8 Remunerating authors and performers: Are statutory fair compensation provisions sufficient?[1]

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1. INTRODUCTION

Digitalization has created both challenges and new opportunities for the content markets and their players. With digitalization, content providers – at all stages of the supply chain – have had *broad, diverse opportunities* to simplify the creative processes and to distribute the material cheap, fast and to everywhere with internet access. A key *challenge* is the potential for piracy, which is significantly more pronounced with digital technology.[2] 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.[3] Piracy is therefore a particularly important issue for the contemporary content industry in general. In this chapter, however, it will be revealed that *also the legal content market* in the digital era is suffering from an imbalance, and probably to such a degree that it is not sustainable. Authors and performers are continuously getting paid less for providing to a greater digital consumption by the end users. The *creation of new works and performances can be affected by it*

[1] I thank the Peder Sæther Center and Prof. Trond Petersen for the grant that gave me the opportunity to stay at Berkeley Law and write this chapter, and Creos Vederlagsfond in Oslo for *their* financial support. I also thank Prof. Ole-Andreas Rognstad for input and good discussions in the process of holding the presentation at the ATRIP 39th online Congress, and while writing the chapter.

[2] Remuneration report EU (2015), p. 62.

[3] Terje Gaustad and Irina Eidsvold-Tøien. *Mangfold i spill: Digitalisering av kultur og medier i Norge Opphavsrett, håndheving og Mangfold.* Universitetsforlaget (2021), p. 69–82.

and will most probably have a negative effect on diversity along the aesthetic–expressive dimension.[4]

In a report written by Economics Europe and IVIR for the EU Commission in 2015, the observation is that "[e]merging 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."[5] Similar thoughts are expressed in the EU's Impact Assessment of 2016: "While online content services have become essential for the generation of revenues, rightholders face difficulties when seeking to monetise and control the distribution of their content online. There is a growing concern about the sharing of the value generated by some of the new forms of online content distribution."[6] The same is stated in a study for the WIPO Standing Committee for artists and performers: "[a]ll in all, the goals of authors, composers and performers seeking fair remuneration for their work, have not yet been achieved despite their efforts." Specifically addressing the performers' positions, it is stated: "Performers rightly have the feeling that they are doing all the work of creating the music, recording the music, promoting the recordings and driving fans to the platforms – yet everyone seems to be getting rich except the performers."[7] And, in an opinion from the European Copyright Society addressing selected aspects of the implementation of Articles 18–22 of the Directive (EU) 2019/790 on Copyright in the Digital Single Market (the DSM Directive), it is referred to "a well-established body of empirical studies that shows an enormous disparity between the earnings of winners-take-all-star authors and performers, as well as the persistent precariousness of the financial situation of the vast majority of creators and performers."[8]

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4 Gaustad (2022), p. 69.

5 Economics Europe and IVIR, University of Amsterdam: Remuneration of authors and performers for the use of their works and the fixations of their performances, Contract number: MARKT/2013/080/D SMART 2015/0093, p. 18.

6 European Commission, Commission Staff Working Document, Impact Assessment on the modernisation of EU copyright rules, Brussel, 14.9. 2016 SWD (2016) 301 final, Part 1, p. 132.

7 Study on the artists in the digital music marketplace: economic and legal considerations. Christian Castle, Esq. and Prof. Claudio Feidjo. WIPOs Standing Committee on Copyright and Related Rights Forty-first Session Geneva, June 28 to July 1, 2021, p. 50.

8 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, June 8, 2020.

In this chapter I will follow up on the imbalance claim by presenting an empirical study of the Norwegian music sector in 2019 (section 2).[9] The study was prepared for the Norwegian Government as a background for their measures to govern the development in the cultural field. I was project manager for the work. Even though the data is collected from the *music sector* in *Norway*, it does not minimize the relevance of the findings for *other content* and *other countries* where digitalization and internet technology are key components of the market, as I see it.[10] Norway is a global leader in technology,[11] and there is no indication that the trends discussed in the report would not be relevant for other countries and other industries as well. It should also be added that a similar study was carried out one year earlier, surveying the implications of digitalization for the value chain in film and TV series, and it found the same tendencies with regard to the cash flow to the creation stage (authors and actors) for audiovisual content.[12]

After the presentation of the findings of the study (section 2), I will investigate some possible explanations for how this development could happen (section 3) and discuss the sufficiency of current legislative instruments to deal with the situation (section 4).

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[9] Ministry of Culture, *What now? The impact of digitization on the Norwegian music industry* (2019) (hereafter referred to as *Music report (2019)*). The digital version is available: https://www.regjeringen.no/contentassets/94e99440dd604be1836c4543fdb92cb6/what-now---the-impact-of-digitization-on-the-norwegian-music-industry---english-summary---june-2019.pdf.

