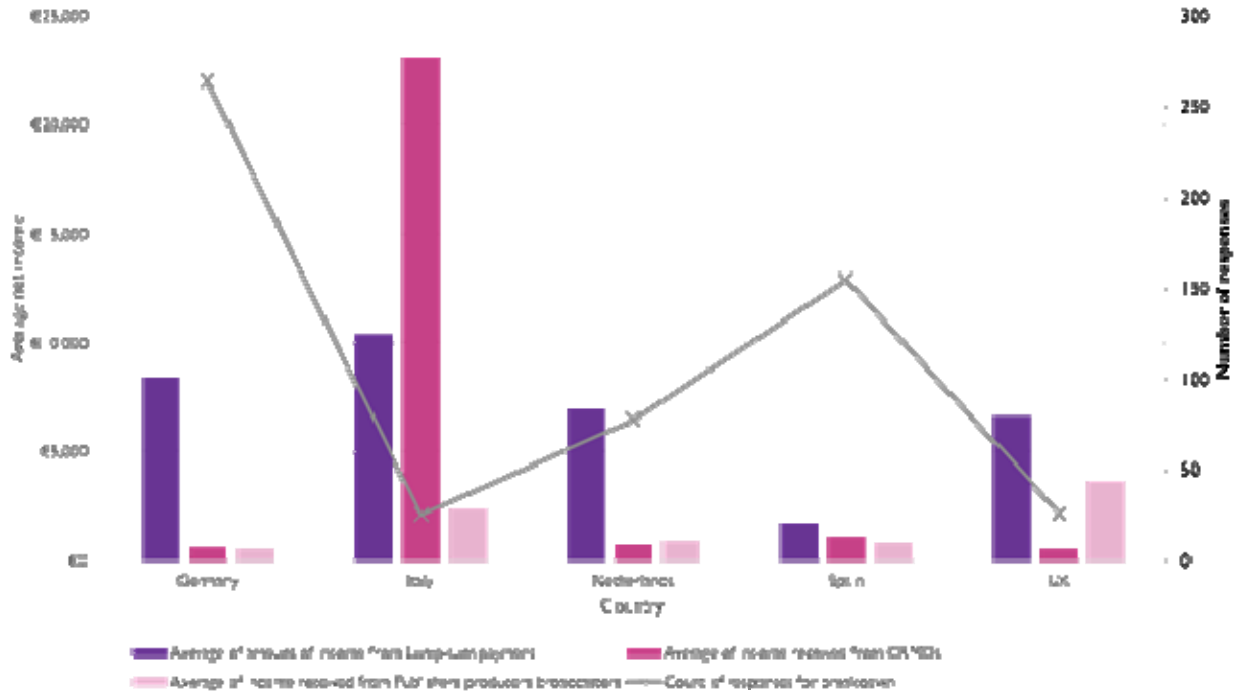


Note: Denmark, France, Hungary, Poland and Lithuania are excluded from this graph as they had less than ten responses in this category.

As for net income, the highest incomes per unit of work are observed in Germany and Italy. The average net income per unit of work amongst UK respondents is very close to the figure calculated for the Netherlands at approximately €2,000, though the low number of observations for the UK means that this figure may be influenced by outliers. Spain is significantly lower than those countries, with an average net income per unit of less than €1,000.

The figure below illustrates the distribution of income received through lump sum payments, the CRMO and the producer, publisher or broadcaster.

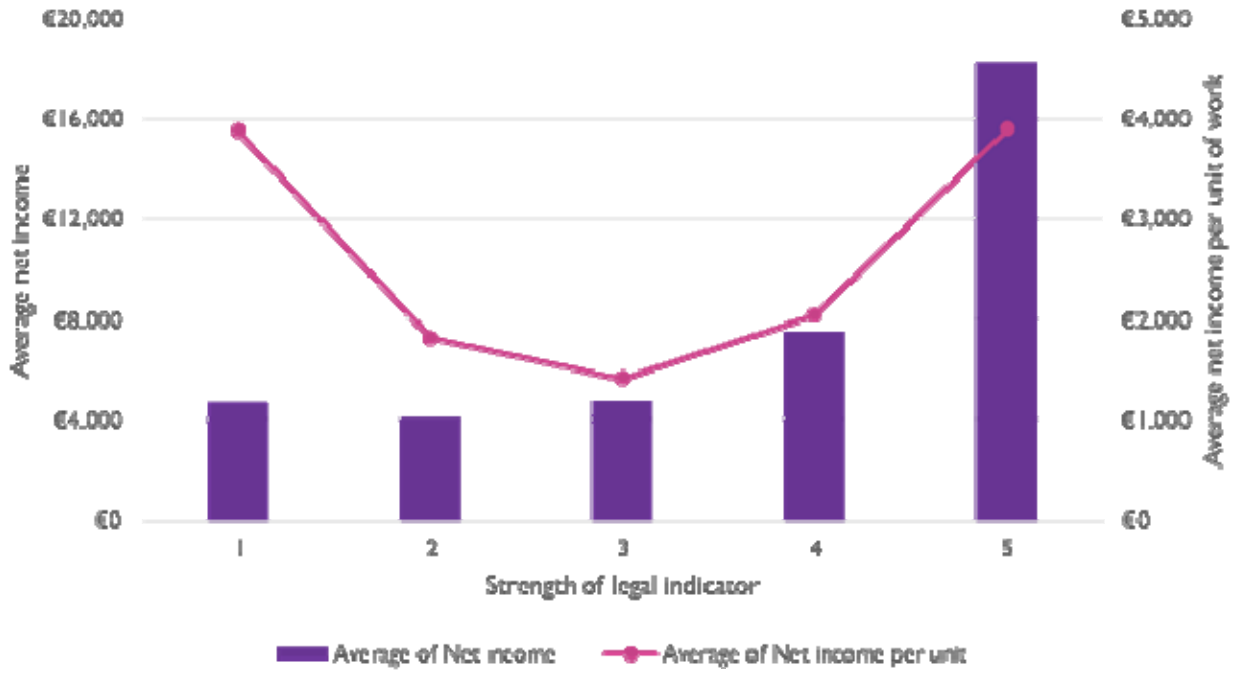
Figure 12.18: Origin of average net income for actors, in the last year, by country



Note: Denmark, France, Hungary, Poland and Lithuania are excluded from this graph as they had less than ten responses in this category.

Italy has an extremely high average level of royalties from CRMOs which is driven by an outlier observation. Otherwise, consistent with our understanding of the industry, in the three other countries lump-sum payments are the main source of income for actors while CRMO payments are rather low, particularly so in the UK. Below, we present the distribution of average net income and average net income per unit for actors by the strength of the legal indicator.

Figure 12.19: Average net income and average net income per unit of work by strength of legal indicator for actors, in the last year

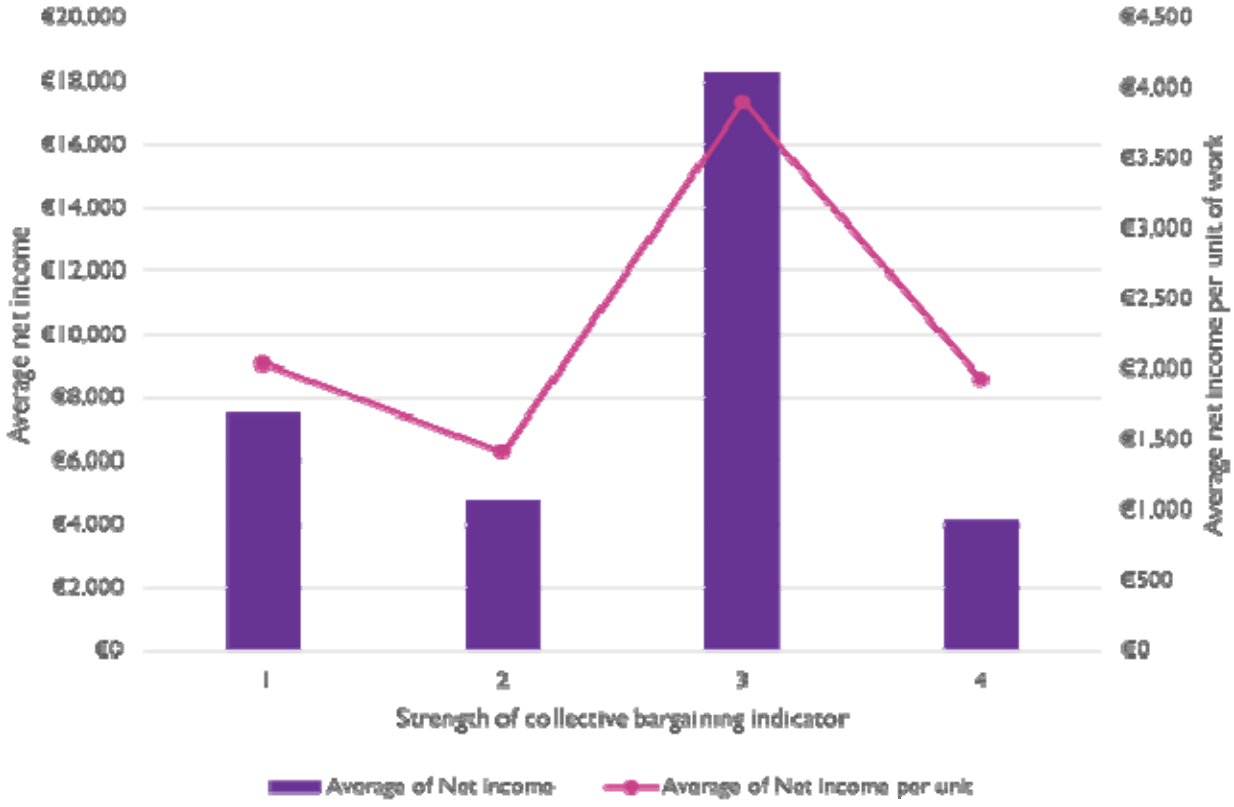


Note: The number of responses used for average net income for each level of strength are: 3 for level 1, 28 for level 2, 233 for level 3, 9 for level 4 and 289 for level 5. The number of responses used for average net income per unit of work are: 1 for level 1, 18 for level 2, 157 for level 3, 5 for level 4 and 224 for level 5.

The number of responses for average net income and average net income per unit of work is greater than 10 in all cases with the exception of levels one and four. Average net income increases continuously when moving from a legal indicator of two to an indicator of five while the same is true for average net income per unit of work in respect of levels three to five. The results for levels three and five are the most robust due to the significant number of observations in those cases, though the possibility that the type of actor that responded to the survey differs between those categories cannot be ignored. For example, the majority of respondents from some countries may have been supporting actors while from others they may have been leading film actors. We would expect such respondents to have rather different levels of remuneration.

Below, we present a similar exploration of the average net income distribution by the strength of the collective bargaining indicator. Fewer than ten responses were received from countries with a level one indicator and so they cannot be considered in our analysis. For the remaining countries, we observe an inverse "V-shaped" pattern for both average net income and average net income per unit where level three collective bargaining is associated with higher levels of average income compared to levels two and four. Given that Germany and Italy are the only countries with a level three indicator, such a result is not surprising in light of the above observation that these countries have the highest average net income and highest average net income per unit of work for actors.

Figure 12.20: Average net income and average net income per unit by strength of collective bargaining indicator for actors, in the last year



Note: The number of responses used for average net income for each level of strength is: 9 for level 1, 233 for level 2, 289 for level 3 and 31 for level 4. The number of responses used for average net income per unit of work is: 5 for level 1, 157 for level 2, 224 for level 3 and 19 for level 4.

12.4.2 Econometric analysis[216]

The results of the econometric analysis indicate that the strength of collective bargaining has a positive association with the amount of income actors receive per unit of work from CRMOs and lump sum payments. However, we find no evidence that collective bargaining affects the total remuneration per unit of work of actors and nor do we find evidence of a relationship with the amount of income received from producers. It is important to note, however, that it was not possible to develop particularly robust models in the case of total remuneration per unit of work for actors and hence the results of these models must be interpreted with quite some caution.[217]

We further find that the strength of the legal framework overall has a significant positive relationship with the total income of actors: the stronger the legal framework, the higher the income earned per unit of work by actors. This finding is consistent with the results of our statistical analysis presented in Figure 12.19, taking into account the fact that only three responses were received from countries with a level

[216] The detailed econometric results can be found in section 13.9 of the Technical Appendix to this report.

[217] In particular, our diagnostic tests suggested that even the best possible models suffer from omitted variables bias.

one legal strength indicator while the number of responses for levels two and four are also low. Taking those weaknesses into account there is evidence of a strong increasing trend between levels three and five: these account for the vast majority of responses and hence are likely to drive the results of our econometric analysis. We also find that the overall strength of the legal framework has a positive relationship with the lump sum income received by actors. Given that lump-sum income is, in most cases, the most important source of income for actors (see Figure 12.18), the impact of the legal framework on lump-sum income is likely to be the key driver of the effect we observe on total income.

Analysing the impact of specific elements of the legal framework on the remuneration of actors we find that their total income per unit of work is higher where there are limitations on future forms of exploitation. Such limitations target developments that are outside of the control of the creator that would enable their work to be used in a new way and so are designed to help creators to earn remuneration for their works following technological developments, for example. Our results suggest that such limitations are effective in increasing the remuneration of actors, although it should again be borne in mind that the results reflect restrictions on future works as well as those on future forms.

We find no evidence that actors' incomes per unit of work depend on whether there are formalities for the transfer of rights but we do find some evidence that restrictions on the scope of transfer are associated with lower incomes from producers.

