Interpreting EU reversion rights: why "use-it-or-lose-it" should be the guiding principle

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Abstract

This article presents the findings from a comprehensive mapping of copyright reversion provisions which are currently or were historically a part of the laws of EU Member States. The analysis identifies patterns and argues for a "use-it-or-lose-it" guiding principle that should govern the whole term of creator contracts. This principle is being made explicit within EU copyright law by a new revocation right provided by art.22 of the Directive on Copyright in the Digital Single Market . Whereas the current reversion rights landscape is fragmented, Member States' preference for use-based provisions is clear. The understanding of "use", especially in the digital context is, however, vague. This article proposes a way to address those shortcomings while bringing all reversion rights under a "use-it-or-lose-it" umbrella during the implementation process of the Copyright in the Digital Single Market Directive.

Introduction

Article 22 of the Copyright in the Digital Single Market Directive (CDSM Directive)[1] provides for a right of revocation, which introduces a use-it-or-lose-it principle to EU copyright law. The right came about quite unexpectedly. It was not actively considered by the European Commission during the drafting phase, and advocacy by creator organisations was limited. Revocation rights

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[1] Directive 2019/790 on copyright and related rights in the Digital Single Market and amending Directives 96/9 and 2001/29 [2019] OJ L130/92.

and the use-it-or-lose-it principle art.22 CDSM Directive is based on, are not, however, a novelty. The majority of EU Member States already offers provisions which allow creators,[2] under certain conditions, to change or terminate their contractual relationships. Those provisions are quite fragmented, and often address only certain types of works and agreements. More than half are, however, triggered by the lack of use of a work. This preference for non-use reversion provisions sets the EU apart from Commonwealth countries which offer only time-based termination. Whereas this preference for use-based reversion provisions is clear, the understanding of "use" is not. The currently binding reversion provisions lack detail and do not account for digital forms of exploitation, making it difficult for creators to take advantage of their rights.

This article argues that the right of revocation provided by the CDSM Directive is an opportunity to bring order to the fragmented EU reversion rights landscape by introducing an overarching use-it-or-lose-it principle. This principle requires transferees to use works entrusted to them by creators throughout the whole term of an agreement. The continuous use requirement, compared with one limited in time, is better suited to address the current long term of copyright protection and buy-out creator contracts. For the new right to be fully effective, the Member States legislators need to address the vague concept of "use" when implementing art.22 CDSM Directive into their national legal orders.

This article builds on the results of a comprehensive mapping of reversion provisions which are currently or were historically a part of the national laws of the EU Member States, carried out as a part of a collaborative project between CREATe (University of Glasgow) and IPRIA (University of Melbourne). As the introduction of the right of revocation by the CDSM Directive was not preceded by a focused debate, the mapping project aimed to identify the lessons which can be learned from the currently binding provisions to inform the implementation of art.22 CDSM Directive. The complete record of the mapped provisions has been published as a CREATe Working Paper,[3] and can be explored on the project's webpage.[4] The mapping project also led to the publication of an Open Letter on art.22 CDSM Directive signed by a group of leading international academics, with a view of drawing attention to the issue of the revocation right, and the historic opportunity it creates not only for bettering the position of creators, but also

[2] The term "creators" in this article is used to refer jointly to authors and performers unless stated otherwise.
[3] Ula Furgał, "Reversion rights in the European Union Member States", CREATe Working Paper 2020/11 (2020) available at: https://zenodo.org/record/4281035#.X8dg9bPLeUk [Accessed 8 March 2021].
[4] The Reversion Rights Resource Page is available at: https://www.create.ac.uk/reversion-rights-resource-page/ [Accessed 8 March 2021], presents two interactive features: a map and a table, which allow the exploration of the mapped reversion provisions.

advancing public interest. The text of the letter is published in the same E.I.P.R. issue as this article.[5]

After the introduction, this article begins with an explanation of what reversion rights are and how the revocation right found its way into the CDSM Directive. It continues by painting a picture of the fragmented landscape of current reversion rights in the EU Member States, emphasising the preference for use-based provisions. This article then proceeds to the discussion of the express and implied use requirements, the meaning of "use", and the challenges creators face in a system where they are the ones making decisions to terminate or modify their contractual relationships. This article concludes with recommendations for implementation of the CDSM Directive revocation right.

What are reversion rights?

By way of creator contracts, authors and performers transfer[6] their rights in works and performances in exchange for remuneration and promise of exploitation. Their contractual counterparts, content producers, publishers, distributors and the like, benefit from the advantaged position since creative industries enjoy a continuous excess of creative works.[7] Acting as a weaker bargaining party, creators are often unable to fully secure their interests. Additionally, not many creators can make a living solely by their artistic craft, as cultural markets are winner-takes-all markets where a small percentage of authors earns the lion's share of total earnings.[8] Copyright contract law provides for a variety of solutions to aid creators in their contractual dealings with third parties, which can concern both the form and contents of copyright agreements. One of those solutions are reversion rights, rights which entitle authors and performers, under certain conditions, to reclaim the rights they have transferred to a third party.