[10] Ruth Towse, *Dealing with Digital: the economic organisation of streamed music*. Media, Culture & Society (2020), p. 1474, Sebastian Felix Schwemer, *Article 17 at the intersection of EU Copyright Law and Platform Regulation,* NIR 3/2020 p. 400, Martin Senftleben, Christina Angeloupolos, Giancarlo Frosio, Valentina Moscon, Miquel Peguera, Ole-Andreas Rognstad. *The Recommendation on Measures to Safeguard Fundamental Rights and the Open Internet in the Framework of the EU Copyright Reform.* European Intellectual Property Review (2018), p. 149–163, Sebastian Schwemer, Jens Schovsbo. *What is Left of User Rights? – Algorithmic Copyright Enforcement and Free Speech in the Light of the Article 17 Regime*. Paul Torremans (ed), Intellectual Property Law and Human Rights, 4th edition: Wolters Kluwer (2020), p. 1–17, Yngvar Kjus, Roy Aulie Jacobsen. *Will the EU's directive on copyright in the digital market change the power balance of the music industry? Views from Norway.* Nordisk Kulturpolitisk Tidsskrift, year 25, 1/2022, p. 28–42.

[11] Arnt Maasø, Anja Nylund Hagen. *Metrics and decisions-making in music streaming*: The International Journal of Media and Culture (2020) p. 18–31.

[12] Terje Gaustad, Marcus Gjems-Theie, Irina Eidsvold-Tøien et al., *Utredning av pengestrømmene for norske filmer og serier* [Report on the cash flow for Norwegian films and series]; BI:CCI (2018), p. 65. See the digital version (only in Norwegian): Høring - utredning av pengestrømmer i verdikjeden for filmer og serier - regjeringen.no.

2. THE NORWEGIAN MUSIC SECTOR STUDY

2.1 A Classical Value Chain

The mandate of the abovementioned music report for the Norwegian Ministry of Culture comprised investigation on possible *changes in the cash flow* in the music industry after digitalization and the *impact this might have on the market positions* of the various links in the music industry's value chain.

As a point of departure for the study, the report referred to the classical value chain for music production. The creation stage (composers and lyricists) is the basis for value creation in the culture economy, followed by the performance (musicians, conductors and vocalists), the production (music companies ("labels") or master owners), the distribution (platforms, concert halls) and the end users (users, consumers). The study focused on the *changes in cash flow* from the users to the various stages of the value chain, *market shares* and *positioning between the parties*, post-digitalization.

Note: One assumes that for subsequent investments in the production and distribution stages, the creation and performance stages must receive sufficient remuneration to sustain the creation of new works and performances.

Figure 8.1 Classical value chain

2.2 Income Decrease for Authors and Performers

The findings of the report show that, relatively speaking, *the income of authors and performers are constantly decreasing in the digital era* and that the variety of musical works is minimized.[13] At the same time, the market shares of the platforms and streaming services are increasing dramatically over time.

The report shows that cash flow to authors and performers is reduced in the digital economy, and that these parties receive a smaller share of the total market revenue compared with the analogue era, in favor of new actors in the music field – streaming platforms such as Spotify and YouTube.

The following describes the main findings of the report, which made it possible to conclude on the beforementioned issues and documented *the impact of digitalization on the music industry* in Norway.

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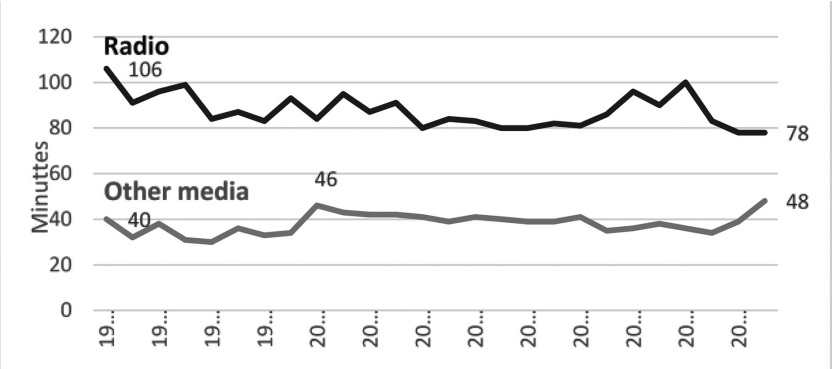
[13] Music report (2019), p. 135 et seq.