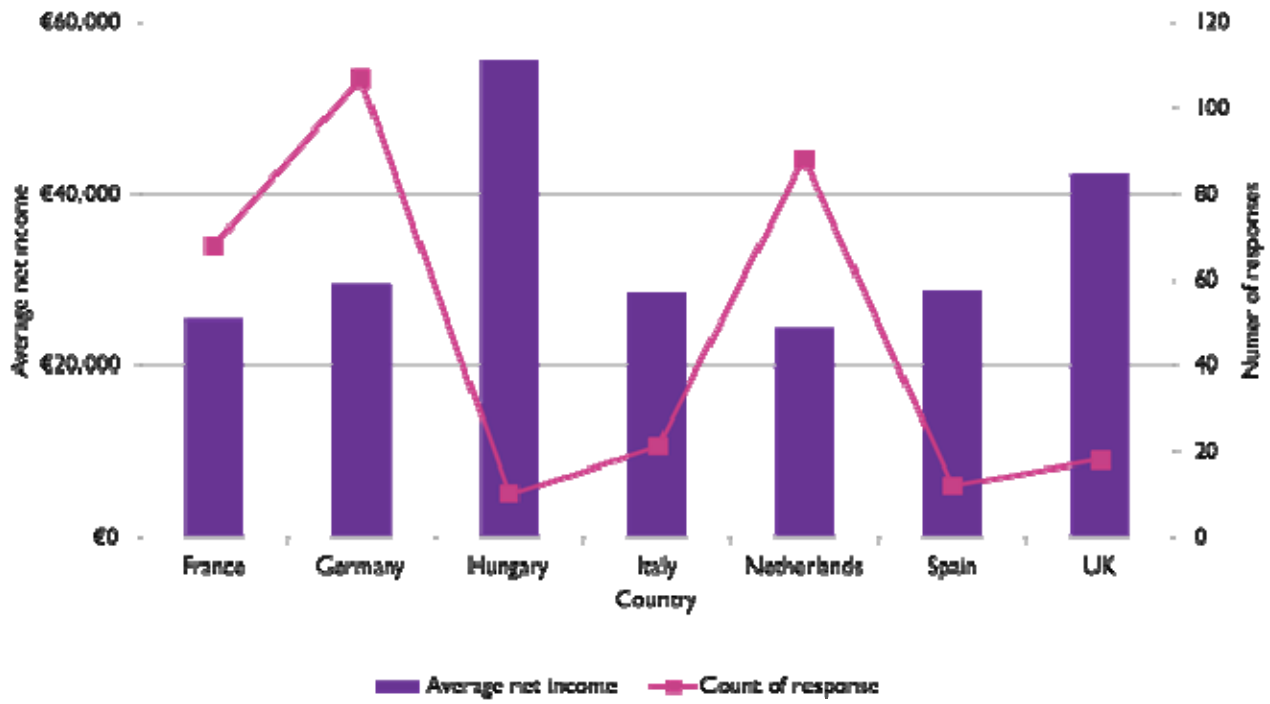
12.5 Principal directors

This section explores the remuneration of principal directors. First, a statistical analysis of remuneration levels is presented, followed by a presentation of results sourcing from the econometric modelling of remuneration variables.

12.5.1 Statistical analysis

The statistical analysis begins with an exploration of the average net income levels observed for principal directors across different countries, as presented in the following figure.

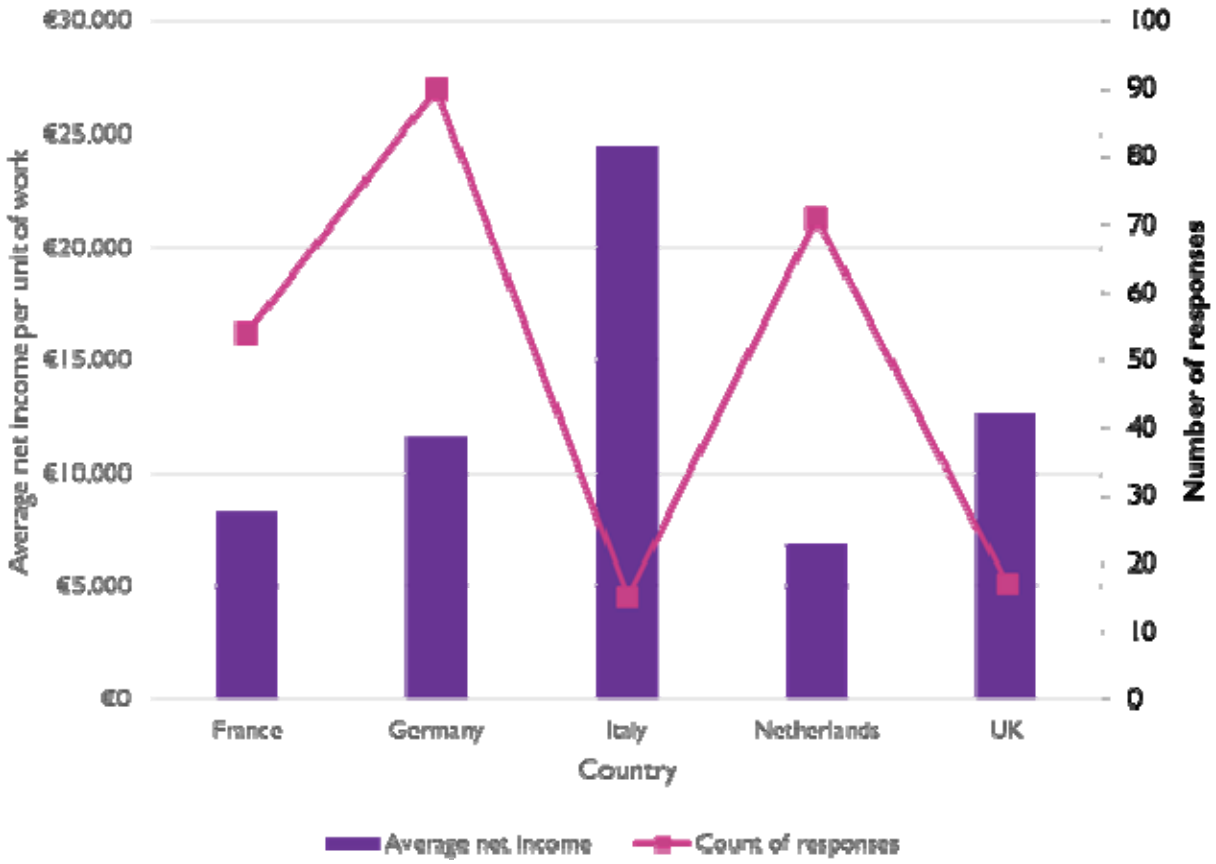
Figure 12.21: Average net income of principal directors, in the last year, by country



Note: Denmark, Poland and Lithuania are excluded from this graph as they had fewer than ten responses in this category.

For those countries with more than 10 responses, the average net income is highest in Hungary (€55,625) but the number of observations is not particularly high, thus creating suspicions of outlier influences. Income in the UK is the second highest, at around €42,300 and is between approximately €25,000 and €30,000 for the remaining countries. The following figure presents these results in a "per unit of work" basis.

Figure 12.22: Average net income per unit of work for principal directors, in the last year, by country

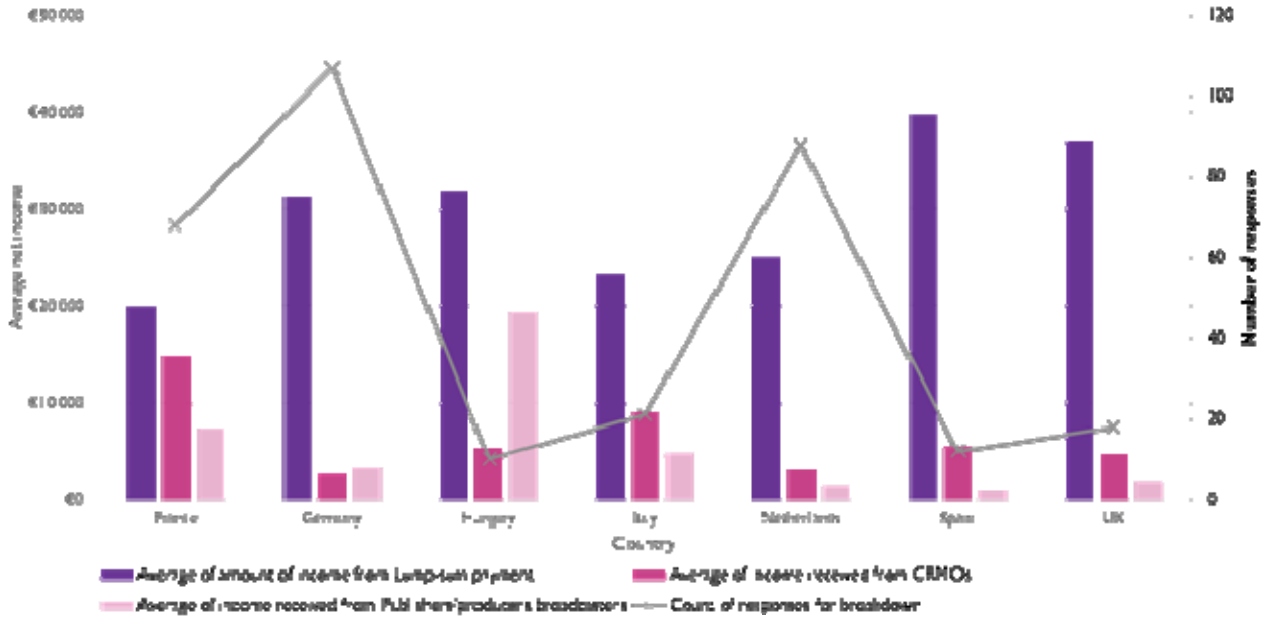


Note: Denmark, Hungary, Poland, Spain and Lithuania are excluded from this graph as they had less than ten responses in this category.

Responses that led to the calculation of the average net income per unit variable were also rather limited: only France, Germany and the Netherlands had a number of responses markedly higher than 20. Italy has the highest average net income per unit of work at almost €25,000 but this is based on a relatively small number of responses. The UK has the second highest level of average net income per unit of work at approximately €13,000 but the response rate is also low. Of the three countries that had high response rates, Germany has higher average net income per unit when compared to the Netherlands and France.

Bearing in mind the limitations imposed by low response rates, the figure below shows a clear pattern across the seven countries: average income from lump-sum / up-front payments is, with the exception of France, by far the most important source of income for principal directors. In France, income from lump-sum payments is still the highest (€19,882) but income received from CRMOs is also relatively high (€14,890). This can potentially be explained by the types of rights managed by CRMOs in France and the size of those markets in France.

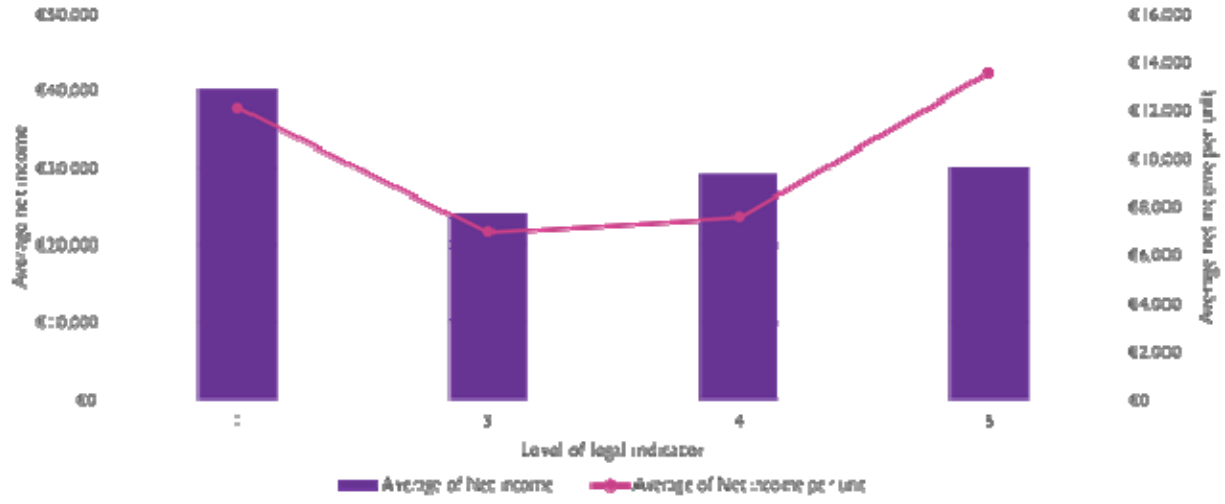
Figure 12.23: Origin of average net income for principal directors, in the last year, by country



Note: Denmark, Poland and Lithuania are excluded from this graph as they had less than ten responses in this category.

Breaking remuneration down by the strength of the legal indicator we find that average net income per unit exhibits a "V-shaped" pattern, as shown in the figure below. The highest income per unit is observed for a level five legal indicator, falling to a minimum value at level three and rising up to slightly below maximum levels at level one. There is no clear pattern for average net income: the highest levels of average net income are observed for a level one legal indicator (i.e. in the UK and Denmark) while, for levels above two, average net income is between €24,000 and €31,000.

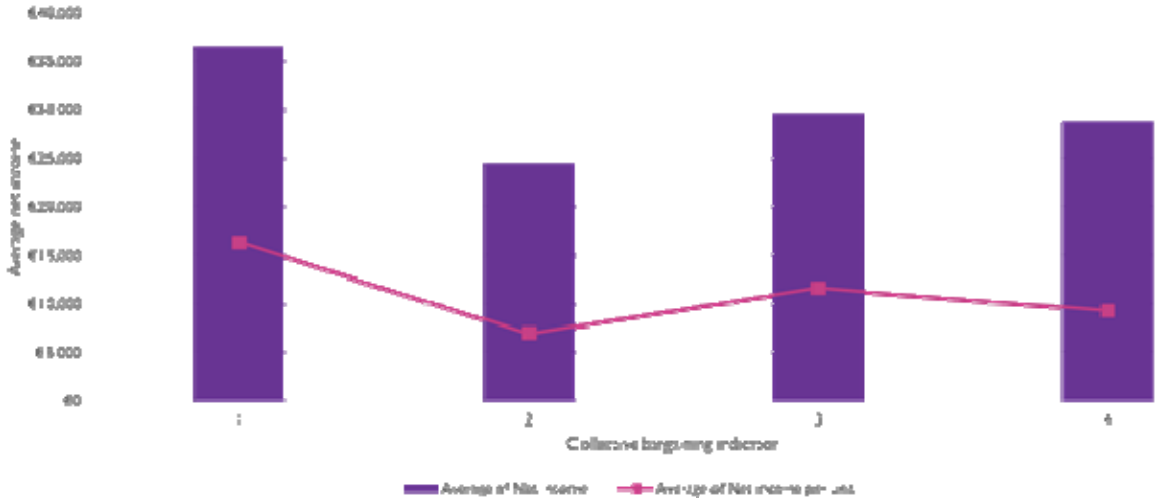
Figure 12.24: Average net income and average net income per unit of work by strength of legal indicator for principal directors, in the last year



Note: The numb of responses used for average net income for each level of strength are: 19 for level 1, 89 for level 3, 78 for level 4 and 141 for level 5. The number of responses used for average net income per unit of work are: 18 for level 1, 71 for level 3, 62 for level 4 and 114 for level 5.

Breaking income down by the strength of the collective bargaining indicator we find that the highest level of average net income and net income per unit of work is observed in level one countries (i.e. Spain, Italy, Hungary and Lithuania). Both measures of income fall for level two, rise for level three and fall again for level four countries. Overall, there is no clear relationship between income and the strength of the collective bargaining indicator for principal directors.