The value of reversion rights is being increasingly recognised by scholars, even though the empirical data on the effects of reversion rights in Europe is scarce, if not non-existent. Rebecca Giblin's The Author's Interest Project, which framed CREATe's and IPRIA's co-operation,

[5] Martin Kretschmer and Rebecca Giblin, "Getting Creators Paid: One More Chance for Copyright Law" (2021) 43 E.I.P.R. 279.
[6] The term "transfer" in this article is used to refer jointly to assignments and licences, unless stated otherwise.
[7] Ruth Towse, "Copyright Reversion in The Creative Industries: Economics and Fair Remuneration" (2018) 41 Columbia Journal of Law & Arts 467, 476.
[8] A 2018 survey commissioned by the ALCS and carried by CREATe has found that the top 10% of writers in the UK earn about 70% of total earnings in the profession. See Martin Kretschmer et al, "UK Authors' Earnings and Contracts 2018: A Survey of 50,000 Writers" (2019) available at: https://www.create.ac.uk/uk-authors-earnings-and-contracts-2018-a-survey-of-50000-writers/ [Accessed 8 March 2021].

sees statutory reversion rights as one of the ways to better the financial position of authors while simultaneously reclaiming otherwise lost culture to the broader society.[9] Her empirical research with Joshua Yuvaraj demonstrates that contract-based approaches are not sufficient to safeguard creators' reversion interests.[10] Paul Heald's work exploring the effects of the US termination provisions has found that shifting the ownership of rights in books back to the authors has caused previously out-of-print works to be available again.[11] Marcella Favale has recognised the value of reversionary rights for solving the orphan works problem[12] and Séverine Dusollier sees the use reversion rights as a way out of excessive or buy-out copyright transfers.[13] Not all the effects of reversion rights, however, are necessarily positive. As noted by Karas and Kirstein, such rights can potentially reduce publishers' incentive to invest and lower authors' remuneration.[14] This prediction, however, was made in relation to the time-based termination, not the use-it-or-lose-it provisions on which this article focuses.

Right of revocation—an unexpected but welcome surprise

The EU has largely refrained from legislating in the area of copyright contracts, leaving this matter to the Member States.[15] Chapter 3 CDSM Directive is an exception from the EU's traditionally non-interventionalist approach. It offers a set of provisions aimed at bettering the contractual position of creators, including the principle of proportionate and appropriate renumeration, the contract adjustment mechanism, and of course the right of revocation. Creators have been provided with both the means of obtaining information on the exploitation of their works, and a way of adjusting or terminating their contractual relationships. Pursuant to art.22 CDSM Directive, authors and performers can reclaim the rights they have assigned or licensed on an exclusive basis when their works or other subject-matter are not being exploited.

[9] The Author's Interest webpage is available at: https://authorsinterest.org/ [Accessed 8 March 2021].
[10] Rebecca Giblin and Joshua Yuvaraj, "Are Contracts Enough? An Empirical Study of Author Rights in Australian Publishing Agreements" (2020) 44 Melbourne University Law Review 1.
[11] Paul Heald, "Copyright Reversion to Authors (and the Rosetta Effect): An Empirical Study of Reappearing Books", SSRN available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3084920 [Accessed 8 March 2021].
[12] Marcella Favale, "Bouncing Back from Oblivion: Can Reversionary Copyright Help Unlock Orphan Works?" (2019) 41 E.I.P.R. 339.
[13] Séverine Dusollier, "EU Contractual Protection of Creators: Blind Spots and Shortcomings" (2018) 41 Columbia Journal of Law & Arts 435, 447.
[14] See Michael Karas and Roland Kirstein, "Efficient Contracting under the U.S. Copyright Termination Law" (2018) 54 International Review of Law and Economics 39; Michael Karas and Roland Kirstein, "More Rights, Less Income?: An Economic Analysis of the New Copyright Law in Germany" (2019) 175 Journal of Institutional and Theoretical Economics 420.
[15] Two major studies were commissioned by the EU bodies to explore Member States legal framework applicable to creator contracts. See Lucie Guibault and Bernt Hugenholtz, "Study on the Conditions Applicable to Contracts Relating to Intellectual Property in the European Union" (University of Amsterdam: IViR, 2002); Séverine Dusollier et al, "Contractual Arrangements Applicable to Creators: Law and Practice of Selected Member States" (European Parliament Committee on Legal Affairs, 2014).

Rights can be revoked by creators either in full or in part, and only after a reasonable period following the conclusion of an agreement. Member States are left with considerable freedom in implementing this provision: they can decide whether to adopt special provisions for particular types of works and sectors, and whether to limit waivability and exercise of rights in time.

The EU has notably intervened on creator contracts once before, when by the way of the Term Directive it introduced the right of revocation for performers.[16] To date, this is the only revocation provision common to all Member States. The Term Directive requires Member States to allow a performer to terminate the agreement with a phonogram producer if, 50 years after the phonogram was first lawfully communicated to the public, the producer does not offer copies of the phonogram for sale in sufficient quantity, or does not make it available to the public. This right follows the use-it-or-lose-it principle; however, it is quite narrow in its scope.

The Proposal for the CDSM Directive tabled by the European Commission in September 2016 did not include a reversion right, and the accompanying Impact Assessment did not consider it an option.[17] But the idea of adopting an EU-wide general reversion right has not been foreign to the European Commission. In its 2014 Report on the Public Consultation on the review of the EU copyright, the Commission noted that according to authors' and performers' submissions they should be able to claim their rights back, particularly when a work is not being exploited.[18] However, out of 167 organisations self-identifying as a "representative of authors/performers" which submitted responses to the consultation, only 20 mentioned rights reversion when asked about mechanisms for ensuring creators receive an adequate remuneration for exploitation of their works or performances.[19] Thus, the fact that the Commission has singled out this issue from over 9,500 replies is by itself surprising.