2.2.1 Increased use of music after digitalization

Numbers in the report show that Norwegians listen to more music than ever. If there is a loss of revenue for music composers and performers, we must look for *other explanations than a decline in demand*.



Note: (corresponds to Figure 4.2 on p. 53 in the report). The figure shows that Norwegians listen to more music than ever (on media other than radio).

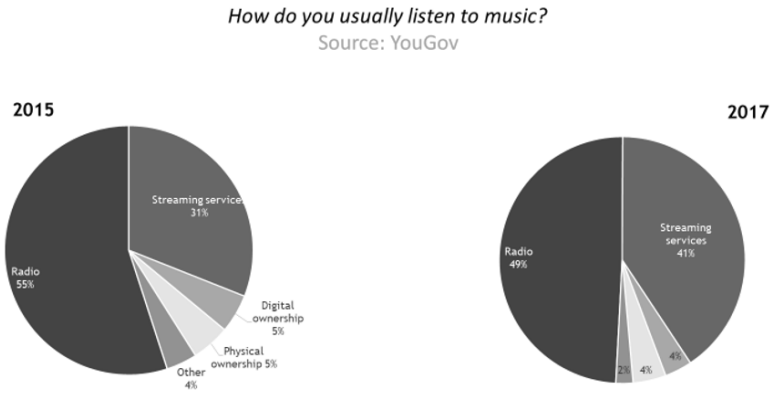
Figure 8.2 Historical changes in pattern of music listening

The media or *sources of consumption* are radio, vinyl albums, cassettes, CDs, MP3 players, audio files downloaded from the internet, and streamed internet files. Traditional radio is still the biggest medium, but it is constantly decreasing. Here we also find a great deal of unconscious listening, in contrast to "on-demand" streaming, where the listener actively is choosing what to hear. We do not know if the numbers for radio listening would have been so high if radio was not free and "unconscious" (for instance in a car), or if the radio "demand" for music will be upheld (since it is unconscious) and would *turn towards another listening medium*.

Figure 8.3 shows that radio media is continually losing ground.[14]

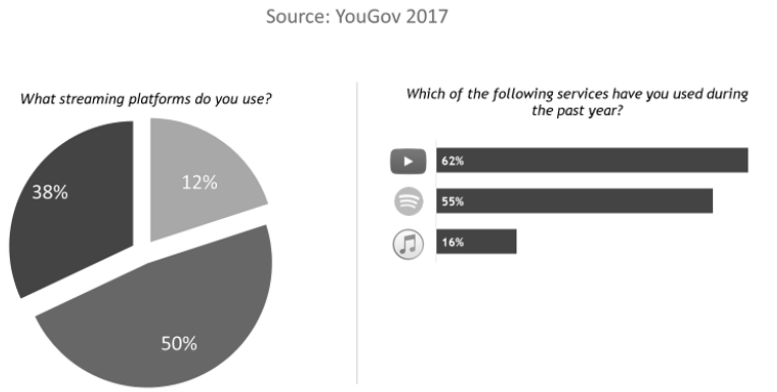
Figure 8.4 shows that streaming services have seen a dramatic growth in recent years, and YouTube and Spotify are the most popular platforms.

[14] The data collected were compiled too early to include the impacts of the switch to Digital Audio Broadcast (DAB), but this change is expected to considerably intensify the downward trend in radio media.



Note: The report refers to surveys from YouGov, indicating that streaming services have grown by 10 percentage points in two years, and they continue to grow (Towse (2020), p. 1473).

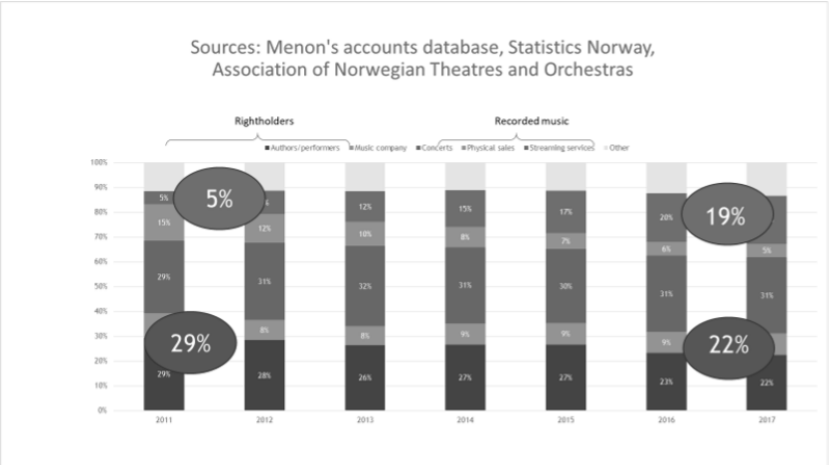
Figure 8.3 How do you most often listen to music?