Figure 12.25: Average net income and average net income per unit by strength of collective bargaining indicator for principal directors, in the last year



Note: The number of responses used for average net income for each level of strength are: 45 for level 1, 88 for level 2, 107 for level 3 and 87 for level 4. The number of responses used for average net income per unit of work are: 32 for level 1, 71 for level 2, 90 for level 3 and 116 for level 4.

12.5.2 Econometric analysis[218]

The econometric analysis of influences on the per-unit remuneration of principal directors found that the amount of royalty income per unit of work received from producers and CRMOs are positively associated with the strength of collective bargaining. Given the finding that lump-sum payments are by far the most important source of income for principal directors (see Figure 12.23), the fact that we find no evidence of a relationship between collective bargaining and total remuneration per unit of work is, in light of the absence of an impact on lump-sum remuneration per unit of work, unsurprising. Moreover, the fact that the level of income per unit of work is reasonably consistent across all levels of the collective bargaining indicator (Figure 12.25) supports a conclusion that collective bargaining has little impact on the total per unit remuneration of principal directors.

We also find no evidence that principal directors' total remuneration per unit of work is affected by the overall strength of the legal framework, though there is evidence of a positive relationship with royalty payments from producers. In models that broke down the legal system into specific elements, we found that formalities for the transfer of rights are positively associated with royalty remuneration from producers.

[218]The detailed econometric results can be found in section 13.10 of the Technical Appendix to this report.

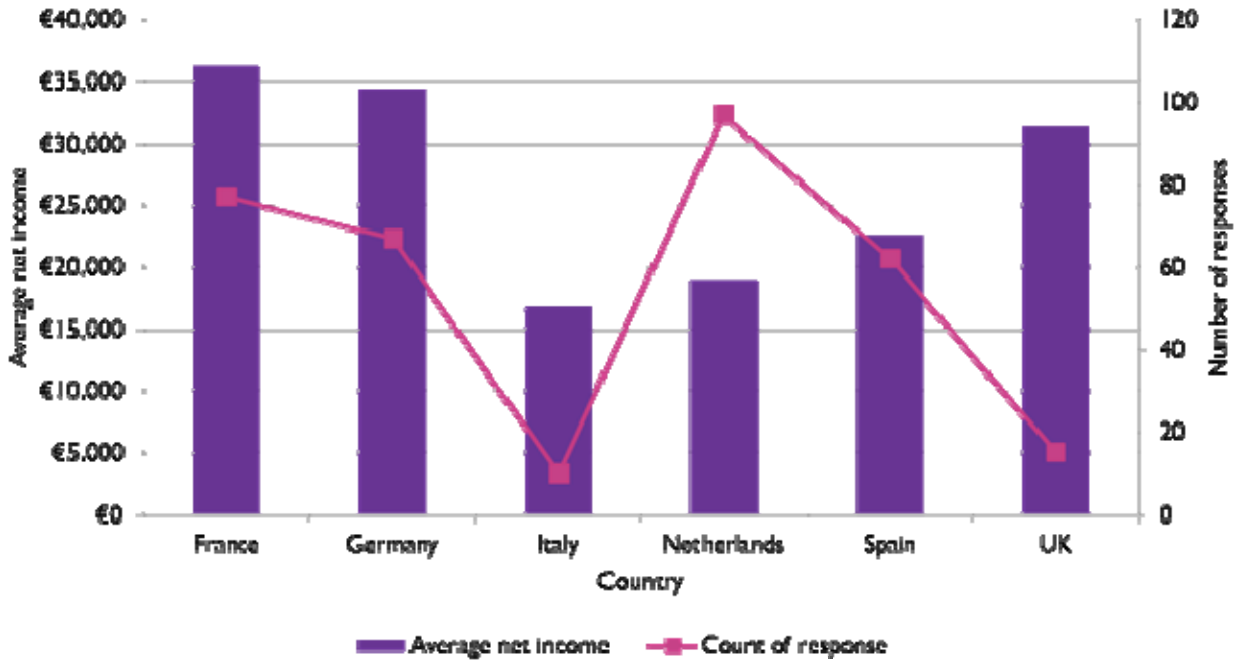
12.6 Screenwriters

This section explores screenwriters' remuneration. First, a statistical analysis of remuneration levels is presented, followed by a presentation of results sourcing from the econometric modelling of remuneration variables.

12.6.1 Statistical analysis

We first analyse the average net income of screenwriters across different countries, as shown in the following figure.

Figure 12.26: Average net income of screenwriters, in the last year, by country

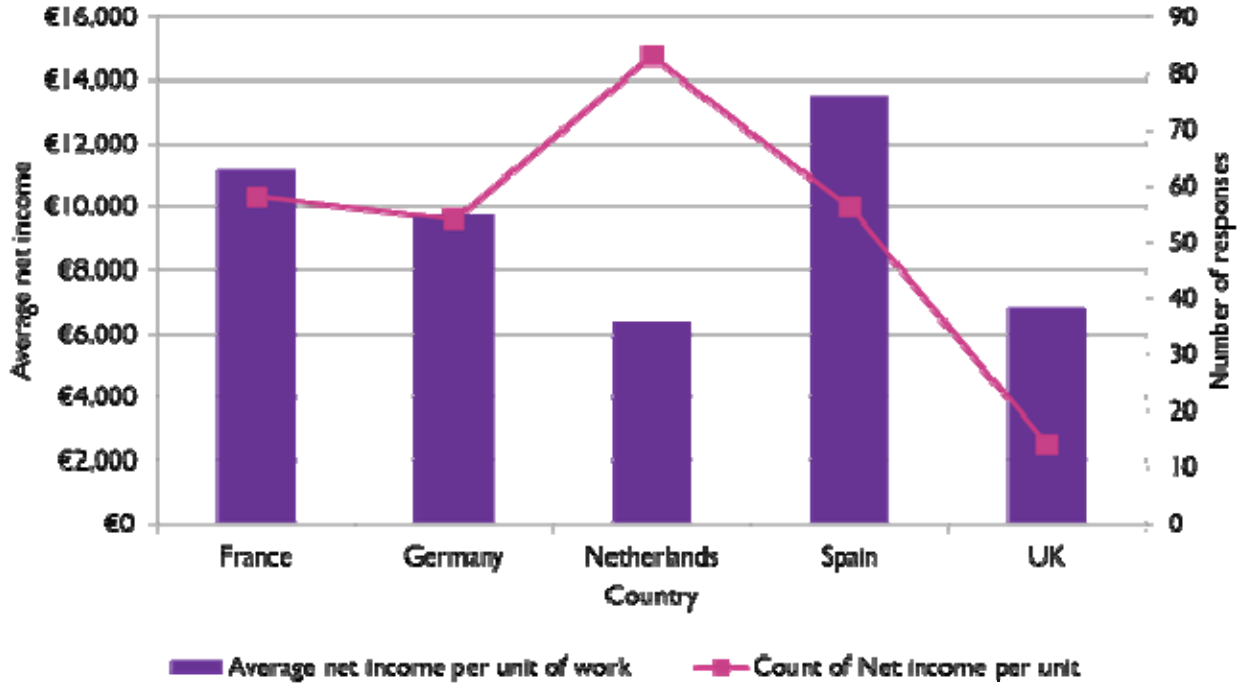


Note: Denmark, Hungary, Poland and Lithuania are excluded from this graph as they had less than ten responses in this category.

Average net income among these countries is highest in France and Germany (approximately €35,000 in each case) followed by the UK at around €30,000. Of these countries the lowest average net income is observed in the Netherlands, which is the only country with an average figure of less than €20,000.

As shown in the figure below, average net income per unit of work is highest in Spain (€13,497), unlike total income where France had the highest levels. This indicates that income earned in Spain is based on fewer units of work, thus driving up the average value of per unit income. The Netherlands and the UK have significantly lower income per unit, both being below €7,000.

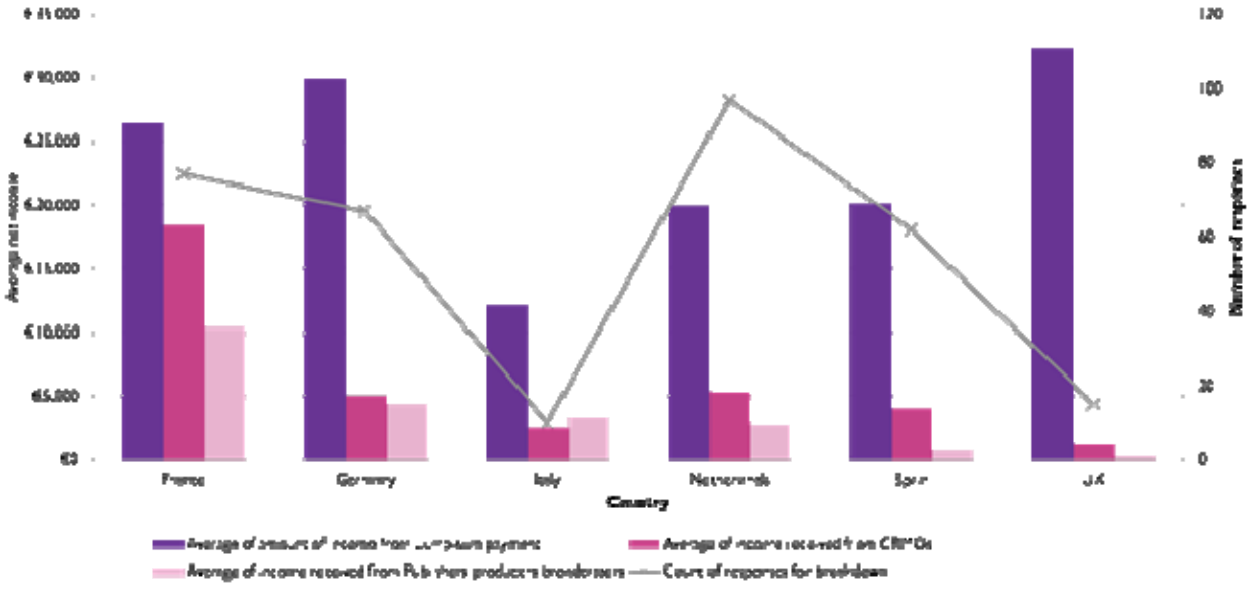
Figure 12.27: Average net income per unit of work for screenwriters, in the last year, by country



Note: Denmark, France, Hungary, Italy, Poland and Lithuania are excluded from this graph as they had less than ten responses in this category.

The figure below shows that, as for principal directors, lump-sum payments are the dominant source of income for screenwriters. In most countries the second most dominant source of income is royalties from CRMOs but in Italy royalties from CRMOs are surpassed by royalties received from publishers/producers/broadcasters.

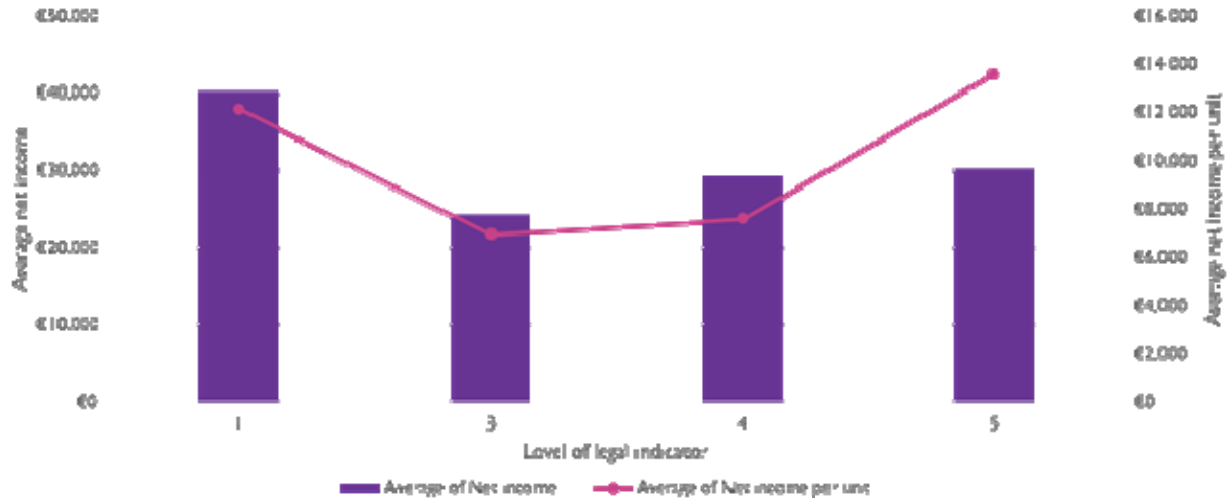
Figure 12.28: Origin of average net income for screenwriters, in the last year, by country



Note: Denmark, France, Hungary, Italy, Poland and Lithuania are excluded from this graph as they had less than ten responses in this category.

Breaking remuneration down by the strength of the legal indicator we find that, similar to the case for principal directors, screenwriters' incomes per unit of work are highest in level five countries, followed by level one. Those based in countries that have a legal strength indicator of three or four earn substantially less per unit of work. There is no clear relationship between screenwriters' total income and the strength of the legal framework.