The European Composer and Songwriter Alliance (ECSA) and the UK Society of Authors (SoA) were among those creator organisations to identify reversion rights as a missing element of the Proposal. Both organisations noted that authors in some Member States already benefit from

[16] Directive 2011/77 amending Directive 2006/116 on the term of protection of copyright and certain related rights [2011] OJ L265/1 art.3(2a).
[17] Commission Staff Working Document, Impact Assessment on the Modernisation of EU Copyright Rules: Accompanying the document Proposal for a Directive on Copyright in the Digital Single Market and Proposal for a Regulation laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions of television and radio programmes SWD(2016) 301 final.
[18] European Commission, Report on the Responses to the Public Consultation on the Review of the EU Copyright Rules (2014), p.79.
[19] European Commission, "Public Consultation on the review of the EU copyright rules" (2013), Questions 72–74.

reversion rights, and that the EU should provide for "an equal regulatory framework in every Member State"[20] by ensuring that all creators in Europe enjoy the same rights.[21] Both organisations actively advocated a right of revocation even before the Proposal was tabled, publishing recommendations[22] and lunching campaigns[23] aimed at bettering contractual position of creators. The attention of the majority of the creator organisations lay elsewhere, on the right of fair remuneration[24] and the share of platforms' revenues to be delivered thanks to the new intermediary liability regime provided by what now is art.17 CDSM Directive.[25]

While advocacy for the introduction of the reversion provision was limited, especially compared with news organisations' campaign for the new press publishers' right, creator organisations warmly welcomed the introduction of the provision in the European Parliament compromise.[26] A new art.16a introduced by the Parliament proposed a revocation right triggered not only by the absence of exploitation of works but also the lack of regular reporting. The Industry, Research and Energy (ITRE) Committee's opinion and the amendments tabled in the Legal Affairs (JURI) Committee proposed even more triggers, suggesting that creators should be able to reclaim their rights also in case of lack of promotion, payment of remuneration and reporting as well as insufficient exploitation.[27] The records of the JURI Committee meetings do not explain why only

[20] "The Society of Authors' Response to the Intellectual Property Office's Calls for Views on the European Commission's Draft Legislation to Modernise the European Copyright Framework' (2016) available at: https://www.societyofauthors.org/SOA/MediaLibrary/SOAWebsite/Submissions/20161205-Submission-to-IPO-on-DSM-directive-dec-2016.pdf [Accessed 8 March 2021].

[21] "EC Draft Proposal for a Directive on Copyright in the Digital Single Market and related issues: Point of View of Europe's Music Creators" (2016) available at: http://composeralliance.org/wp-content/uploads/2016/12/2016-draft-copyright-directive-ECSA-viewpoint.pdf [Accessed 8 March 2021].

[22] "ECSA-FACDIM Draft Recommendations on the Status of Music Creators" (2015) available at: http://composeralliance.org/wp-content/uploads/2015/03/ECSA_FACDIM_Resolution_Unfair_Contracts_For_EC_Review_2014-11-11.pdf [Accessed 8 March 2021].

[23] The Society of Authors, C.R.E.A.T.O.R., "Fair contract terms" available at: https://www.societyofauthors.org/Where-We-Stand/C-R-E-A-T-O-R-Campaign-for-Fair-Contracts [Accessed 8 March 2021].

[24] See Raquel Xalabarder, "The Principle of Appropriate and Proportionate Remuneration for Authors and Performers in Art.18 Copyright in the Digital Single Market Directive. Statutory Residual Remuneration Rights for Its Effective National Implementation" (2020) 4 InDret 1.

[25] See Christina Angelopoulos and João Pedro Quintais, "Fixing Copyright Reform: A Better Solution to Online Infringement" (2019) 10 J.I.P.I.T.E.C. 147.

[26] "Authors' Group Open Letter to the Council of the EU in Support of the Copyright Directive" (2019) available at: https://composeralliance.org/authors-group-open-letter-in-support-of-the-copyright-directive/ [Accessed 8 March 2021].

[27] Pursuant to the ordinary legislative procedure, the Legal Affairs Committee of the European Parliament was responsible for drafting a report on the CDSM Directive, which later was voted on during the Parliament plenary. The Industry, Research and Energy Committee was one of five Parliament Committees providing supporting opinions during the report-drafting process. See European Parliament, "Opinion of the Committee on Industry, Research and Energy for the Committee on Legal Affairs on the Proposal for a Directive of the European Parliament and of the Council on Copyright in the Digital Single Market", PE-

two triggers made their way to the JURI Report and later to the European Parliament compromise. The Parliament compromise on art.16a, later renumbered to art.22, was accepted during the trialogue, with the right's triggers narrowed to the "lack of use" and some other modifications. No information beyond a simple note that art.16a is "to be discussed at the political level" in the trialogue compromise proposal document is available.[28] Since the CDSM Directive provides only for minimum harmonisation, there is no obstacle to expanding the list of triggers by Member States[29] but the "lack of use" or, as the Recitals phrase it, situations where "the works and performances … are not exploited at all"[30] remains the only required trigger of the newly introduced EU-wide general revocation right.

Existing landscape of national revocation provisions

The existing laws of Member States offer a wide variety of provisions allowing authors and performers to reclaim their rights. There are currently more than 150 statutory provisions enabling change or termination of creator contracts. Those are only copyright and related rights specific statutory provisions. Creators might be able to reclaim their rights also under general contract law or pursuant to contractual reversion clauses. Some of the statutory reversion provisions are general in their nature, others apply only to certain works (audiovisual, adaptations, journalistic) or agreements (publishing, adaptation, performance).

Not only reversion rights sensu stricto lead to rights reverting back to the creators. Provisions prescribing a maximum term of an agreement inevitably result in termination. There are also provisions which simply describe what a creator is permitted to do. For example, in Austria after a set period of time, the author of a contribution to a periodical publication is allowed to reproduce and publish their work elsewhere.[31] Also, not all reversion rights are referred to as reversion rights. Member States use different terminology to describe provisions with reversionary effect, including such terms as termination, withdrawal and revocation. Some of those differences are a consequence of an English translation of respective national laws, but

592.363; European Parliament; "Amendments 673–872, Draft report Therese Comodini Cachia, PE-601.094v01-00, Amendments 952, 953, 958, 959, 960.

[28] Compromise text of the CDSM Directive as of 23 November 2018 available at: https://juliareda.eu/wp-content/uploads/2018/11/Copyright-Directive_4-column-document_ARTICLES-Version-3.2-for-3rd-trilo…pdf [Accessed 8 April 2021].