Note: (corresponds to Figure 4.4 on p. 54 of the report): Four out of five people use streaming services. YouTube is the most frequently used platform for new music searches.

Figure 8.4 Which services have you used for music searches?

The report reveals that *authors and performers have seen a reduction in earn-*



Note: (corresponds to Figure 3.8 on p. 45 of the report): The figure shows that rightsholders, especially authors and performers, are receiving a continuously smaller share of the music market. Streaming companies are winning the growth in music use and market shares.

Figure 8.5 Changes in market position as a consequence of digitalization

ings in recent years, despite an increase in music use.[15] The numbers from the music report show that streaming services pay less to artists and authors than comparable income streams at the analogue stage.[16]

2.2.2 Change in the balance of power between the market players

Market growth has occurred mainly in streaming services and large platforms. Streaming services have a market share of 50% and have had an increase of more than 10 percentage points in two years. Composers and performing artists have seen a decline of 7 percentage points of the total turnover from 2011 to 2017, while streaming services had an increase of 15 percentage points in the same period. YouGov surveys show that YouTube is by far the largest arena for listening and searching for new music, with 62% stating that this is the medium they use.

Despite a seemingly slight increase of income from the concert market, authors and performers do not benefit from the increase in this market either. Since income from recorded music has decreased, the income from the concert market now comprises a proportionately larger share of authors' and

[15] Music report p. 45.
[16] Music report p. 45.

performers' total income, not because concert revenues by themselves have increased.[17]

A part of the conclusion of the report is that there has been a *change in the balance of power* in the music industry.[18] The platform services stand for a significantly larger share of turnover in the field than before. It means that the revenue growth we have seen over the period to a greater extent has *accrued to the players in the end market than the actors upstream in the value chain* – the creators and the performers.[19] For recorded music it is not only the technology that has changed, but also the business model – which also has significant economic implications for liquidity and investment ability.[20] Digitalization has led to a change in the dynamics of the music industry. In the end market, a few new players take over a larger share of turnover in the industry. At the same time, we see that this goes beyond the authors and the performers, who represent a smaller share of the total earnings in the industry compared with previous times.

The music report also confirms that most authors and performers are males, and they are earning more than females.[21] Digitalization has not changed these structures. It looks as if more females are making it into the middle-income category, but there are far fewer of them in the higher-income group. This most likely has consequences for the diversity of expressions.[22] If fewer women are writing and performing music, then fewer with female experiences and perspectives are expressing their minds and their life experiences through music.[23]

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[17] Music report p. 76 et seq.

[18] Music report p. 46.

[19] Similar is stated in the EU's Impact Assessment on modernisation of EU's copyright rules (SWD (2016), p. 132.

[20] Where the consumer previously bought a CD and paid a fixed lump sum that gave the right to hear as much or as little as one wanted in the future if one wished, it is today the market share from actual listening that provides revenue. The income also comes in *after the listening*, as opposed to physical purchase, where the income came *before the listening* and completely regardless of the amount of listening. Based on this change – from an economy based on copy sales to an economy based on consumption – there is reason to believe that one in the CD economy had greater income than today: The consumer paid a fixed lump sum, and if the record was not listened to, it had no consequences for the rightholders, as the money transaction had already happened. Today the situation is the opposite. More on this in the Music report p. 46.

[21] Music report p. 126.

[22] What does Norwegian cultural life look like?: https://www.balansekunst prosjektet.no/statistics (visited May 2022). The statistics show that 69% of the music in Norway is produced by men, and 31% by women.

[23] The report also shows that digitalization has moved more women into music teaching than music composing and performing, Music report p. 128. The Norwegian Cultural Council is working for a greater diversity in Norwegian culture: Deposit

2.3 Implication of Current Business Models

While the report shows the decrease in authors' and performers' overall income, it also demonstrates that the different *business models for streaming services* have not been beneficial to the creatives compared with other rightholders. The so-called *pro rata business model*, which is used by the large streaming services today (like Spotify), means that the subscription payment from all customers goes to a single pot, where the payment to the rightholders takes place on the basis of market share. Many music organizations have advocated instead to use a so-called *user-centric business model*. A user-centric business model means that payment from consumers' subscription fees is paid exclusively to the licensees to whom this subscriber listens. Such a model establishes a *more direct relationship between the consumer and licensees* in the value chain, and the principle will to a greater degree be *similar to a copy logic*; the share of what the individual customer pays goes to the person who created, performed and produced what the customer pays for. Preliminary studies seem to have an uncertain conclusion on the consequences of such changes in business model, though.[24]

2.3.1 The split between the record labels and the performers

The record labels had their "golden age" of income from 1990–2000 (worldwide) – having its best year in 1998.[25] The income situation seems to have stabilized since 2010 – after some turbulent years – also including the digital stage (see Figure 8.6).