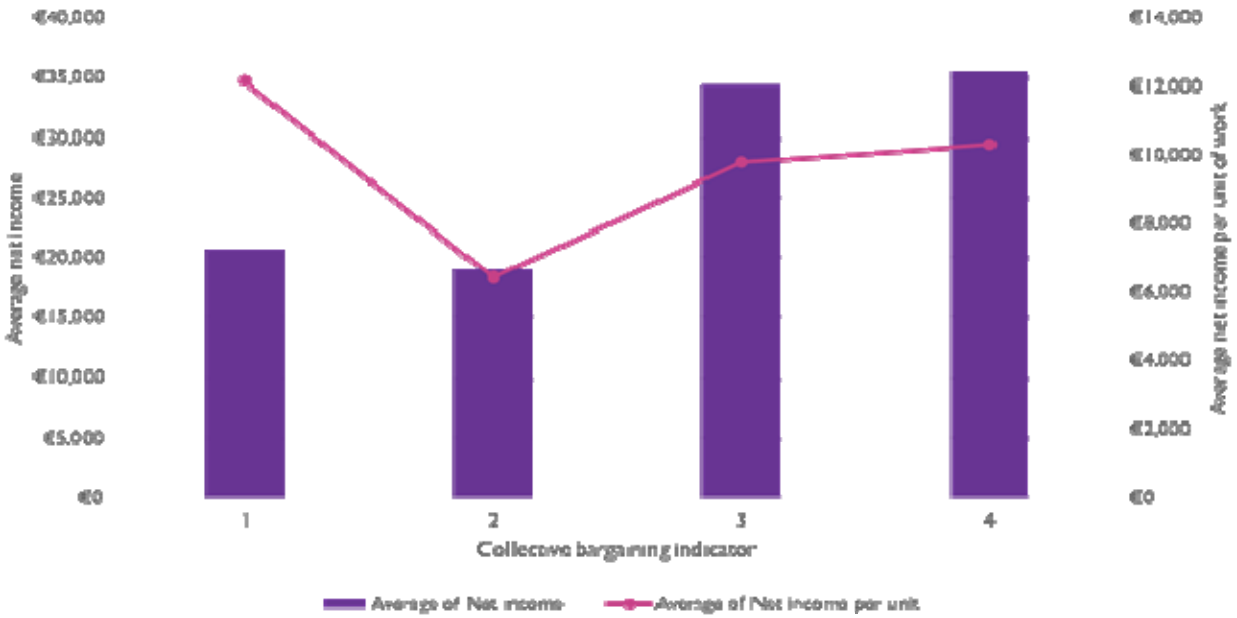
Figure 12.29: Average net income and average net income per unit of work by strength of legal indicator for screenwriters, in the last year



Note: The number of responses used for average net income for each level of strength are: 15 for level 1, 98 for level 3, 79 for level 4 and 142 for level 5. The number of responses used for average net income per unit of work are: 14 for level 1, 83 for level 3, 60 for level 4 and 120 for level 5.

The breakdown of remuneration by the collective bargaining strength indicator is shown in the figure below. Average net income is increasing when moving from level 2 (€19,045) to level 3 (€34,456) and level 4 (€35,510). Average net income per unit of work follows a similar pattern, rising from approximately €6,400 level 2 to approximately €10,300 at level 4.

Figure 12.30: Average net income and average net income per unit by strength of collective bargaining indicator for screenwriters, in the last year



Note: The number of responses used for average net income for each level of strength are: 78 for level 1, 97 for level 2, 67 for level 3 and 92 for level 4. The number of responses used for average net income per unit of work are: 68 for level 1, 83 for level 2, 54 for level 3 and 72 for level 4.

12.6.2 Econometric analysis[219]

As for principal directors, our econometric analysis found that the strength of collective bargaining has a positive relationship with the level of screenwriters' income per unit of work from producer and CRMO royalty payments while the overall strength of the legal framework is found to have a positive relationship with royalty income from producers. In contrast to the results for principal directors, however, we find that stronger legal frameworks are associated with higher lump-sum payments per unit of work and also with higher total remuneration per unit of work. Taking into account the characteristics of the data presented in Figure 12.28 and Figure 12.30, this result appears to be driven by the fact that France, Germany and Spain all have relatively high incomes per unit of work and each has a legal strength indicator of five.

The results also suggest that screenwriters based in countries in which the legal system includes formalities for the transfer of rights earn higher total incomes per unit of work than do those based in countries that do not have such formalities. Moreover, the levels of per-unit lump-sum and producer royalty income are found to be higher in countries with formalities in place. As encouraging as this finding may seem, it is important to note that it was not possible to develop particularly robust models in the case of lump-sum remuneration for screenwriters and hence the results of these models must be interpreted with quite some caution.[220] Finally, our results also

[219] The detailed econometric results can be found in section 13.11 of the Technical Appendix to this report.

[220] In particular, our diagnostic tests suggested that even the best possible models suffer from omitted variables bias.

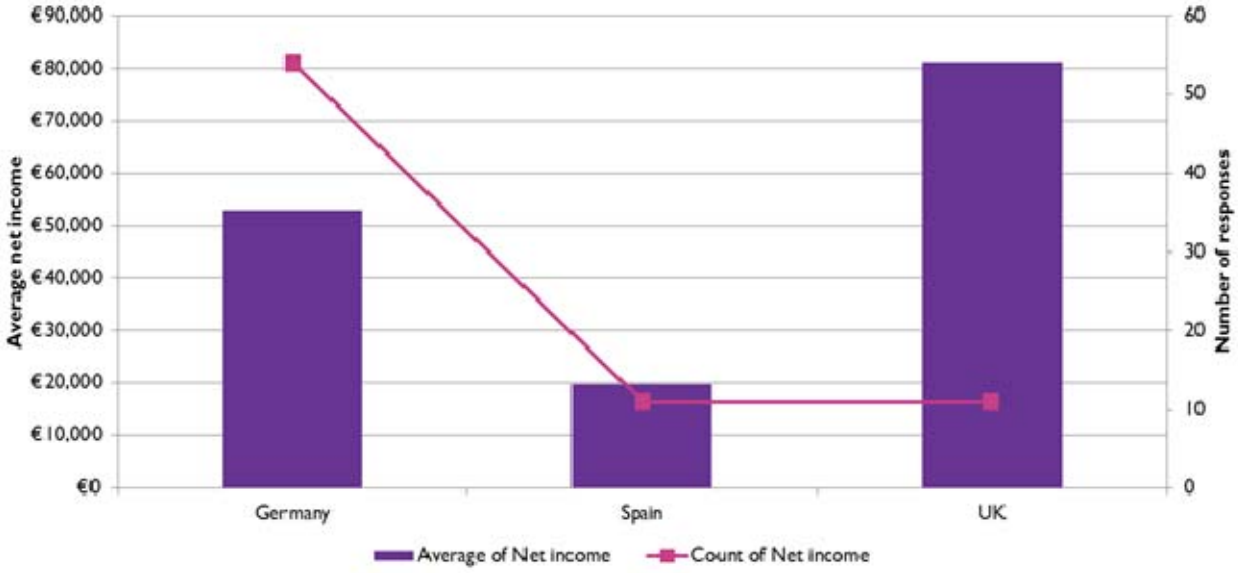
indicate that limitations on the scope of transfer are associated with lower incomes from producers.

12.7 Composers of music for audio-visual

12.7.1 Statistical analysis

In this section we examine the remuneration of composers of music for film and TV productions. We first analyse the average net income of such composers across different countries, as shown in the following figure.

Figure 12.31: Average net income of composers of music for audio-visual, in the last year, by country



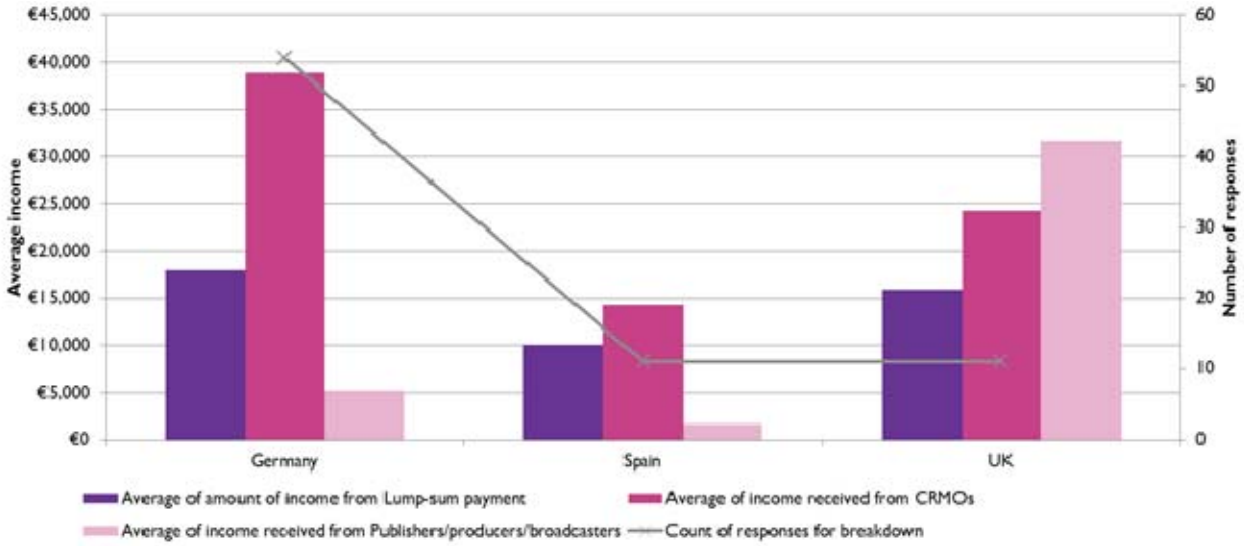
Note: Denmark, France, Hungary, Italy, the Netherlands, Poland and Lithuania are excluded from this graph as they had less than ten responses in this category.

All countries except Germany, Spain and the UK had fewer than ten responses and hence are not presented on the figure above. Of the countries for which we received more than ten responses the highest average net income was observed in the UK at more than €80,000, although this average is driven by the presence of an outlier observation coupled with the fact that relatively few responses were received from the UK. When considering average net income per unit of work, Germany was the only country for which we received more than ten responses: such respondents earned €7,659 net income per unit of work, on average.

As shown in the figure below, 63 per cent of the income of German composers of music for audio-visual sources from CRMOs while the corresponding figure for the UK is just 34 per cent. The UK is the only country in which income from publishers/producers/broadcasters is a substantial source of income for composers of music for film and TV productions, which may potentially be explained by differences in industry practice (there is no clear explanation based on our understanding of the legal framework). Lump sum payments are an important element of remuneration in

all three countries, accounting for between 22 per cent and 39 per cent of total net income, on average.

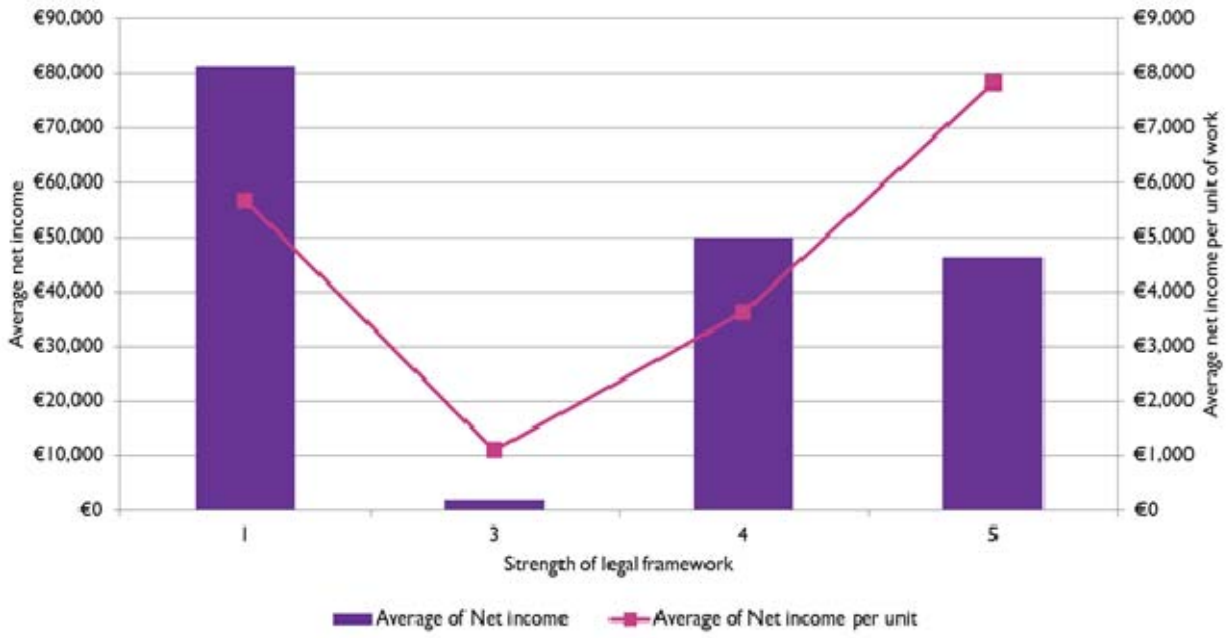
Figure 12.32: Origin of average net income for composers of music for audiovisual, in the last year, by country



Note: Denmark, France, Hungary, Italy, the Netherlands, Poland and Lithuania are excluded from this graph as they had less than ten responses in this category.

In terms of the legal framework, the average remuneration for level five respondents (i.e. primarily German respondents) is €46,255. This is less than the average for Germany alone, indicating that the other countries with level five legal indicators – in particular Spain – have lower remuneration, on average. Average net income per unit for respondents from countries that have a level five legal indicator countries is €7,823, which is very similar to the German average. The only country for which we received responses in the case of the level one indicator was the UK while we only received two responses for countries with a level three indicator and six responses for countries with a level four indicator (all of which were from French respondents).

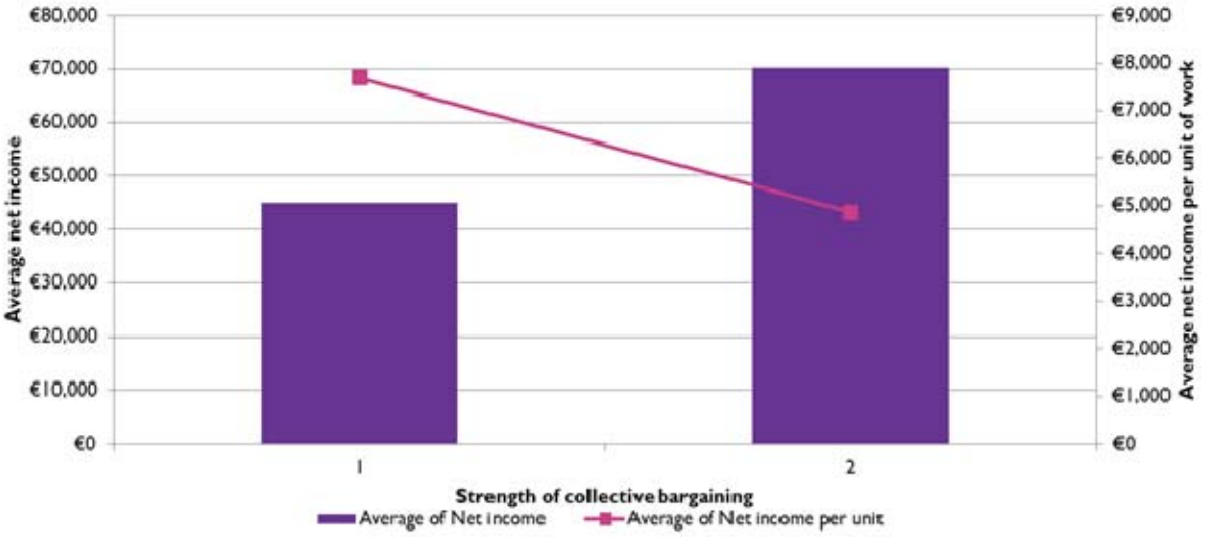
Figure 12.33: Average net income and average net income per unit of work by strength of legal indicator for composers of music for audiovisual, in the last year



Note: The number of responses used for average net income for each level of strength is: 11 for level 1, 2 for level 3, 6 for level four and 67 for level 5. The number of responses used for average net income per unit of work is: 9 for level 1, 1 for level 3, 6 for level 4 and 50 for level 5.