[29] See "Comment of the European Copyright Society Addressing Selected Aspects of the Implementation of Articles 18 to 22 of the Directive (EU) 2019/790 on Copyright in the Digital Single Market" available at: https://europeancopyrightsocietydotorg.files.wordpress.com/2020/06/ecs_comment_art_18-22_contracts_20200611.pdf [Accessed 8 March 2021].

[30] CDSM Directive para.80.

[31] Bundesgesetz über das Urheberrecht an Werken der Literatur und der Kunst und über verwandte Schutzrechte (Urheberrechtsgesetz) StF: BGBl. Nr. 111/1936 (StR: 39/Gu. BT: 64/Ge S. 19.) (Austrian Copyright Act) s.36.

there are instances where a Member State uses different terms for provisions caused by different triggers.[32] Thus, to grasp a full range of revocation provisions available, one needs to look at a provision's effect: a creator's ability to reclaim their rights, not its name or form.

Effects of reversion provisions

Where the effects of reversion are concerned, those provisions do not necessarily lead to termination. The dissolution of an agreement is only one of the two options. The second is an end to the exclusive character of a transfer. The Member States revocation provisions allow agreements to be terminated either in full or in part, with the partial termination concerning particular works (e.g. agreements on future works terminated only with respect to the works which have not yet been completed)[33] or uses (e.g. the possibility to terminate a publishing agreement with respect to the languages in which the work has not been published).[34] When the exclusive right of a transferee is brought to an end, it either means that the exclusive agreement between the parties changes into a non-exclusive one[35] or simply that the creator can perform certain acts which used to be reserved exclusively to the transferee. Such is the case in Austria, where the author is free to publish their work after 20 years but only as a part of a complete edition of their works.[36] There are also provisions which have less conventional consequences. For example, in Portugal, when a publisher, regardless of the author's calls, does not publish all agreed copies of a work, the author can publish the outstanding copies with another publisher at the expense of the original.[37]

Geographically fragmented landscape

Whereas most of the Member States have some reversion rights in place, there are still countries which support no other provision than the performers' right of revocation required by the Term Directive. Such is the case with Cyprus, Estonia, Ireland, Latvia and Malta. On the other side of

[32] For example, in Croatia the right to terminate an agreement owing to moral rights reasons (parvo opozvati) and the general non-use provision (ukinuće isključivog prava iskorištavanja) are referred to differently. See Zakon o autorskom pravu i srodnim pravima 2003/167/2399 (Croatian Copyright Act) arts 17 and 45.

[33] Austrian Copyright Act s.31.

[34] Ley de Propiedad Intelectual, regularizando, aclarando y armonizando las Disposiciones Legales Vigentes sobre la Materia (aprobado por el Real Decreto legislativo No.1/1996 de 12 de abril de 1996, y modificado hasta el Real Decreto-ley No.17/2020, de 5 de mayo de 2020) (Spanish IP Act) art.62; Lietuvos Respublikos autorių teisių ir gretutinių teisių įstatymas 1999 m. gegužės 18 d. Nr. VIII-1185 (Lithuanian Copyright Act) art.45.

[35] See 1999 évi LXXVI. törvény a szerzői jogról (Hungarian Copyright Act) s.51.

[36] Austrian Copyright Act s.34.

[37] Código do Direito de Autor e dos Direitos Conexos, Decreto-Lei No.63/85—Diário da República No.61/1985, Série I de 14 March 1985 (Portuguese Copyright Act) art.86.

the spectrum are Italy and Spain, whose laws offer a number reversion provisions, all of them applicable to particular types of works or agreements.

While geographical distribution of reversion provisions is mostly random, two interesting regional patterns are visible. The first is in the Nordic countries, where Finland,[38] Sweden[39] and Denmark[40] adopted very similar copyright acts in the 1960s. Since then, the acts have been amended in Finland and Sweden; however, the termination provisions in those countries remain the same. Denmark, on the other hand, adopted a new copyright act in 1995, which has repealed most of the previously existing reversion provisions.[41] Secondly, countries of the former Eastern Bloc (Poland, Romania, Bulgaria, Slovenia, Slovakia, Czechia, Hungary) are quite generous with reversion provisions, especially the general ones. Five countries providing for a general non-use termination (eight countries in the whole EU) and five countries offering a moral rights-based termination (nine countries in the whole EU) are Central-Eastern Member States.

Preference for use-based reversion provisions

The majority of the reversion provisions found in Member States' laws are linked to the exercise of right or use of work. Such provisions allow creators to reclaim their rights when a work is not used at all or is used in an insufficient or inappropriate manner, or when a work is not accepted or completed. The remaining provisions are triggered by the circumstances linked to the parties of an agreement: a creator, with reversion prompted by their moral rights and convictions, or a transferee, with reversion usually connected to their economic condition (e.g. bankruptcy, insolvency, transfer of an entity to a third party).