Numbers from a survey presented in the music report[26] show that *performers lose income* if they *choose artist contracts*[27] instead of *licensing the music*

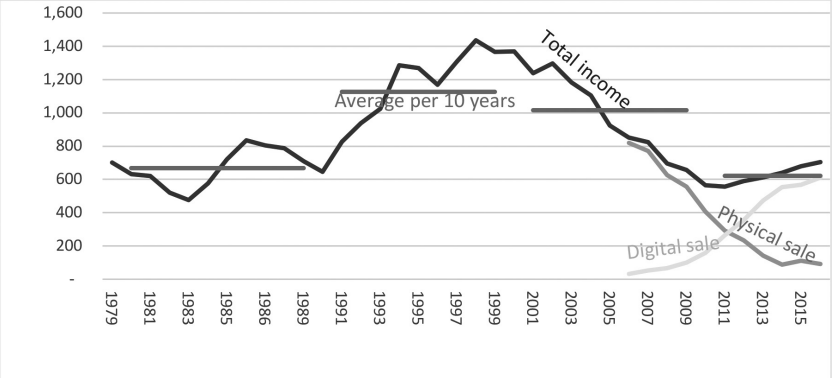
Report from the Ministry of Culture to the Norwegian Parliament, *The power of culture Cultural policy for the future*, St. 8 2018–2019, p. 10.

[24] See https://www.synchtank.com/blog/a-centric-of-the-light-what-user-centric-licensing-means-for-music-publishers/ (visited May 2022).

[25] Music report (2019), p. 36 cf. Audun Molde. *A history*. Oslo: Cappelen Damm (2018).

[26] Music report p. 87.

[27] An artist contract is the typical record label contract, where an artist enters into an agreement with a record company. Parties are the *performer* and the *record company* (producer, master owner). The agreement is characterized in that a producer finances a recording of a performer's performance and obtains an independent right in her performance (master's rights, NCA § 20). The performer will have an independent right in her performance (performance, NCA § 16). The composer's right in a sound recording (NCA §2 cf. § 3) is often handled by a collective organization (Tono in Norway). There are therefore three licensees in a sound recording: the author, the performer and the producer. In summary: The artist enters into an artist agreement with a record company that finances the recording. In exchange the artist gets royalty of the sale. In a regular



Note: Numbers in fixed 2017 prices (KPI-modified).
Source: IFPI

Figure 8.6 Record labels total income (worldwide) from 1979 to 2016

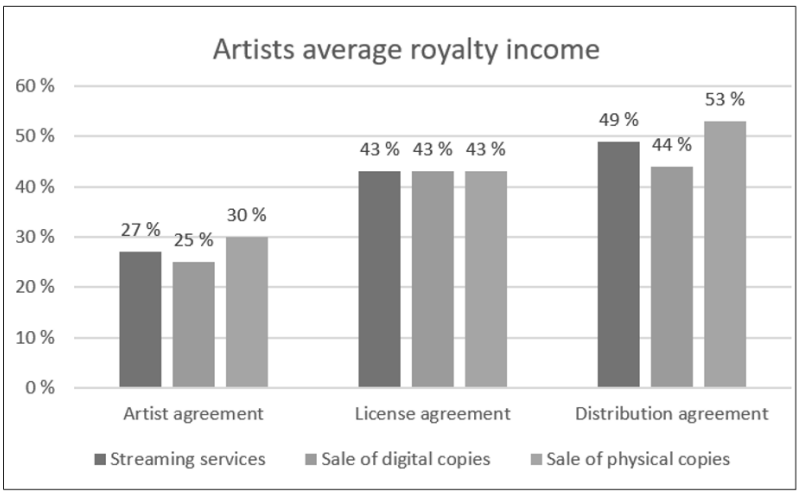
themselves.[28] That issue concerns *the split* in income between artists and producers, which until now has been difficult to get information about from the record labels. Such information is important to survey the development in position between the actors in the music field, and also to control that the royalty payment made is correct.[29] The EU's remuneration report confirms the lack of transparency in these matters: "…there is a lack of transparency of

artist contract, the record company will be the owner of all the material recorded during the contract period. The company is responsible for risk and all expenses. The artist transfers the rights to make a recording, copying and distribution. There has been little transparency in the contracts between labels and artists, and difficult to get an overview on *what percentage the royalty is*, and *what it takes* to release the royalty, see Remuneration report EU (2015), p .8.