In terms of the collective bargaining indicator, all countries were allocated a level 1 or level 2, reflecting limited collective bargaining for composers of music for audiovisual. The figure below shows that while average net income is higher in level 2 countries than level one countries, the reverse is true for average net income per unit of work.

Figure 12.34: Average net income and average net income per unit of work by strength of collective bargaining indicator for composers of music for audiovisual, in the last year



Note: The numb of responses used for average net income for each level of strength is: 69 for level 1 and 17 for level 2. The number of responses used for average net income per unit of work is: 51 for level 1 and 15 for level 2.

12.7.2 Econometric analysis

It has not been possible to employ econometric analysis for composers of music for audio-visual due to a lack of observations.

13 Appendix 7: Technical Appendix

13.1 Data manipulation

As noted in the main body of this report, the data on which our statistical and econometric analyses are based were obtained through an online, self-completion survey. While many questions were pre-coded such that the respondent need only select one of several possible alternative responses, it was necessary to allow respondents to insert their own numeric or text answers to some questions.

Responses to the pre-coded and open-ended questions presented different challenges with respect to turning raw response data into consistent data that are suitable for analysis.

Many pre-coded questions asked respondents to indicate which of several possible ranges contains their net income (or various components of that income). To allow these data to be analysed, we first created a variable to record a single monetary income value, defined as the mid-point of the relevant range, defined in terms of national currency. Before analysing these data, it was necessary to adjust the national currency income variables for both exchange rates and to reflect the fact that the purchasing power of a euro differs between countries. To transform the income variables into a consistent unit of measurement we obtained Eurostat data on Purchasing Power Parities (PPP) and used these to convert the income variables into Purchasing Power Standard (PPS) terms.[221]

The open-ended questions presented a different set of challenges, mostly related to inconsistencies in response both across different respondents and within individual responses. For example, one set of questions asked respondents to specify the percentage of total income that was earned from different activities (e.g. session musician, featured artist, composer etc.) in the audiovisual and music sectors. Some respondents responded in numeric while others responded in text to this question. It was therefore necessary to clean the data such that all responses were in numeric. Moreover, for an individual respondent the sum of the percentages within a given sector should have been 100 but there are many cases in which the sum of the percentages within sector was either greater than or less than 100. Our approach to this issue was to adjust those cases where the reported sum of percentages exceeded 100 per cent proportionally to ensure that the sum was 100 per cent. We did not adjust those cases where percentages were less than 100 per cent as it would be unreasonable to assume that, say, a respondent earned 100 per cent of income from

[221] We chose the approach of PPP adjustment rather than an adjustment based on average earnings because much of the income earned by authors and is dependent on consumer spending. Authors and performers are not typically salaried employees and so we consider average earnings to be less relevant than purchasing power.

being a featured artist if he reported that only 40 per cent was earned from that activity and did not provide any further information.

We used the data on the percentage of income earned from each activity to calculate a per-activity net income using the PPS total net income mid-points described above. This approach had the advantage of increasing the variation in the dataset, which is particularly beneficial for the purpose of econometric analysis. More precisely, our analysis is based on the net income of the respondent's self-reported key activity and so the multiplication of a total income mid-point by a per-activity percentage ensures that the per-activity income is more dispersed than total income.

Later questions in the survey asked respondents to report their income from CRMOs, publishers and lump-sum/up-front payment for their key activity. We observed some inconsistencies in responses to these questions compared to responses to the total income and per-activity percentage questions described above:

- In some cases we found that the respondent had reported non-zero income from CRMOs, publishers and/or lump-sum for their key activity but had not specified what percentage of their total income was earned from that activity. In such cases, we replaced the 'zero' per-activity income values with the sum of lump-sum income, CRMO income and royalty income from publishers (since these focussed on key activity). This approach could potentially result in a lower than actual income level from that activity.
- In other cases we found that the respondent's reported income from CRMOs, publishers and/or lump sum exceeded the estimated total income from their key activity. In such cases we did not adjust the estimated income from key activity as we assumed that respondents are more aware of their total income from an activity than they are of the sources of that income. However, we note that this approach may again result in a lower than actual level of income from the specified activity.

Having made these adjustments, we had an estimate of the respondent's income from each of the key activities mentioned in the survey. These key activities were more granular than those that are the focus of this study as we considered that a more detailed breakdown would help respondents. For the purpose of analysis, however, it was necessary to group certain categories of respondents that are engaged in very similar activities as follows:

- session musicians;
- music performers (including featured artists and singer-songwriters);
- music writers (including composers, lyricists and songwriters);
- actors (including film actors and TV actors);
- principal directors;
- screenwriters; and
- composers of music for audio-visual.

Having grouped respondents in this manner we proceeded to calculate the amount of income each respondent earned per unit of work in its key activity. This approach controls directly for the influence of the number of works on the income of authors and performers (a screenwriter that had ten contracts would be expected to earn more than an otherwise identical screenwriter that only had one contract, for example).

It should be noted that a requirement for simplicity in the questionnaire meant that we collected data on the units of work over the past year. Given the potential for royalty payments to span a number of years, it is not possible to assume that the total income received in the past year is related to the works completed solely in the past year. Not only may some of the income relate to works from previous years, but some of the works in the last year may not yet have yielded income for the creator due to delays in royalty payments. However, the approach taken is the best available method of normalising the income reported.

We also converted the income and income per unit variables into logarithms such that the econometric analysis would have the flexibility to use whichever formulation of the variable was determined to be the most appropriate on the basis of diagnostic tests.

13.2 Indicators

As noted in the main body of this report we developed an index of the overall strength of the legal framework and a separate index of the strength of collective bargaining agreements on the basis of the information reported by our legal correspondents and our own understanding. These variables were employed in both our statistical and econometric analysis to help inform our understanding of the extent to which differences in levels of remuneration are associated with differences in legal systems and collective bargaining.

13.2.1 Construction of the legal indicator

Our approach to setting the values of the 'legal strength' indicator was to first identify whether each of six potential general rules of copyright law apply to a specific category of author or performer in each country.[222] For the purpose of this analysis, four categories were considered:

- music performers (including session musicians and other music performers);
- music writers;
- actors; and
- audiovisual authors (including principal directors, screenwriters and composers of music for audio-visual).

Each applicable rule was given a score of one and these were summed to give a 'general' score out of six. The higher the score, the stronger the legal framework. Similarly, specific rules on rental, public lending and communication of a commercial phonogram (for music performers only) were identified and the rules were given a total score out of three for music performers (two for other categories of author and performer). The initial scorings for the case of music performers are shown in the table below.

[222]The general factors are: formalities for the transfer of rights; rules on form of payment (e.g. lump sum, royalties etc.); limitation on scope; limitation on future forms; limitation on future works; and "best seller" - type clause.

Table 13.1: Setting the legal indicator for music performers: Step 1

MS	Formal-ities	Right to remun-eration	Specifi-cation of rights transf e-rred	Future modes of exploit-ation	Future works	Best-seller clause	Rental	Lending	Comm-unication of comer-cial phonog r-am
DE	1	1	0	1	1	1	1	1	1
DK	0	0	0	0	0	0	0.5	0	1
ES	1	1	1	0	0	0	0.5	1	1
FR	1	1	0	0	0	0	0	0	0.5
HU	1	0	0	1	1	1	1	1	1
IT	1	1	0	1	1	1	0.5	1	0
LT	1	0	1	1	1	0	0.5	0	0.5
NL	1	0	0	0	0	0	0.5	1	0.5
PL	1	1	1	1	1	1	0.5	1	0.5
UK	0	0	0	0	0	0	1	1	0

Note: For all columns other than 'rental' and 'communication of commercial phonogram' a score of 1 indicates that the rule applies to music performers in the relevant Member State while a score of zero indicates that it does not apply. In the cases of 'rental' and 'communication of commercial phonogram', the scores should be interpreted as follows: 0) no right exists; 0.5) exclusive right (from producer); and 1) remuneration administered collectively.

To form an overall indicator, the general rules were given a weight of 75 per cent and the specific rules a weight of 25 per cent.[223] The weightings were based on our legal experts' views given that the basic remuneration paid to an author or performer consists of the fee for doing the work (or showing up) plus royalties on exploitation of the work, which weigh heavier than the royalties paid for rental, public lending and the communication of a commercial phonogram. The calculation of the final legal indicator value for the case of music performers is shown in the table below.

Table 13.2: Setting the legal indicator for music performers: Step 2

MS	General (/6)	Specific (/3)	75 % general-	25 % specific	100%	Indicator
DE	5	3	63%	25%	88%	5
DK	0	1.5	0%	13%	13%	1
ES	3	2.5	38%	21%	58%	3
FR	2	0.5	25%	4%	29%	2
HU	4	3	50%	25%	75%	4
IT	5	1.5	63%	13%	75%	4
LT	4	1	50%	8%	58%	3
NL	1	2	13%	17%	29%	2
PL	6	2	75%	17%	92%	5
UK	0	2	0%	17%	17%	1

The values of the legal indicator for the other categories of author and performer are presented in the tables below.

[223] To test the extent to which the methodology used to construct the legal strength indicator had an impact on the results, we ran a separate set of regressions in which an alternative legal strength indicator was included. This version of the indicator used weights of 85 per cent general, 15 per cent specific rather than the 75 per cent / 25 per cent used in the baseline models. There were very limited differences in the results of these models and so we report the baseline results throughout this report.

Music authors

Table 13.3: Setting the legal indicator for music authors: Step 1

MS	Formalities	Right to remuneration	Specification of rights transferred	Future modes of exploitation	Future works	Best-seller clause	Rental	Lending
DE	1	1	0	1	1	1	1	1
DK	0	0	0	0	0	0	0.5	0
ES	1	1	1	1	1	1	0.5	1
FR	1	1	1	1	1	1	0	0
HU	1	0	0	1	1	1	1	1
IT	1	1	0	1	1	1	0.5	1
LT	1	0	1	1	1	0	0.5	0
NL	1	0	0	0	0	0	0.5	1
PL	1	1	1	1	1	1	0.5	1
UK	0	0	0	0	0	0	1	0

Note: For all columns other than 'lending' and 'communication of commercial phonogram' a score of 1 indicates that the rule applies to music performers in the relevant Member State while a score of zero indicates that it does not apply. In the cases of lending' and 'communication of commercial phonogram', the scores should be interpreted as follows: 0) no right exists; 0.5) exclusive right (from producer); and 1) remuneration administered collectively.

Table 13.4: Setting the legal indicator for music authors: Step 2

MS	General (/6)	Specific (/2)	75 % general-	25 % specific	100%	Indicator
DE	5	2	63%	25%	88%	5
DK	0	0.5	0%	6%	6%	1
ES	6	1.5	75%	19%	94%	5
FR	6	0	75%	0%	75%	4
HU	4	2	50%	25%	75%	4
IT	5	1.5	63%	19%	81%	5
LT	4	0.5	50%	6%	56%	3
NL	1	1.5	13%	19%	31%	2
PL	6	1.5	75%	19%	94%	5
UK	0	1	0%	13%	13%	1

Audiovisual performers

Table 13.5: Setting the legal indicator for audiovisual performers: Step 1

MS	Formalities	Right to remuneration	Specification of rights transferred	Future modes of exploitation	Future works	Best-seller clause	Rental	Lending
DE	1	1	0	1	1	1	1	1
DK	0	0	0	0	0	0	0.5	0
ES	1	1	1	0	0	0	0.5	1
FR	1	1	0	0	0	0	0	0
HU	1	0	0	1	1	1	1	1
IT	1	1	1	1	1	1	0.5	1
LT	1	0	1	1	1	0	0.5	0
NL	1	0	0	1	0	0	0.5	1
PL	1	1	1	1	1	1	0.5	1
UK	0	0	0	0	0	0	1	1

Note: For all columns other than 'lending' and 'communication of commercial phonogram' a score of 1 indicates that the rule applies to music performers in the relevant Member State while a score of zero indicates that it does not apply. In the cases of lending' and 'communication of commercial phonogram', the scores should be interpreted as follows: 0) no right exists; 0.5) exclusive right (from producer); and 1) remuneration administered collectively.

Table 13.6: Setting the legal indicator for audiovisual performers: Step 2

MS	General (/6)	Specific (/2)	75 % general-	25 % specific	100%	Indicator
DE	5	2	63%	25%	88%	5
DK	0	0.5	0%	6%	6%	1
ES	3	1.5	38%	19%	56%	3
FR	2	0	25%	0%	25%	2
HU	4	2	50%	25%	75%	4
IT	6	1.5	75%	19%	94%	5
LT	4	0.5	50%	6%	56%	3
NL	2	1.5	25%	19%	44%	3
PL	6	1.5	75%	19%	94%	5
UK	0	2	0%	25%	25%	2

Audiovisual authors

Table 13.7: Setting the legal indicator for audiovisual authors: Step 1

MS	Formalities	Right to remuneration	Specification of rights transferred	Future modes of exploitation	Future works	Best-seller clause	Rental	Lending
DE	1	1	0	1	1	1	1	1
DK	0	0	0	0	0	0	0.5	0
ES	1	1	1	1	1	1	0.5	1
FR	1	1	1	1	1	1	0	0
HU	1	0	0	1	1	1	1	1
IT	1	1	0	1	1	1	0.5	1
LT	1	0	1	1	1	0	0.5	0
NL	1	0	0	1	0	0	0.5	1
PL	1	1	1	1	1	1	0.5	1
UK	0	0	0	0	0	0	1	0

Note: For all columns other than 'lending' and 'communication of commercial phonogram' a score of 1 indicates that the rule applies to music performers in the relevant Member State while a score of zero indicates that it does not apply. In the cases of lending' and 'communication of commercial phonogram', the scores should be interpreted as follows: 0) no right exists; 0.5) exclusive right (from producer); and 1) remuneration administered collectively.