Currently, only a handful of Member States champion time-based reversion provisions and only the Spanish provision concerning publishing contracts results in termination.[42] The remaining time-based provisions mark the time when an exclusive agreement changes into a non-exclusive one, or when a limitation of creator's freedom to exercise their rights ends. For example, in Lithuania the author is limited in exercising their rights following the publication of work for an additional three years or an alternative time specified in the agreement.[43] This preference for the non-use reversion provisions sets the EU apart from the US[44] and Canada,[45] which only offer

[38] 8 July 1961 Upphovsrättslag 372/2020 (Finnish Copyright Act).
[39] Lag (1960:729) om upphovsrätt till litterära och konstnärliga verk (Swedish Copyright Act).
[40] Lov om ophavsretten til litterære og kunstneriske værker (LBK No.1170 of 21 December 1994).
[41] Lov om ophavsret (LBK No.1144 of 23 October 2014) (Danish Copyright Act).
[42] Spanish IP Act art.69.
[43] Lithuanian Copyright Act art.47.
[44] Pursuant to 17 U.S.C. ss.203, 304 authors can reclaim their rights 35 years after the conclusion of an agreement.
[45] Pursuant to art.14(1) of the Copyright Act R.S.C. 1985, c.42, as amended assignment of copyright is terminated 25 years after author's death.

time-based termination rights. Historically, however, the Spanish IP Act 1879[46] and the UK Copyright Act 1911, which was a binding law for Ireland, Malta and Cyprus,[47] provided for the termination of agreements 25 years after the death of the author, with rights reverting back to their legal successors. Torremans and Otero Garcia-Castrillon refer to those termination rights as "trap provisions", since not many assignees are aware of their existence but they remain applicable to a number of currently binding agreements, concluded during the second half of the 20th century.[48]

The principle of use-it-or-lose-it

Express and implied use obligations

When a creator transfers their rights, they have a reasonable expectation that those rights will be exploited.[49] An obligation to use transferred rights is not, however, a general rule of copyright contract law. Only a handful of Member States' laws include an explicit obligation of a transferee to exploit licensed or assigned rights: Slovakia,[50] Denmark,[51] France,[52] Belgium[53] and Greece.[54] None of them sets out the consequences of breaching the use obligation directly in its copyright legislation, which means in the case of a transferee failing to exploit the work, the creator needs to refer to general contract law.

The use obligation is more often implied, since reversion rights based on the use-it-or-lose-it principle indirectly oblige a transferee to exploit transferred rights. Currently, eight Member States provide for a general reversion right triggered by the lack of use or insufficient use of work. Those provisions follow the same use-it-or-lose-it logic as the right of revocation introduced in art.22 CDSM Directive. While allowing the agreement to be terminated also owing to insufficient use of work, the majority of Member States require as a further condition that it

[46] Ley de 10 de enero de 1879 de propiedad intelectual art.6.
[47] As noted by Elena Cooper, the Copyright Act 1911 applied to Ireland, Malta and Cyprus, as parts of the British Empire in 1911, and remained binding law up until 1976 in Cyprus and 1967 in Malta. See Elena Cooper, "Reverting to Reversion Rights? Reflections on the Copyright Act 1911" (2021) 43 E.I.P.R. 292.
[48] See Paul Torremans and Carmen Otero Garcia-Castrillon, "Reversionary Copyright: A Ghost of the Past or a Current Trap to Assignments of Copyright?" (2012) 2 Intellectual Property Quarterly 77.
[49] See Dusollier, "Contractual Arrangements Applicable to Creators: Law and Practice of Selected Member States" (2014), p.446.
[50] Zákon z 1. Júla 2015 Autorský zákon (Slovak Copyright Act) s.70. An obligation to use an exclusive right can be excluded by a contract.
[51] Danish Copyright Act s.54. Assignee's obligation to use rights cannot be derogated from.
[52] Code de la propriété intellectuelle (French IP Code) art.L131-3 para.4.
[53] Code de droit économique (Belgian Economic Code) art.XI.167§1.
[54] Νόμος 2121/1993 Πνευματική Ιδιοκτησία, Συγγενικά Δικαιώματα και Πολιτιστικά Θέματα (Greek Copyright Act) art.13(1).

prejudices the legitimate interests of the author (Slovenia,[55] Romania,[56] Germany,[57] Czechia,[58] Croatia,[59] Austria).[60] Dutch[61] and Slovak[62] laws do not include such an additional requirement. Some Member States limit the exercise of the right in time, prescribing a period of time which needs to lapse before an author can terminate the agreement (i.e. a grace period). It is either two years (Czechia, Germany, Romania, Slovenia) or one year (Slovakia) after the conclusion of an agreement or the delivery of work, whichever happened later. All countries which champion two years' time limitation provide for shorter periods of time for periodical works: three months, six months or one year, depending on frequency of publication.

Temporal aspect of use obligations

The temporal limitation of the right's exercise does not mean that if a work has been subject to exploitation within a grace period, a reversion right cannot be invoked later when the exploitation ceases. Reversion provisions triggered by the lack of use or insufficient use of work imply a continuous exploitation requirement: it remains valid as long as the contractual relationship between the parties lasts. This sets apart those provisions from reversion rights triggered by the lack of initial exploitation, that is, provisions which entitle creators to reclaim their rights in case the exploitation of work has not started within a particular period of time.[63] This period of time can be specified in a reversion provision, prescribed in an agreement or determined on a case-by-case basis, and tends to be calculated from either the conclusion of an agreement or the delivery of the work, whichever happened later. Provisions triggered by the lack of initial exploitation concern only the first stage of the contractual relationship between the parties, which can continue beyond this first phase.

The difference between the non-use and the lack of initial use provisions becomes clearer when one compares the provisions of Hungarian and Dutch law. In Hungary, an author is entitled to terminate an exclusive licence in cases where a transferee fails to begin exploitation in

[55] Zakon o avtorski in sorodnih pravicah (Uradni list RS, št. 16/07—uradno prečiščeno besedilo, 68/08, 110/13, 56/15, 63/16—ZKUASP in 59/19) (Slovenian Copyright Act) art.83.
[56] Legea No.8 din 14 martie 1996 privind dreptul de autor și drepturile conexe Publicat în Monitorul Oficial No.489 din 14 iunie 2018 (Romanian Copyright Act) art.48.
[57] Urheberrechtsgesetz vom 9 September 1965 (BGBl. I S. 1273), das zuletzt durch Artikel 1 des Gesetzes vom 28 November 2018 (BGBl. I S. 2014) geändert worden ist (German Copyright Act) art.41.
[58] Zákon ze dne 3 února 2012 občanský zákoník s.2378.
[59] Croatian Copyright Act art.45.
[60] Austrian Copyright Act s.29.
[61] Wet van 23 september 1912, houdende nieuwe regeling van het auteursrecht (Auteurswet 1912) (Dutch Copyright Act) art.25e.
[62] Slovak Copyright Act s.73.
[63] See Закон за авторското право и сродните му (Bulgarian Copyright Act) art.39; Ustawa z dnia 4 lutego 1994r. o prawie autorskim i prawach pokrewnych (Polish Copyright Act) art.57, Danish Copyright Act s.54.