[28] License agreement covers the situation when the holder of the master rights transfers her rights to an (other) record company. The parties in such an agreement are *the master owner* and *the record company*. This is a common agreement, for instance when a Norwegian record label transfers its right to a record company abroad, or if an artist herself has financed a recording and enters into a license agreement with a record company. An artist agreement is not natural where the artist herself owns master's rights and holds producer rights. In summary: The artist enters into a license agreement with a record company, where the artist herself finances the recording and allows a record company to get an *exclusive license* for a *limited period* in a *given territory*. The company's main tasks then will be *marketing* and *distribution*.

[29] WIPO's study on artists in digital music (2021), p. 50ff.

the remuneration arrangements in the contracts of authors and performers in relation to the rights transferred."[30]



Note: (corresponding to Figure 4.15 in the report p. 74) Artists' average royalty percentage in contracts with record companies.

Figure 8.7 Artist average royalty income

As Figure 8.7 shows, performers get a better royalty position *by licensing* the music than by entering into an *artist contract* with the record company. This can seem obvious, because in the former situation the artists define the terms to a greater extent. If the artist is the master owner, she can *decide what royalty percentage* she shall have and *when royalty is released*. However, artists still hold a weaker negotiating position than the labels, both when *demanding a position as a master owner* and *by setting the terms*. This is also emphasized in EU's impact assessment, prior to the DSM Directive.[31]

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[30] Remuneration report EU (2015), p. 8.

[31] Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC (Text with EEA relevance). There is a presumption for the creatives being in a weak bargaining position; DSM preamble, recital 72: "Authors and performers tend to be in the weaker contractual position when they grant a licence or transfer their rights…" cfr. Remuneration report EU (2015), p. 4.

Previous figures showed changes in the music market (Figure 8.5) and revealed that the record labels *have had hardly any change* of position in the music market in the digital era. At the same time, numbers from the report show *a great reduction* in the relative income *for artists and composers* in comparison with the income from the physical sale of music.[32] As I see it, this means record labels have been safeguarding their position by taking a greater part of the total income from sales of recordings.

2.4 Summary – Findings from the Music Report

The music report confirms that business models and remuneration schemes have not been beneficial to stabilize authors' and performers' position and income situation in the digital era.[33] Hence, it adds to the picture drawn by other sources, examples of which were given in the introduction. The findings of the study suggest that there is a need to do something about the situation, which I will discuss after having reviewed the technological, legal, and commercial background of the situation that is documented by the music report.

3. THE TECHNOLOGICAL, LEGAL, AND COMMERCIAL BACKGROUND SHAPING THE CURRENT STATUS

3.1 Technological Background

The internet and digital technology have changed tremendously over the years. At the time of the internet's establishment around 2000, the internet was *more of a transport conduit than a market.* The regulations *sought to ensure the efficiency and growth of the internet*, more than anything else. Yahoo and Amazon existed, but not Facebook, Twitter or YouTube.[34]

Digital technology and *access to larger bandwidth* laid the technological foundation for the development and changes in the music field. Production and distribution of music and audiovisual content shifted from a physical to a digital format and facilitated great market changes. Norway has a very high internet coverage and a high level of daily usage of the internet (91%).[35] This

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[32] Music report p. 45.

[33] Music report p. 1, 45 and 46. Similar is stated by Towse (2020), p. 1474 and the WIPO study p. 49 in connection to the business model.

[34] WIPO's study on artists in digital music (2021), p. 4.

[35] Towse (2020), p. 1472, cf. www.statista.com.topics/4258/media-usage-in-norway.

makes the findings in the music report relevant to examine different aspects of the development in the streaming economy.

As mentioned above, the remedies for artists and authors to *create a work* or *a performance* have also changed. The simplicity in making and sharing recordings, for instance, or making changes in a score or adapting a new part into something existing, are a few examples of how digitalization has changed the whole production line for works and performances.

The digital age and technological advances have also created several alternative ways through which the creatives can *reach out to their audiences*.[36] The new opportunities require *new business models* that can handle the new ways of exploiting works and performances to the audiences. As it is now, though, the market seems to have difficulties in finding business models that are balancing the income streams in a way that secures all links in the value chain a fair share of the various revenues.[37]

3.2 Legal Conditions

The *legal situation* that enabled the development and changes in the market derives in part from the "Safe Harbor Agreement," [38] the main principles of which were later put into the E-Commerce Directive.[39] The EU's privacy law forbids movements of its citizens' data outside of the EU, unless it is transferred to a location which is deemed to have adequate privacy protections in line with those in the EU. The Safe Harbor Agreement, signed by the EU and the US in 1998, was meant to fulfill the requirements in the EU's privacy law, and thereby ensure free flow of data between the continents at a time when the

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[36] From the survey in the Music report, a young violinist in Norway, with capacity of using the digital technological tools, could inform that she had gotten a new, huge online public in Japan, which also laid the ground for physical concerts in Japan at a later stage.