Table 13.8: Setting the legal indicator for audiovisual authors: Step 2

MS	General (/6)	Specific (/2)	75 % general-	25 % specific	100%	Indicator
DE	5	2	63%	25%	88%	5
DK	0	0.5	0%	6%	6%	1
ES	6	1.5	75%	19%	94%	5
FR	6	0	75%	0%	75%	4
HU	4	2	50%	25%	75%	4
IT	5	1.5	63%	19%	81%	5
LT	4	0.5	50%	6%	56%	3
NL	2	1.5	25%	19%	44%	3
PL	6	1.5	75%	19%	94%	5
UK	0	1	0%	13%	13%	1

13.2.2 Construction of the collective bargaining indicator

The collective bargaining indicator was based on our understanding of the strength of trade unions in each country. It was more difficult to quantify the strength of collective bargaining in each country than was the case for the legal indicator. For this reason, the values attributed to the collective bargaining indicator were determined on the basis of the responses of our legal correspondents to the questionnaire and on the knowledge of our legal experts.

In the table below, the interpretation of the indicator is as follows:

- Level 1 – no collective bargaining agreements.
- Level 2 – no collective bargaining agreements, but trade union (or CRMO) involvement either in putting forward model contracts or in negotiating contractual terms for their members.
- Level 3 – some collective bargaining agreements, but for specific categories of right holders (e.g. not for all featured artists but singers only, not for all session musicians but members of orchestras only).
- Level 4 – collective bargaining agreements that apply to (virtually) all right holders in the given category.

It should be emphasized that in levels 3 and 4, no distinction has been made between binding and non-binding collective bargaining agreements. Since these agreements are the result of collective bargaining by unions and industry representatives, it is assumed that, in practice, they will almost always be applied to all right holders in the given field, safe perhaps for the few occurrences in which authors and performers can negotiate better terms and conditions as a result of a strong individual bargaining position.

Table 13.9: Setting the collective bargaining indicator

MS	Session musicians	Featured artists	Music writers	Principal Directors	Screenwriters	Actors	Composers of music for AV
DE	3	1	1	3	3	3	1
DK	3	2	2	4	4	4	2
ES	1	1	1	1	1	2	1
FR	4	4	2	4	4	4	2
HU	1	1	1	1	1	1	1
IT	3	1	1	1	1	3	1
LT	2	2	2	1	1	1	2
NL	2	2	1	2	2	2	1
PL	1	1	1	1	1	1	1
UK	4	3	2	4	4	4	2

13.3 Econometric models

13.3.1 Member state dummy variable models

Our intended approach to the econometric modelling was to start from a relatively simple model and to explore the explanatory power of additional (and more detailed)

explanatory variables. To put this point more clearly, we began by exploring a model such as:

$$R_i = \alpha_i + \beta MS_i + \boldsymbol{X'}_i\boldsymbol{\gamma} + \varepsilon_i$$

In this model, the dependent variable, R_i, measures the per unit level of remuneration of an individual author or performer, adjusted for cross-country differences in average incomes.[224] As described above, all monetary variables included in our models were adjusted using Eurostat data on Purchasing Power Parity (PPP) such that the monetary values employed in the models are in terms of Purchasing Power Standard (PPS).

The variable MS_i is a dummy variable identifying whether or not the individual is based in a particular Member State (nine such dummies were included in the models while the tenth country would serve as the base case).[225] The coefficient on this dummy variable measures the effect of differences in the legal framework between countries on levels of remuneration, but would also capture other country-specific effects. Therefore, this model does not allow inferences to be drawn on the extent to which the legal framework specifically affects remuneration levels (see below for models that allow for such inferences to be drawn).

The vector of variables $\boldsymbol{X'}_i$ is a set of individual control variables based on responses to the survey. The selection of control variables was an element of the econometric analysis and so, at this point, we simply note that the variables reported in the table below were candidates for inclusion in the model as individual-level controls.

Table 13.10: Candidate control variables (individual-level)

Personal characteristics	Experience and success	Contracting
Number of years in industry	Professional awards	Type of counterparty to contract
Level of education	Number of pieces per year	Whether used model contract
Age		Whether used representative in negotiations
		Whether negotiated most recent contract with more than one potential exploiter

Given the nature of the dependent variable, the model would be estimated using ordinary least squares.

Unfortunately, the coverage and completeness of the survey data were insufficient to develop models of this type that would lead to meaningful results. Responses to our survey are generally concentrated in a few countries with a small number of responses within each category of author and performer from other countries. This characteristic of the dataset means that the estimated coefficients on the Member State dummy variables would be subject to substantial margins of error and could potentially be highly misleading (e.g. if the small number of responses received from

[224] The specific measure of remuneration that we used is discussed further in the specification of the model in 5.3.3 below. The definition of a unit of work varied by profession (e.g. for music writers it would be a composition while for actors it would be a single contract).

[225] 'Dummy variables' take a value of either zero or one. For example, a dummy variable indicating whether or not the individual is based in a certain country would take a value of one for all respondents that are from that country and zero for all other respondents.

a given country were biased towards either very low earner or very high earners). For these reasons we have not developed Member State dummy variable models and have instead focussed on a set of models in which we explicitly control for the characteristics of national legal systems, pooling observations from different countries.[226] These models are described in the following section.

13.3.2 Models that control for the characteristics of national legal systems

The model described above would, if estimated, help to identify whether, controlling for observable differences between individuals, the level of remuneration differs between Member States. Such a finding would be indicated by significant coefficients on the set of Member States dummy variables. The model would not, however, allow us to understand the extent to which these differences can be attributed to the legal framework, economic factors or other unobservable differences between countries.

To understand the extent to which economic and legal differences between countries are associated with differences in remuneration we added relevant control variables to the models. With respect to economic factors, these variables included indicators of the per-capita value of music and audiovisual purchases in a given year (proxied by per household expenditure on recreation and culture in terms of PPS) and population (to capture the size of the market). With respect to legal factors, we developed an index of the overall strength of the legal framework and a separate index of the strength of collective bargaining agreements (see discussion above on how these indicators were constructed).

Given these indictors, we established a set of models that included two additional variables to account for legal strength and collective bargaining strength:

$$R_i = \alpha_i + \boldsymbol{X'}_i\boldsymbol{\gamma} + \delta LS_i + \mu CB_i + \varepsilon_i$$

where R_i, and $\boldsymbol{X}_i$ are defined as above, LS_i is the variable indicating the strength of the legal framework and CB_i is the variable indicating the strength of collective bargaining. While the 'strength' indicators do not capture the impact of specific legal factors on levels remuneration, they do provide the first clear indication of the impact of the legal framework as a whole.

Given the concerns about response coverage and completeness outlined above, we omitted the Member State dummy variables from our econometric models and hence our results are based on a pooled set of observations, controlling for differences between countries in terms of legal strength, union strength, population and cultural expenditure.

Having explored the impact of the legal framework as a whole, we then developed models which included a set of dummy variables that indicate whether a particular

[226] To check for the influence of observations from countries in which there were few respondents we ran a second set of models in which we restricterd the sample to countries for which there were at least ten responses in the relevant category of author and performer. There were very limited differences in the results of the models and hence we report the results in which all countries were included throughout this report.

feature of law is present in the legal system of the country in which the individual author or performer is located. These models focussed on the general features of copyright law and included dummy variables for one or more of the following (as determined by our diagnostic tests):

- formalities for the transfer of rights;
- rules on form of payment (e.g. lump sum, royalties etc.);
- limitation on scope;
- limitation on future forms;
- limitation on future works; and
- "best seller" - type clause.

More precisely, this type of model took the form:

$$R_i = \alpha_i + X'_i\gamma + Z_i'\mu + \varepsilon_i$$

where R_i, and $\boldsymbol{X}_i$ are defined as above. The vector $\boldsymbol{Z}_i$ is a set of dummy variables that indicate whether a particular legal feature is applicable to the individual concerned.

The results of this class of model identify the extent to which the remuneration of the author or performer is associated with each economic and legal factor. For example, the results identify the extent to which the existence of formalities for the transfer of rights is associated with the level of remuneration of authors and performers (a positive coefficient would indicate that remuneration is higher where such formalities exist). The individual control variables would again identify the extent to which remuneration is influenced by personal characteristics, experience and so on.

Again, given the concerns about response coverage and completeness outlined above, we omitted the Member State dummy variables from our econometric models and hence our results are based on a pooled set of observation, controlling for differences between countries in terms of legal strength, union strength, population and cultural expenditure.

It should be noted that while these two distinct models were estimated in the cases of per-unit total remuneration, per-unit lump sum remuneration and per-unit royalty income from publishers, only one model was estimated in the case of per-unit royalty income from CRMOs. More precisely, neither the legal indicator nor individual elements of general copyright law are included in the models for income from CRMOs. Therefore, there is no difference between the 'Model 1' and 'Model 2' variants in the case of income from CRMOs. The decision to exclude legal factors from these regressions reflects the fact that, in general, the rules on copyright contracts are deemed not to apply to CRMOs because CRMOs are deemed to act in the best interest of their members.

13.3.3 Model specification

Selection of dependent variable

The purpose of this study is to analyse the extent to which levels of remuneration are associated with different features of the legal framework as distinct from other influences. Therefore, variables measuring the level of remuneration of an individual author or performer should be the dependent variable of our econometric models.

Responses to the survey allow several measures of remuneration from an individual's key activity to be employed in our models. In particular, we have explored models with dependent variables based on the following:

- total remuneration per unit of work from key activity;
- lump-sum / up-front / one-off remuneration per unit of work from key activity;
- royalty remuneration per unit of work from CRMOs in respect of key activity; and
- royalty remuneration per unit of work from publishers in respect of key activity.

For the latter two categories of remuneration the survey also asked respondents to identify the breakdown by different sources (including by type of rights, online/offline exploitation etc.). Unfortunately, only a small proportion of respondents provided an answer for this question and hence it was not possible to include variables such as level of remuneration from mechanical rights for online exploitation in our models.

Selection of explanatory variables

It is important to note that some of the information gathered through the survey was not considered for inclusion in the econometric models on the basis that we suspect that there was a misinterpretation of the survey question by respondents. This misinterpretation means that the variable does not always measure the factor that was intended and we cannot identify which respondents misinterpreted the questions and which had the correct interpretation. On this basis, the variable measuring whether or not the respondent used a representative in negotiations was not considered for inclusion in the econometric analysis.[227] As noted above, Member State dummies were not included due to concerns about response coverage and completeness.

A further point to note relates to the set of models in which specific features of general copyright law are identified using dummy variables. There is limited variation in the dataset in respect of some general copyright law and hence it has not been possible to include all variables in the models (because of multi-collinearity problems). The lack of variation in such cases derives partly from a degree of similarity across countries and partly from the fact that we sometimes have very few responses from countries that do not have a particular legal feature. For example, in the case of music performers the limitation on the exploitation of future works variable is perfectly collinear with the variable which captures limitations on future forms of exploitation. Countries either have both of these limitations or neither, meaning that it is not possible to separately identify the impact of each limitation on the remuneration of music performers. In other cases, variables are not perfectly collinear but still suffer from collinearity since they can be expressed as a linear combination of other explanatory variables included in the model.

[227] We think that the misunderstanding occurred because 'trade union' was given as an example of a type of representative in the question. Having analysed responses to this question by country, and compared these responses to the legal framework, we think that this led some respondents to select 'used representative' rather than the 'collective bargaining agreement' option in their responses to this question.

Logs versus levels

The above discussion has described the variables that are included in our models but has not considered the precise form in which these variables enter our models. More precisely, we have not yet discussed the issue of whether the numeric explanatory and dependent variables should enter the models as levels or whether they should be log transformed.

In regression analysis, it is common to logarithmically transform variables where a non-linear relationship exists between the independent and dependent variables. This approach makes the effective relationship non-linear, while still preserving the linear regression model. Logarithmic transformations are also a convenient means of transforming a highly skewed variable into one that is more approximately normal. Finally, it is appropriate to make a logarithmic transformation when it is suspected that there is a given percentage change in an explanatory variable will lead to a constant percentage change in the dependent variable.

We tested models in which the dependent variable was included as a numeric value and models in which the dependent variable was logarithmic. Diagnostic tests (including those for linearity, normality of residuals and omitted variables bias) of models in which the dependent variable was numeric were inferior to those for logarithmic models (i.e. the logarithmic models met more of the assumptions of the linear regression model than did the numeric models). On this basis, the models reported below employ a logarithmic dependent variable.

13.4 Interpreting regression results

To interpret the regression results presented in the tables below, a little background knowledge of econometrics and statistics is required. In this section, we seek to provide the necessary knowledge to understand the discussion that follows.

The tables below consist of the following columns:

Variable	Coef.

The "Variable" column contains the explanatory variables of the regression model. Explanatory variables are those factors which we believe might have an impact on the level of remuneration per unit work.

The "Coef" column shows the impact of the explanatory variable on the level of remuneration. A positive value for the coefficient shows that an increase in the value of the variable increased the level of remuneration per unit work whilst a negative coefficient means that an increase in the value of the variable lowers the level of remuneration per unit work. The greater the magnitude of the coefficient, either positive or negative, the greater the impact on the level of remuneration per unit work.

In our models, the dependent variable is measured in logs. In these cases, the coefficient measures the percentage change in the value of the dependent variable for a unit increase in the value of the explanatory variable. For example, a coefficient of 0.2 on a variable measuring the experience of the author or performer means that an

additional year of experience leads to a 0.2 per cent increase in the level of remuneration per unit work, all else being equal.

It is important to note that not all variables have a statistically significant influence on the dependent variable, however. Statisticians and econometricians use significance tests to determine whether or not a particular explanatory variable has an impact on the dependent variable. In the tables of results, a single asterisk next to an entry in the "Coef" columns indicates that the coefficient is significantly different from zero at the 10 per cent level, whilst a double asterisk indicates that it is significant at the five per cent level and a triple asterisk indicates that it is significant at the one per cent level. We have greater confidence that the dependent variable does truly impact on the dependent variable if it is significant at the one per cent level than we do if it is significant at the five per cent level.

Given our finding of heteroskedasticity, it should be noted that the standard errors on which our hypothesis tests are based are robust.

Dummy variables

Some of the variables included in the regressions are 'dummy variables', which take a value of either zero or one. For example, a dummy variable indicating whether or not the individual is based in a country that has formalities for the transfer of rights would take a value of one for all respondents that are from such countries and zero for all other respondents. Dummy variables are indicated by a ~ symbol in the results tables below.

Interpreting the coefficients on dummy variables is slightly more complex than is the interpretation of the coefficients on standard logarithmic variables. The coefficient on a dummy variable indicates the change in the level of remuneration per unit work given a change in the value of the dummy variable from zero to one. For example, a positive and significant coefficient on the "formalities for the transfer of rights" dummy variable in a regression examining the remuneration of music screenwriters should be interpreted as follows:

Screenwriters from countries in which there are formalities for the transfer of rights have higher remuneration compared to screenwriters from countries that do not have such rights, all else being equal.