the agreed time, and, if no time was agreed, within a reasonable time in a given situation.[64] This is a reversion right triggered by the lack of initial use of work. In the Netherlands, the general use-it-or-lose-it provision consists of two parts, distinguishing between initial and subsequent use: a creator can terminate the agreement if a work is not exploited within a reasonable time following the conclusion of the agreement and when a work is no longer exploited (to a sufficient extent) following the initial act of exploitation.[65] If the second trigger was not added, the Dutch provision, like the Hungarian one, would be relevant only for the initial phase of exploitation. The second trigger ensures continuous exploitation of work. This shows a qualitative difference between "non-use" and "lack of initial use" provisions.

Reversion provisions triggered by the lack of initial use seem fitting when an agreement concerns a particular exploitation act, for example publication of a single edition of a book, but might not be sufficient when the exploitation ought to extend over the whole term of an agreement. The duration of agreements often exceeds the time needed for a transferee to recover their investment and can last the entire copyright term.[66]

Relevance of temporal aspect for implementation process

The distinction between reversion rights triggered by non-use and those set off by lack of initial use is relevant for the implementation of art.22 CDSM Directive. In Hungary, where the general reversion right is limited to initial use, the implementation draft tabled in May 2020 does not suggest any changes to the current legislation.[67] A number of submissions to the public consultation on the implementation of the CDSM Directive conducted by the Polish Ministry of Culture suggest that there is no need to implement art.22 CDSM Directive since Polish law already provides for the right of revocation.[68] Submissions do not, however, recognise that this right is triggered only by the lack of initial use, and applies only to the contracts envisaging distribution of works.[69]

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[64] Hungarian Copyright s.51(1)(a).
[65] Dutch Copyright Act art.25e(1).
[66] A recent study by García et al demonstrates that the economic viability of sound recordings is remarkably short, and it is a matter of months, not years. See Kristelia García, James Hicks and Justin McCrary, "Copyright and Economic Viability: Evidence from the Music Industry" (2020) 17 Journal of Empirical Legal Studies 696.
[67] The draft text on the implementation of CDSM and CabSat Directives was prepared by the Ministry of Justice and the National Office of Intellectual Property and published on 7 May 2020 available at: https://www.sztnh.gov.hu/sites/default/files/szjt_dsm.satcab_indoklassal_2020.05.07.pdf [Accessed 8 March 2021].
[68] See submissions by ZAPAV, Copyright Polska, REPROPOL, STOART, Kreatywna Polska, Izba Wydawców Prasy, PIIT, IAB Polska, TVN Discovery Polska and Lewiatan available at: https://bip.mkidn.gov.pl/pages/posts/konsultacje-publiczne-3276.php?p=20 [Accessed 8 March 2021].
[69] Polish Copyright Act art.57.

What is curious is the example of Belgium, one of a handful of countries which champion a general obligation of exploitation. The draft bill prepared by the Council for Intellectual Property proposes introduction of a new reversion right, separate from the general exploitation obligation.[70] The new right would allow creators to reclaim their rights, but only when a transferee has not exploited the rights within the agreed period, and if such period was not set, a period fixed in accordance with honest practices of the profession for the type of works concerned. Thus, instead of specifying the consequences of breaching the general use requirement, the draft proposes the introduction of a new right limited to initial use of work.[71]

The right of revocation introduced by art.22 CDSM Directive, like all currently binding non-use provisions, implies a continuous use requirement. This means that its implementation cannot be limited to creation or reference to a currently existing reversion provision triggered by lack of initial use. The principle of use-it-or-lose-it that art.22 CDSM Directive is based on should remain intact throughout the whole term of an agreement, which requires Member States to provide for a general non-use provision in order to give full effect to the new revocation right.

The meaning of "use"

Reversion provisions based on the use-it-or-lose-it principle face two key challenges: the meaning of exploitation and the types of failures which justify termination or alteration of an agreement. The trigger of general use provisions is typically phrased as lack of use or insufficient use of work. The laws of Member States offer little detail about how these requirements should be interpreted. Provisions are designed as all-encompassing: currently no types of works or agreements are explicitly excluded from their scope. Pursuant to art.22 CDSM Directive, Member States, however, will be able to exclude works and other subject-matter which usually include contributions of multiple creators from the scope of the new reversion right.

The provisions concerning specific types of works or agreements name a particular behaviour triggering a reversion right. More often than not, this behaviour corresponds to the main purpose

[70] "Avis Du Conseil de La Propriété Intellectuelle Du 19 Juin 2020 Concernant La Transposition En Droit Belge de La Directive 2019/790/UE Du 17 Avril 2019 Sur Le Droit d'auteur et Les Droits Voisins Dans Le Marché Unique Numérique et Modifiant Les Directives 96/9/CE et 2001/29/CE' 97" available at: https://economie.fgov.be/sites/default/files/Files/Intellectual-property/Avis%20Conseils%20Propri%C3%A9t%C3%A9%20intellectuelle/Avis-CPI-19062020.pdf [Accessed 8 March 2021].q

[71] Luxembourg has followed the Belgian example and proposed a new reversion right triggered by lack of initial use in its CDSM Directive implementation draft presented on 10 February 2021 available at: https://gouvernement.lu/content/dam/gouvernement/documents/actualites/2021/02-fevrier/12-consultation-publique/20210204-APL-transposition-directive-2019790-Version-finale.pdf [Accessed 8 March 2021].

of the contract. For example, most of the reversion provisions concerning publishing agreements allow the author to reclaim their rights in cases where a work is not published[72] or copies of work are not produced.[73] Termination of performance agreements is triggered either by the lack of initial performance[74] or by an interruption in performance lasting two or three years,[75] and provisions concerning audiovisual works are set off by either lack of completion of work or lack of distribution or making a work available to the public.[76] Those provisions seem to paint a black and white picture, where a work is either being used in a particular way or it is not.