[37] WIPO's study on artists in digital music (2021), p. 49.

[38] A *safe harbor law* states that certain types of behavior are not considered violations as long as they fall under a given rule. The "Safe Harbor Agreement" in this connection points to the agreement between the EU and the US on the principles on how data should be transferred between the EU and the US to be "safe harbor" (legal). The principles are expressed in the Commission Decision of 26 July 2000 pursuant to Directive 95/46/EC (EU's Data Protection Directive) of the European Parliament and of the Council, on the adequacy of the protection provided by the *safe harbor privacy principles.*

[39] Directive 200/31/EC of the European Parliament and the Council of 8 June 2000 on certain aspects of information society services, in particular electronic, in the Internal Market, [2000]-commerce OJ L 178 1–16. Similar is stated by Sebastian Felix Shwemer. *Article 17 at the intersection of EU Copyright Law and Platform Regulation*, NIR 3/20, p. 400.

internet was established as an infrastructure. If the guidelines were upheld, it exempted companies from liability for the data transferred between them. The terms implied, among other principles, that the transfers should be of a strictly *technical nature* and that the services should *not deal with the content*.[40]

In 2000, the EU adopted the E-Commerce Directive, which expanded on many of the same principles as the Safe Harbor regulation. The main purpose of the E-Commerce Directive was *to secure the internet as an infrastructure*. Therefore, it exempted European transfer and storage service providers from liability to a great degree. Facilitating a high level of activity on the web was considered to be more important than introducing measures that might prevent the introduction of new services and the internet as an infrastructure.[41] One of the goals at the EU level was to facilitate more jobs, in order to increase the EU's competitiveness, especially vis-á-vis the US. Freedom of expression was central to the priorities of interests.[42] Another aim of the E-Commerce Directive was to ensure further integration in the EU community, by allowing *free competition* in *one common market*, comprising the *digital market*.[43]

Articles 12–14 of the Directive required that Member States should not hold storage and transfer service providers (ISSPs) liable for unlawful information that was uploaded to the internet by a third party. Such providers were *not*

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[40] The seven main principles in the Safe Harbor Agreement were: (1) The data subject should be informed that their data has been collected, how it will be used and how to contact the data holder for any queries, (2) The data subject should be able to opt out as well as forward the relevant data to another third party, (3) The transfer of any data can only happen with a third party that meets the required data protection principles, (4) A reasonable effort must be made to keep the data safe from loss/theft, (5) The data must be relevant and reliable for its original purpose of collection, (6) The data subject should be able to access, correct and delete any information held about them, (7) There must be effective means of enforcing these rules. The Safe Harbor Agreement was later *ruled invalid* by the European Court of Justice (EUCJ) on 6 October 2015 (Schrems I: C-362/14) and led to the creation of the EU–US Privacy Shield, which also was found invalid by EUCJ in Schrems II (C-311/18).

[41] Proposition No. 31 (2002–2003) to the Odelsting, *Om lov om visse sider av elektronisk handel og andre informasjonssamfunnstjenester* [Regarding Act relating to certain aspects of electronic commerce and other information society services] (The Electronic Commerce Act, p. 6, cf. the Directive's preamble, recital 5).

[42] The Directive's preamble, recital 2 and 9. It also appears in the preparatory works for the Electronic Commerce Act, as the Directive was implemented in Norwegian law several years later. See Proposition No. 4 (2003–2004) to the Odelsting *Om lov om endringer i lov om visse sider av elektronisk handel og andre informasjonssamfunnstjenester (ehandelsloven)* [Regarding Act relating to amendments to the Act relating to certain aspects of electronic commerce and other information society services (The Electronic Commerce Act)], p. 13 et seq.