An added complication arises where dummy variables are used to indicate whether or not an author or performer has one given characteristic from several characteristic options. In this case it is always necessary to omit one option from the regression and hence the coefficients on the other dummies are interpreted relative to the omitted option. For example, dummy variables indicating the type of counterparty to the contract are included in our analysis. The regressions below include dummy variables for all types of counterparty except 'Individual' and so a positive coefficient on, say, a dummy variable for 'Large / major' should be interpreted as follows:

relative to those that hold a contract with an individual, those that hold contracts with large / major organisations have higher remuneration per unit work, all else being equal.

A similar interpretation is required for variables which indicate the geography of the counterparty (domestic is the base case and the coefficient on the 'international' variable is relative to that base case).[228]

13.5 Model specifications

13.5.1 Models that control for the characteristics of national legal systems

The results of two sets of models are reported in this Appendix. The 'Model 1' variants have the following specification:

$$R_i = \alpha_i + X'_i\gamma + \delta LS_i + \mu CB_i + \varepsilon_i$$

where R_i is remuneration per unit of work, $\boldsymbol{X}_i$ is a vector of control variables, LS_i is the variable indicating the strength of the legal framework and CB_i is the variable indicating the strength of collective bargaining. While the 'strength' indicators do not capture the impact of specific legal factors on levels remuneration, they do provide the first clear indication of the impact of the legal framework as a whole.

Having explored the impact of the legal framework as a whole, we then developed models which included a set of dummy variables that indicate whether a particular feature of law is present in the legal system of the country in which the individual author or performer is located. These models are referred to as 'Model 2' variants and included dummy variables for some of the following:

- presumption of ownership transfer to producer in AV;
- formalities for the transfer of rights;
- rules on form of payment (e.g. lump sum, royalties etc.);
- limitation on scope;
- limitation on future forms;
- limitation on future works; and
- "best seller" - type clause.

More precisely, this type of model took the form:

$$R_i = \alpha_i + X'_i\gamma + Z_i'\mu + \varepsilon_i$$

where R_i, and $\boldsymbol{X}_i$ are defined as above. The vector $\boldsymbol{Z}_i$ is a set of dummy variables that indicate whether a particular legal feature is applicable to the individual concerned.

It should be noted that while these two distinct models were estimated in the cases of per-unit total remuneration, per-unit lump sum remuneration and per-unit royalty income from publishers, only one model was estimated in the case of per-unit royalty

[228] It should be noted that the coefficient on dummy variables does not identify the marginal effect (i.e. the impact on revenue per employee of a hange in the value of the dummy variable from zero to one). Given that our dependent variable is measured in logs, an exponential transformation of the coefficient of the dummy variable is required to identify marginal effects. We are less interested in the magnitude of the effect that its significance and direction and hence we report coefficients in the tables below.

income from CRMOs. More precisely, neither the legal indicator nor individual elements of general copyright law are included in the models for income from CRMOs. Therefore, there is no difference between the 'Model 1' and 'Model 2' variants in the case of income from CRMOs. The decision to exclude legal factors from these regressions reflects the fact that, in general, the rules on copyright contracts are deemed not to apply to CRMOs because CRMOs are deemed to act in the best interest of their members.

13.6 Results for session musicians

Table 13.11: Results of total income models for session musicians

Variable	Model 1	Model 2
Collective bargaining strength	0.50	3.95
Legal strength	0.56	-
Formalities for the transfer of rights~	-	-1.06
Limitation on scope~	-	9.66
Limitation on future forms~	-	6.02**
Cultural spend	0.00	0.00
Population	0.00	0.00*
Experience	0.03	0.06**
Large / major~	-0.77	-0.95
Small / indie~	-1.16	-1.39**
International~	0.24	0.34
Almost always use model contract~	0.04	1.10
Often use model contract~	0.64	1.14
Sometimes use model contract~	0.15	-0.02
Rarely use model contract~	2.59	3.33
Never use model contract~	0.79	1.51
Negotiate with only one party~	0.32	0.14
Constant	1.75	-9.48

Notes:
*=significant at the 10 per cent level; **=significant at the 5 per cent level; ***=significant at the 1 per cent level;
Model 1 R2 =0.12; Model 2 R2 =0.23
Model 1 linktest p-value (for hatsq)=0.33; Model 2 linktest p-value (for hatsq)=0.94
Model 1 ovtest p-value=0.35; Model 2 ovtest p-value=0.05
Model 1 mean VIF =1.76; Model 2 mean VIF =1.81.

Table 13.12: Results of other income models for session musicians (Model 1 variant)

	Lump sum	CRMO	Publisher
Collective bargaining strength	1.10	-0.15	0.09
Legal strength	0.86*	-	0.19
Cultural spend	0.00***	0.00*	0.00***
Population	0.00*	0.00	0.00
Experience	0.01	0.03	0.03
Large / major~	0.97	2.04***	2.11**
Small / indie~	-0.37	1.29**	1.08
International~	0.10	-0.05	-0.30
Almost always use model contract~	-4.12***	-1.77	-0.95
Often use model contract~	-5.55***	-4.49**	-4.03**
Sometimes use model contract~	-2.42**	-0.06	-2.02
Rarely use model contract~	0.43	0.85	0.20
Never use model contract~	-2.55**	-1.60	-2.24
Negotiate with only one party~	1.18	0.42	0.38
Constant	8.31***	4.30	5.19*

Notes:
*=significant at the 10 per cent level; **=significant at the 5 per cent level; ***=significant at the 1 per cent level;
Lump sum R2 =0.34; CRMO R2 =0.31; Publisher R2 =0.30
Lump sum linktest p-value (for hatsq)=0.85; CRMO linktest p-value (for hatsq)=0.50; Publisher linktest p-value (for hatsq)=0.45
Lump sum ovtest p-value=0.83; CRMO ovtest p-value=0.66; Publisher ovtest p-value=0.23
Lump sum mean VIF =1.76; CRMO mean VIF =1.09; Publisher mean VIF =1.76.

Table 13.13: Results of other income models for session musicians (Model 2 variant)

	Lump sum	CRMO	Publisher
Collective bargaining strength	5.08**	-0.15	1.65
Formalities for the transfer of rights~	4.47**	-	4.73***
Limitation on scope~	10.49*	-	3.16
Limitation on future forms~	4.76**	-	-0.39
Cultural spend	0.00	0.00*	0.00
Population	0.00**	0.00	0.00
Experience	0.01	0.03	0.01
Large / major~	0.99	2.04***	2.32***
Small / indie~	-0.50	1.29**	1.06
International~	0.12	-0.05	-0.32
Almost always use model contract~	-3.74***	-1.77	-1.28
Often use model contract~	-5.00***	-4.49**	-3.88***
Sometimes use model contract~	-1.96*	-0.06	-1.44
Rarely use model contract~	1.05	0.85	0.18
Never use model contract~	-2.05*	-1.60	-2.26**
Negotiate with only one party~	1.18	0.42	0.66
Constant	-10.51	4.30	-4.71

Notes:
*=significant at the 10 per cent level; **=significant at the 5 per cent level; ***=significant at the 1 per cent level;
Lump sum R2 =0.36; CRMO R2 =0.31; Publisher R2 = 0.35
Lump sum linktest p-value (for hatsq)=0.88; CRMO linktest p-value (for hatsq)=0.50; Publisher linktest p-value (for hatsq)=0.76
Lump sum ovtest p-value=0.84; CRMO ovtest p-value=0.66; Publisher ovtest p-value=0.16
Lump sum mean VIF =1.81; CRMO mean VIF =1.09; Publisher mean VIF =1.81.

13.7 Results for music performers

Table 13.14: Results of total income models for music performers

Variable	Model 1	Model 2
Collective bargaining strength	-0.18	-1.12**
Legal strength	0.21	-
Formalities for the transfer of rights~	-	1.03
Limitation on scope~	-	-2.21**
Limitation on future forms~	-	-2.03*
Cultural spend	0.00	0.00
Population	0.00	0.00
Experience	-0.02*	-0.02*
Large / major~	0.94**	0.89*
Small / indie~	0.51	0.51
International~	-0.13	-0.14
Almost always use model contract~	0.79	0.88
Often use model contract~	-3.70***	-3.76***
Sometimes use model contract~	-0.77	-0.59
Rarely use model contract~	1.23	1.32*
Never use model contract~	-0.14	-0.06
Negotiate with only one party~	0.17	0.18
Constant	3.93***	7.42***

Notes:
*=significant at the 10 per cent level; **=significant at the 5 per cent level; ***=significant at the 1 per cent level;
Model 1 R2 =0.07; Model 2 R2 =0.08
Model 1 linktest p-value (for hatsq)=0.71; Model 2 linktest p-value (for hatsq)=0.83
Model 1 ovtest p-value=0.74; Model 2 ovtest p-value=0.61
Model 1 mean VIF =2.11; Model 2 mean VIF =1.96.

Table 13.15: Results of other income models for music performers (Model 1 variant)

	Lump sum	CRMO	Publisher
Collective bargaining strength	-0.26	0.26*	0.28
Legal strength	-0.09	-	0.20
Cultural spend	0.00	0.00***	0.00**
Population	0.00	0.00	0.00
Experience	0.00	0.02*	0.03**
Large / major~	0.66	1.04***	0.98**
Small / indie~	0.08	0.66**	0.54*
International~	0.11	0.02	0.24
Almost always use model contract~	2.76***	1.24*	0.54**
Often use model contract~	(omitted)	(omitted)	(omitted)
Sometimes use model contract~	1.07	0.72	0.94
Rarely use model contract~	1.13	0.93	0.64
Never use model contract~	1.21	0.45	0.44
Negotiate with only one party~	-0.12	-0.37	-0.35
Constant	4.10***	3.42***	2.08

Notes:
*=significant at the 10 per cent level; **=significant at the 5 per cent level; ***=significant at the 1 per cent level;
Lump sum R2 =0.06; CRMO R2 =0.10; Publisher R2 =0.10
Lump sum linktest p-value (for hatsq)=0.66; CRMO linktest p-value (for hatsq)=0.21; Publisher linktest p-value (for hatsq)=0.98
Lump sum ovtest p-value=0.55; CRMO ovtest p-value=0.04; Publisher ovtest p-value=0.52
Lump sum mean VIF =2.11; CRMO mean VIF =1.13; Publisher mean VIF =2.11.

Table 13.16: Results of other income models for music performers (Model 2 variant)

	Lump sum	CRMO	Publisher
Collective bargaining strength	-1.17	-0.26*	0.24
Formalities for the transfer of rights~	1.86*	-	0.67
Limitation on scope~	-2.43	-	0.14
Limitation on future forms~	-3.03	-	0.30
Cultural spend	0.00	0.00***	0.00
Population	0.00	0.00	0.00
Experience	0.00	0.02*	0.03**
Large / major~	0.59	1.04***	0.97**
Small / indie~	0.02	0.66**	0.53*
International~	0.13	0.02	0.25
Almost always use model contract~	2.92***	1.24*	0.58
Often use model contract~	(omitted)	(omitted)	(omitted)
Sometimes use model contract~	1.29	0.72	0.97
Rarely use model contract~	1.32	0.93	0.68
Never use model contract~	1.43*	0.45	0.48
Negotiate with only one party~	-0.08	-0.37	-0.34
Constant	5.91	3.42***	1.70

Notes:
*=significant at the 10 per cent level; **=significant at the 5 per cent level; ***=significant at the 1 per cent level;
Lump sum R2 =0.08; CRMO R2 =0.10; Publisher R2 =0.10
Lump sum linktest p-value (for hatsq)=0.62; CRMO linktest p-value (for hatsq)=0.21; Publisher linktest p-value (for hatsq)=0.89
Lump sum ovtest p-value=0.32; CRMO ovtest p-value=0.04; Publisher ovtest p-value=0.53
Lump sum mean VIF =1.96; CRMO mean VIF =1.13; Publisher mean VIF =1.96.

13.8 Results for music writers

Table 13.17: Results of total income models for music writers

Variable	Model 1	Model 2
Collective bargaining strength	-1.66	-1.36
Legal strength	-0.54	-
Formalities for the transfer of rights~	-	-0.60
Limitation on scope~	-	0.01
Limitation on future forms~	-	-1.38
Cultural spend	0.00	0.00
Population	0.00	0.00
Experience	0.03	0.03
Large / major~	1.00	1.05
Small / indie~	0.68	0.72
International~	-0.05	-0.08
Almost always use model contract~	0.67	0.64
Often use model contract~	0.30	0.23
Sometimes use model contract~	-0.26	-0.33
Rarely use model contract~	1.76	1.70
Never use model contract~	0.31	0.29
Negotiate with only one party~	-0.36	-0.36

Constant	8.47**	7.93**

Notes:
*=significant at the 10 per cent level; **=significant at the 5 per cent level; ***=significant at the 1 per cent level;
Model 1 R2 =0.08; Model 2 R2 =0.08
Model 1 linktest p-value (for hatsq)=0.44; Model 2 linktest p-value (for hatsq)=0.32
Model 1 ovtest p-value=0.63; Model 2 ovtest p-value=0.38
Model 1 mean VIF =1.83; Model 2 mean VIF =1.65.

Table 13.18: Results of other income models for music writers (Model 1 variant)

	Lump sum	CRMO	Publisher
Collective bargaining strength	-2.27**	0.41	-0.85
Legal strength	-0.76	-	-0.71*
Cultural spend	0.00	0.00	0.00**
Population	0.00	0.00	0.00
Experience	0.04**	0.05***	0.05***
Large / major~	0.06	1.28**	1.71***
Small / indie~	0.32	1.89***	1.66***
International~	-0.53	-0.56	-0.44
Almost always use model contract~	-1.54	0.38	-0.04
Often use model contract~	-1.65	-0.85	-0.31
Sometimes use model contract~	-1.26	-0.15	-0.45
Rarely use model contract~	-0.60	0.79	0.82
Never use model contract~	-1.45	0.29	0.10
Negotiate with only one party~	-0.57	-0.19	-0.11
Constant	13.26***	2.42	6.64*

Notes:
*=significant at the 10 per cent level; **=significant at the 5 per cent level; ***=significant at the 1 per cent level;
Lump sum R2 =0.11; CRMO R2 =0.16; Publisher R2 =0.16
Lump sum linktest p-value (for hatsq)=0.53; CRMO linktest p-value (for hatsq)=0.06; Publisher linktest p-value (for hatsq)=0.90
Lump sum ovtest p-value=0.87; CRMO ovtest p-value=0.12; Publisher ovtest p-value=0.95
Lump sum mean VIF =1.83; CRMO mean VIF =1.11; Publisher mean VIF =1.83.