Most provisions lack detail on how a particular use should be performed. This turns the exploitation of work into a "yes-no" question rather than a quality question. There are, however, some notable exceptions. In Finland and Sweden, a publishing agreement can be terminated not only when a work is not published but also when it is not distributed in the usual manner and is not continuously exploited in a way determined by the market conditions and other circumstances.[77] Slovakia allows termination of licence agreements for publication of works when a work is used in a way which reduces its value[78] and Hungary provides for the termination of an exclusive licence when a work is used in a manner obviously inappropriate or inconsistent with the purpose of the contract.[79] The application of those provisions does involve value judgments and is likely to entail some level of subjectivity, which approximates this type of provisions to revocation rights tiggered by moral rights and convictions of the creator, which are inherently subjective.

The breach of obligations linked to the exercise of transferred rights, but not involving the use of work itself, only exceptionally justifies termination. Here, France supports a unique solution for termination of publishing agreements. The provisions introduced in 2016 allow an author to terminate an agreement when they do not receive due royalties[80] or statements of accounts.[81] As mentioned earlier, the lack of payment and reporting were among the triggers considered

[72] Slovenian Copyright Act art.92; Romanian Copyright Act art.57; Spanish IP Act art.68.
[73] Portuguese Copyright Act art.86; Belgian Economic Code art.XI.196(1).
[74] Slovenian Copyright Act art.98.
[75] Belgian Economic Code art.XI.201; French IP Code art.L132-19; Romanian Copyright Act art.60; Finnish Copyright Act s.30(1).
[76] Finnish Copyright Act s.40; Swedish Copyright Act s.40; Legge 22 aprile 1941 n.633 Protezione del diritto d'autore e di altri diritti connessi al suo esercizio (Italian Copyright Act) art.50; Portuguese Copyright Act art.136; Hungarian Copyright Act s.66; Polish Copyright Act art.72.
[77] Finnish Copyright Act s.33; Swedish Copyright Act s.33.
[78] Slovak Copyright Act s.75.
[79] Hungarian Copyright Act s.51(1)(b).
[80] French IP Code art.L132-17-3-1.
[81] French IP Code art.L132-17-3.

during the CDSM Directive legislative process but did not make their way to the final text of the CDSM Directive.

Digital use of works

What is clearly lacking in the reversion provisions is a consideration of the development of digital technologies and the new forms of exploitation they offer. Only two types of provisions explicitly address the digital use of works. First, Croatia and Romania directly tackle the matter of ebooks, granting publishers priority to publish (or rather to make an offer to publish) a book in an electronic form. This applies to the book of an author already contracted for the analogue format.[82] Secondly, French provisions on the termination of publishing agreements, in the case of lack of permanent and ongoing exploitation of a work, clearly distinguish between print and digital forms of exploitation.[83] Termination due to lack of exploitation in a digital format does not affect the part of the contract concerning exploitation of the work in print and vice versa.

The consideration of digital exploitation of works is also missing in the out-of-print and the lack of subsequent publication provisions. When the national law specifies what an "out-of-print" or "exhausted edition" is, it refers to a number of copies of books. For example, Romania,[84] Slovenia[85] and Spain[86] deem a work to be out of print when the number of unsold copies is less than 5% of copies in an edition, and in any case, if fewer than 100 copies are available. The digital distribution of works is not reflected in those clauses. The lack of consideration for digital uses is common both to reversion provisions dating back to the beginning of the 20th century and to those adopted during the last decade.

With digital uses not explicitly addressed by the revocation provisions, uncertainties persist. Does keeping a work or a performance available online qualify as an exploitation? The 2020 report on the Dutch Copyright Contract Law, which introduced the general use-it-or-lose-it provision to the Dutch Copyright Act in 2015, argues that online availability is nowadays common, but by itself does not amount to sufficient exploitation.[87] It suggests permanent findability, and bringing a work to the public's attention in a continuous manner in all ways are and will be reasonably possible as markers of sufficient exploitation. Similar suggestions are included in a 2018 report on the implementation of the Term Directive, which recommends that

[82] Croatian Copyright Act art.65; Romanian Copyright Act art.53.
[83] French IP Code art.L132-17-2.
[84] Romanian Copyright Act art.57.
[85] Slovenian Copyright Act art.92.
[86] Spanish IP Act art.68.
[87] Stef van Gompel et al, "Evaluatie Wet Auteurscontractenrecht Eindrapport" (2020), p.48 available at: https://www.rijksoverheid.nl/documenten/rapporten/2020/11/18/tk-evaluatie-acr-eindrapport [Accessed 8 March 2021].

the requirement of "offering copies of the phonogram for sale in sufficient quantity" linked to performers' revocation right, should be interpreted as making the performance available online in a manner which "satisfies the reasonable needs of the public, taking into account the nature and aim of the phonogram".[88] This report, however, makes a distinction between popular services such as Spotify and Deezer, where the upload itself would be sufficient, and websites with smaller audiences, such as those of independent record producers, which without additional promotion on third-party services would not meet the use requirement.

In the context of the implementation of art.22 CDSM Directive, performers themselves caution against equating online availability with exploitation of works. The guidelines on the implementation of the CDSM Directive prepared by the Fair Internet Coalition, a group of European performers' organisations, argue that if online accessibility is understood as a sufficient exploitation, art.22 CDSM Directive will have no use for performers. They urge law-makers in Member States to make a link between lack of exploitation and lack of promotion.[89] Considering the number of uncertainties surrounding the application of the current reversion provisions in the digital environment, it is ironic that the CDSM Directive, a directive intended to address the rapid technological development and changing business models in creative industries, provides no indication on how to interpret exploitation in the digital context.

The challenges facing creators

The clarity of reversion rights' triggers is important for creators, as, pursuant to the laws of Member States, the action of an author or a performer is usually required to bring any change to the contractual relationship between the parties. Automatic termination or alteration of an agreement is a rarity. A creator needs to know when they can act, especially since the use of a reversion right carries a future risk of "blacklisting", an unspoken practice of no longer contracting work from troublesome creators.[90]

The actions required from a creator vary, but they often involve such acts as: (1) a notification of creator's intention to terminate or change an agreement; (2) a call to begin or continue exploitation of a work (e.g. publication of a second edition of a book); (3) the setting of

[88] Ana Ramalho and Aurelio Lopez-Tarruella, Implementation of the Directive 2011/77/EU: Copyright Term of Protection (Policy Department for Citizens' Rights and Constitutional Affairs Directorate General for Internal Policies of the Union, 2018), p.49.
[89] Fair Internet, Coalition Joint Guidelines for the Implementation of the 2019 Copyright Directive (2019), p.26 available at: http://www.aepo-artis.org/usr/files/di/fi/9/FAIR-INTERNET-Campaign-joint-guidelines---Implementation-of-the-2019-Copyri_202012151620.pdf [Accessed 8 March 2021].
[90] Dusollier et al, "Contractual Arrangements Applicable to Creators: Law and Practice of Selected Member States" (2014), p.23.

an additional time to use a work; and (4) a notification of termination or change of an agreement. Sometimes, the action of a creator is simply to perform an act they were previously not authorised to do, such as the re-publication of a contribution to a periodical,[91] concluding an agreement with a different publisher[92] or authorising another producer to adapt a work for the screen.[93] The mechanism envisaged in art.22 CDSM Directive follows the dominant pattern since the decision whether to reclaim their rights lies with a creator.

In the case of general non-use provisions, the majority of Member States require that a creator sets a reasonable additional time for a transferee to use the work, and only after this term lapses are they able to terminate or alter the agreement. None of the national laws prescribes this additional time by a specific number of years or months. Provisions simply refer to an appropriate extension (Germany), reasonable term (Netherlands, Slovakia, Austria, Czechia), or adequate time (Slovenia), leaving it to the judgment of the creator. For comparison, the reversion provisions applicable to publishing agreements, triggered by lack of publication of a next edition, always indicate a period of time when the next edition should be published (between one and three years), leaving the creator no discretion.[94]

The requirement of reasonable time is included in art.22 CDSM Directive, as a creator needs to set an appropriate deadline before they are allowed to exercise their rights. This requirement shows that exploitation of work is the ultimate goal of non-use reversion provisions. If case a transferee takes up exploitation within the prescribed time, a creator is no longer entitled to reclaim their rights. Thus, as long as a transferee is interested in and delivers on the exploitation of works, the contractual relationship between the parties is preserved and the transferee's interests are safeguarded. The creator does have a discretion in reclaiming their rights and setting deadlines but their rights can be curtailed by a transferee's action.

Conclusions

As this article has shown, the current EU reversion rights framework is highly fragmented, but the preference for use provisions over time-based termination is visible. The continuous use requirement enshrined in art.22 CDSM Directive is not a substitute for existing obligations. It brings them together under the umbrella of a use-it-or-lose-it principle, a guiding principle over the whole term of an agreement. The distinction between reversion rights triggered by non-use and those set off by lack of initial use is relevant for the implementation of art.22 CDSM Directive.

[91] German Copyright Act s.38(1).
[92] Lithuanian Copyright Act art.47.
[93] German Copyright Act. s.88.
[94] Bulgarian Copyright Act art.52; Italian Copyright Act art.124; Finnish Copyright Act s.34.

As demonstrated, the current implementation process makes no distinction between those two provisions, with some Member States transposition proposals limiting use obligation to the initial phase of exploitation.

As the review of the EU reversion rights framework has demonstrated, whereas the dominance of use-based provisions is clear, the understanding of "use" is vague. The implementation of the new revocation right calls for sufficient clarity and flexibility in determining what "use" is, so that the provision remains applicable to the relevant subject-matter, but parties to an agreement are clear on when the creators' rights are triggered. Considering that the creative and cultural industries are highly diversified, it seems impossible for the law to explicitly address all non-use situations. It is possible, however, building on already existing work and agreement-specific provisions, to formulate guidelines. One way would be for Member States to provide a list of factors which should be taken under consideration when assessing whether a work is being used, such as the lack of remuneration, or promotion and findability of work, which could then be adjusted to particular sectors.

A second important pattern needs to be addressed. The exploitation of works captured by the currently binding provisions is largely analogue, requiring an urgent update to take account of digital reality and contemporary business models. The "yes-no" exploitation question, posed by many of the reversion rights based on the use-it-or-lose-it principle, including the art.22 CDSM Directive provision, makes a sharp distinction between use and lack of use of a work, which is not appropriate to the digital environment where works can be technically available at the switch of a virtual button. A strict application of the non-use trigger, equating availability of a work with its exploitation, could lead to the revocation right losing any practical value for creators. The economic viability of works is limited in time and, when it is no longer beneficial for a transferee to actively exploit it, going beyond sustaining continuous availability in digital format, a creator should be able to seek another forum of exploitation.