Table 13.19: Results of other income models for music writers (Model 2 variant)

	Lump sum	CRMO	Publisher
Collective bargaining strength	-1.12	0.41	-0.06
Formalities for the transfer of rights~	2.06	-	0.70
Limitation on scope~	-0.63	-	-0.36
Limitation on future forms~	-4.44**	--	-3.05
Cultural spend	0.00**	0.00	0.00**
Population	0.00	0.00	0.00
Experience	0.04**	0.05***	0.05***
Large / major~	-0.05	1.28**	1.69**
Small / indie~	0.27	1.89***	1.66***
International~	-0.54	-0.56	-0.46
Almost always use model contract~	-1.55	0.38	-0.05
Often use model contract~	-1.44	-0.85	-0.22
Sometimes use model contract~	-1.21	-0.15	-0.45
Rarely use model contract~	-0.67	0.79	0.77
Never use model contract~	-1.48	0.29	0.08
Negotiate with only one party~	-0.54	-0.19	-0.11
Constant	12.03***	2.42	5.61*

Notes:

*=significant at the 10 per cent level; **=significant at the 5 per cent level; ***=significant at the 1 per cent level;
Lump sum R2 =0.13; CRMO R2 =0.16; Publisher R2 =0.17
Lump sum linktest p-value (for hatsq)=0.34; CRMO linktest p-value (for hatsq)=0.06; Publisher linktest p-value (for hatsq)=0.88
Lump sum ovtest p-value=0.59; CRMO ovtest p-value=0.11; Publisher ovtest p-value=0.86
Lump sum mean VIF =1.65; CRMO mean VIF =1.11; Publisher mean VIF =1.65.

13.9 Results for actors

Table 13.20: Results of total income models for actors

Variable	Model 1	Model 2
Collective bargaining strength	0.65	0.00
Legal strength	0.93***	-
Formalities for the transfer of rights~	-	-1.01
Limitation on scope~	-	1.12
Limitation on future forms~	-	2.31**
Cultural spend	0.00	0.00
Population	0.00**	0.00
Experience	0.00	0.00
Large / major~	2.82***	2.81***
Small / indie~	2.36***	2.40***
International~	0.63	0.58
Almost always use model contract~	1.76	1.76
Often use model contract~	0.00	-0.11
Sometimes use model contract~	1.80*	1.70
Rarely use model contract~	0.31	0.25
Never use model contract~	1.18	1.12
Negotiate with only one party~	-0.10	-0.12
Constant	-2.12	0.15

Notes:
*=significant at the 10 per cent level; **=significant at the 5 per cent level; ***=significant at the 1 per cent level;
Model 1 R2 =0.18; Model 2 R2 =0.19
Model 1 linktest p-value (for hatsq)=0.01; Model 2 linktest p-value (for hatsq)=0.02
Model 1 ovtest p-value=0.04; Model 2 ovtest p-value= 0.05
Model 1 mean VIF =2.40; Model 2 mean VIF =2.96.

Table 13.21: Results of other income models for actors (Model 1 variant)

	Lump sum	CRMO	Publisher
Collective bargaining strength	1.88***	0.94*	1.08
Legal strength	0.63*	-	0.22
Cultural spend	0.00	0.00***	0.00**
Population	0.00***	0.00*	0.00
Experience	0.04**	0.04***	0.05***
Large / major~	0.66	0.42	1.41**
Small / indie~	0.13	-0.06	0.70
International~	0.14	0.09	0.23
Almost always use model contract~	1.69	0.50	3.24***
Often use model contract~	-0.76	-1.23	1.91*
Sometimes use model contract~	1.42	1.00	1.22
Rarely use model contract~	1.11	1.89**	3.67***
Never use model contract~	0.61	0.73	2.16***
Negotiate with only one party~	0.39	0.91*	-1.26
Constant	1.70	4.49***	0.30

Notes:
*=significant at the 10 per cent level; **=significant at the 5 per cent level; ***=significant at the 1 per cent level;
Lump sum R2 =0.17; CRMO R2 =0.19; Publisher R2 =0.16
Lump sum linktest p-value (for hatsq)=0.96; CRMO linktest p-value (for hatsq)=0.49; Publisher linktest p-value (for hatsq)=0.96
Lump sum ovtest p-value=0.88; CRMO ovtest p-value=0.58; Publisher ovtest p-value=0.78
Lump sum mean VIF =2.40; CRMO mean VIF =1.56; Publisher mean VIF =2.40.

Table 13.22: Results of other income models for actors (Model 2 variant)

	Lump sum	CRMO	Publisher
Collective bargaining strength	1.02*	0.94*	1.02
Formalities for the transfer of rights~	-1.30	-	0.69
Limitation on scope~	-0.59	-	-2.57***
Limitation on future forms~	1.19	-	-0.92
Cultural spend	0.00***	0.00***	0.00***
Population	0.00***	0.00*	0.00
Experience	0.04**	0.04***	0.05***
Large / major~	0.69	0.42	1.44**
Small / indie~	0.09	-0.06	0.56
International~	0.14	0.09	0.30
Almost always use model contract~	1.65	0.50	3.01***
Often use model contract~	-0.78	-1.23	1.89*
Sometimes use model contract~	1.32	1.00	1.12
Rarely use model contract~	1.01	1.89**	3.37***
Never use model contract~	0.51	0.73	2.01***
Negotiate with only one party~	0.42	0.91*	-1.22**
Constant	7.08***	4.49***	5.34**

Notes:
*=significant at the 10 per cent level; **=significant at the 5 per cent level; ***=significant at the 1 per cent level;
Lump sum R2 =0.17; CRMO R2 =0.19; Publisher R2 =0.18
Lump sum linktest p-value (for hatsq)=0.72; CRMO linktest p-value (for hatsq)=0.49; Publisher linktest p-value (for hatsq)=0.85
Lump sum ovtest p-value=0.92; CRMO ovtest p-value=0.58; Publisher ovtest p-value=0.65
Lump sum mean VIF =2.96; CRMO mean VIF =1.56; Publisher mean VIF =2.96.

13.10 Results for principal directors

Table 13.23: Results of total income models for principal directors

Variable	Model 1	Model 2
Collective bargaining strength	-0.29	-0.36
Legal strength	-0.34	-
Formalities for the transfer of rights~	-	-1.29*
Limitation on scope~	-	0.66
Cultural spend	0.00**	0.00**
Population	0.00**	0.00**
Experience	-0.03	-0.03
Large / major~	1.11	1.17
Small / indie~	0.65	0.72
International~	0.23	0.21
Almost always use model contract~	2.15	2.10
Often use model contract~	1.03	0.97
Sometimes use model contract~	1.71	1.56
Rarely use model contract~	2.53*	2.45*
Never use model contract~	1.45	1.42
Negotiate with only one party~	-0.39	-0.33
Constant	3.16	2.51

Notes:
*=significant at the 10 per cent level; **=significant at the 5 per cent level; ***=significant at the 1 per cent level;
Model 1 R2 =0.12; Model 2 R2 =0.13
Model 1 linktest p-value (for hatsq)=0.35; Model 2 linktest p-value (for hatsq)=0.42
Model 1 ovtest p-value=0.73; Model 2 ovtest p-value=0.72
Model 1 mean VIF =2.17; Model 2 mean VIF =1.82.

Table 13.24: Results of other income models for principal directors (Model 1 variant)

	Lump sum	CRMO	Publisher
Collective bargaining strength	0.03	0.68**	1.56***
Legal strength	-0.01	-	1.05***
Cultural spend	0.00	0.00**	0.00***
Population	0.00	0.00*	0.00***
Experience	-0.01	0.07***	0.08***
Large / major~	1.28*	1.25	-0.24
Small / indie~	1.60***	0.99	-0.89
International~	0.12	0.06	-0.63
Almost always use model contract~	0.09	3.66**	0.52
Often use model contract~	0.37	3.68***	2.72
Sometimes use model contract~	0.84	2.64*	0.90
Rarely use model contract~	0.76	4.16***	1.81
Never use model contract~	0.98	2.88**	0.91
Negotiate with only one party~	-0.65	0.04	1.11*
Constant	5.81***	-0.45	-2.13

Notes:
*=significant at the 10 per cent level; **=significant at the 5 per cent level; ***=significant at the 1 per cent level;
Lump sum R2 =0.05; CRMO R2 =0.29; Publisher R2 =0.22
Lump sum linktest p-value (for hatsq)=0.50; CRMO linktest p-value (for hatsq)=0.12; Publisher linktest p-value (for hatsq)=0.97
Lump sum ovtest p-value=0.68; CRMO ovtest p-value=0.29; Publisher ovtest p-value=0.33
Lump sum mean VIF =2.17; CRMO mean VIF =1.28; Publisher mean VIF =2.17.

Table 13.25: Results of other income models for principal directors (Model 2 variant)

	Lump sum	CRMO	Publisher
Collective bargaining strength	0.07	0.68**	1.20**
Formalities for the transfer of rights~	0.00	-	3.16***
Limitation on scope~	-0.10	-	-0.37
Cultural spend	0.00	0.00**	0.00*
Population	0.00	0.00*	0.00
Experience	-0.01	0.07***	0.08***
Large / major~	1.28*	1.25	-0.27
Small / indie~	1.60***	0.99	-0.92
International~	0.12	0.06	-0.60
Almost always use model contract~	0.09	3.66**	0.51
Often use model contract~	0.37	3.68***	2.72
Sometimes use model contract~	0.85	2.64*	0.96
Rarely use model contract~	0.76	4.16***	1.82
Never use model contract~	0.98	2.88**	0.88
Negotiate with only one party~	-0.66	0.04	1.05*
Constant	5.93***	-0.45	-1.11

Notes:
*=significant at the 10 per cent level; **=significant at the 5 per cent level; ***=significant at the 1 per cent level;
Lump sum R2 =0.74; CRMO R2 =0.29; Publisher R2 =0.22
Lump sum linktest p-value (for hatsq)=0.42; CRMO linktest p-value (for hatsq)=0.12; Publisher linktest p-value (for hatsq)=0.81
Lump sum ovtest p-value=0.49; CRMO ovtest p-value=0.29; Publisher ovtest p-value=0.21
Lump sum mean VIF =1.82; CRMO mean VIF =1.28; Publisher mean VIF =1.82.

13.11 Results for screenwriters

Table 13.26: Results of total income models for screenwriters

Variable	Model 1	Model 2
Collective bargaining strength	0.08	-0.18
Legal strength	0.49*	-
Formalities for the transfer of rights~	-	1.46*
Limitation on scope~	-	-0.07
Cultural spend	0.00	0.00
Population	0.00	0.00
Experience	0.01	0.01
Large / major~	3.75***	3.76***
Small / indie~	3.44***	3.44***
International~	-0.34	-0.34
Almost always use model contract~	0.72	0.72
Often use model contract~	0.86	0.85
Sometimes use model contract~	1.45	1.43
Rarely use model contract~	-0.17	-0.18
Never use model contract~	0.44	0.42
Negotiate with only one party~	0.51	0.51
Constant	0.20	0.88

Notes:

*=significant at the 10 per cent level; **=significant at the 5 per cent level; ***=significant at the 1 per cent level;
Model 1 R2 =0.11; Model 2 R2 =0.11
Model 1 linktest p-value (for hatsq)=0.31; Model 2 linktest p-value (for hatsq)=0.30
Model 1 ovtest p-value=0.11; Model 2 ovtest p-value=0.12
Model 1 mean VIF =2.40; Model 2 mean VIF =1.67.

Table 13.27: Results of other income models for screenwriters (Model 1 variant)

	Lump sum	CRMO	Publisher
Collective bargaining strength	0.18	0.42**	1.46***
Legal strength	0.60**	-	1.21***
Cultural spend	0.00*	0.00***	0.00
Population	0.00	0.00	0.00
Experience	0.05***	0.10***	0.03
Large / major~	3.90***	1.77	0.39
Small / indie~	3.84***	1.25	0.18
International~	0.20	-0.28	-0.05
Almost always use model contract~	0.98	-0.42	0.12
Often use model contract~	-0.07	-1.25	-0.27
Sometimes use model contract~	1.34**	0.44	-1.08
Rarely use model contract~	0.15	-0.95	1.03
Never use model contract~	0.91	0.78	-0.66
Negotiate with only one party~	-0.01	-0.20	-0.86
Constant	-0.62	4.55**	-3.76

Notes:
*=significant at the 10 per cent level; **=significant at the 5 per cent level; ***=significant at the 1 per cent level;
Lump sum R2 =0.22; CRMO R2 =0.23; Publisher R2 =0.16
Lump sum linktest p-value (for hatsq)=0.01; CRMO linktest p-value (for hatsq)=0.63; Publisher linktest p-value (for hatsq)=0.21
Lump sum ovtest p-value=0.00; CRMO ovtest p-value=0.46; Publisher ovtest p-value=0.46
Lump sum mean VIF =2.40; CRMO mean VIF =1.30; Publisher mean VIF =2.40.

Table 13.28: Results of other income models for screenwriters (Model 2 variant)

	Lump sum	CRMO	Publisher
Collective bargaining strength	-0.22	0.42**	1.09***
Formalities for the transfer of rights~	1.28*	-	3.82***
Limitation on scope~	0.97	-	-2.68***
Cultural spend	0.00*	0.00***	0.00***
Population	0.00	0.00	0.00
Experience	0.05***	0.10***	0.02
Large / major~	4.16***	1.77	0.29
Small / indie~	4.01***	1.25	0.10
International~	0.07	-0.28	-0.04
Almost always use model contract~	-	-0.42	-0.13
Often use model contract~	-	-1.25	-1.05
Sometimes use model contract~	-	0.44	-1.59
Rarely use model contract~	-	-0.95	0.66
Never use model contract~	-	0.78	-1.02
Negotiate with only one party~	0.09	-0.20	-1.00
Constant	-1.16	4.55**	3.90

Notes:
*=significant at the 10 per cent level; **=significant at the 5 per cent level; ***=significant at the 1 per cent level;
Lump sum R2 =0.21; CRMO R2 =0.23; Publisher R2 =0.21

Lump sum linktest p-value (for hatsq)=0.02; CRMO linktest p-value (for hatsq)=0.63; Publisher linktest p-value (for hatsq)=0.38
Lump sum ovtest p-value=0.00; CRMO ovtest p-value=0.46; Publisher ovtest p-value=0.66
Lump sum mean VIF =1.67; CRMO mean VIF =1.30; Publisher mean VIF =1.67.

13.12 Results for composers of music for audio-visual

It has not been possible to employ econometric analysis for composers of music for audio-visual due to a lack of observations.

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