[43] The Directive's preamble, recitals 2 and 3.

considered *making the content available independently*.[44] The E-Commerce Directive did not regulate the circumstances under which a service provider could be held liable – that was a matter for regulation in national law[45] – and the role of an ISSP did not impose any general obligation to monitor the activity.[46]

According to Norway's legal obligations under the EEA Agreement, corresponding provisions on exemption from liability were implemented in Norwegian law through the Electronic Commerce Act.[47] In parallel, an *exception to the exclusive right* of a copyright holder was incorporated into the Copyright Act, to establish a correlation between the copyright law and the Electronic Commerce Act.[48] Should *occasional or temporary reproduction* of copies of a work or a performance occur as part of a technical process to enable the use or transfer of the content, this should *not be considered to lie within the scope of the copyright* protection.[49] A liability exemption would not have been efficient, if one at the same time *required consent in accordance to the Copyright Act* because the action was characterized as a *reproduction of a copy* in a copyright sense. It would also have slowed the transfer process and created transaction costs.

The transfer activity of content, which in Norwegian law is described in section 4 of the Copyright Act, was intended to lie outside both the Copyright Act and the Electronic Commerce Act, and implies that if the internet player acts as described, neither provisions in the Copyright Act nor in the Electronic Commerce Act would apply. Furthermore, should transfers take place within the scope of the copyright protection scheme, the ISSPs would be exempted from liability if the requirements of the Electronic Commerce Act were fulfilled. The regulations in the directives and their implementation into national laws defined the internet players' scope of commercial leeway at the time.

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[44] This is quite the opposite regulation of the DSM Directive art. 17 (EU/2019/790), which will be presented later on.

[45] E-Commerce Directive preamble, recital 8.

[46] E-Commerce Directive article 15.

[47] Act no. 35 of 23 May 2003 relating to certain aspects of electronic commerce and other information society services: section 16, exemption of liability for certain transfer and access services ('mere conduit'), section 17, exemption of liability for certain caching services ('caching'), section 18, exemption of liability for certain storage services ('hosting').

[48] The obligation to ensure such harmonization is based on guiding principles in article 5.1 of the Information Society Directive.

[49] Section 4 of the current Copyright Act, section 11a of the previous act, defines temporary copies under certain circumstances as lying outside of the right to exclusivity and the regulation in the Copyright Act.

This was the legal backdrop against which the current market situation arose. Internet players such as YouTube established their services in accordance with the regulations mentioned above. They claimed only to be *hosts for other parties' content*, not liable if they did not have any contact with the material. The platforms earned money by organizing and promoting the content, including indexing, presenting, and categorizing the material.[50]

In the preamble to the new copyright directive, the DSM Directive of 2019, the classification of the ISSPs' activity was revisited and analyzed:

> Online services are a means of providing wider access to cultural and creative works and offer great opportunities for cultural and creative industries to develop new business models … Legal uncertainty exists as to whether the providers of such services engage in copyright-relevant acts, and need to obtain authorisation from rightholders for content uploaded by their users who do not hold the relevant rights in the uploaded content, without prejudice to the application of exceptions and limitations provided for in Union law.[51]

The DSM Directive aimed at solving this legal uncertainty by obliging *certain, big platforms to pay licenses to the rightholder* for the content uploaded by private users.

During the process from the Commission's *proposal* for the DSM Directive until its final adoption, the platforms' activities were redefined from *suppliers of information services* (the Commission's proposal) via *services for content sharing* (the wording initially adopted by Parliament) to the definition in the DSM Directive today (*communication to the public*).[52] The changes in perspective made it possible to place greater emphasis on the *use* of the creatives' material *on the platform*, instead of the more passive *storage service*. A distinction is also established between *the platforms' activities as service providers* for users, and the platforms' active roles as *facilitators and disseminators of content*. Through the definition, it is clearly stated that a platform falling under the definition in DSM Article 17 is *independently making the content available*, regardless of the user uploading it.[53] From this perspective,

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[50] Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC preamble, recital 62.

[51] DSM preamble, recital 61.

[52] 'Online content-sharing service providers', art. 17 of the Directive adopted. 'Use of protected content by information society services', art. 13 of the proposal for the Directive.

[53] Through their cultural policy channels, rightholders in Norway and the rest of Europe have asserted that the platforms independently *make content available*, and have long demanded changes. See, among others, IFPI Global Music Report 2017, p. 29.

it can be asserted that the Electronic Commerce Act still applies to the actual storage and transfer activity, while the DSM Directive applies to the platforms' functions as *content providers*.[54]

The concept of online content-sharing service providers (OCSSPs) is defined in the DSM regulation. Although the *economical delimitation for an OCSSP* is clearly defined,[55] there can be challenges in how to implement and consider the demand for *the requisite degrees* of "organization and promotion activities" baked into the definition.[56] For the time being, it is sufficient to identify the potential challenges related to defining these terms.

It follows clearly from the DSM that the role of an OCSSP is complementary to the role as a host and a service provider in the E-Commerce Directive:

> When online content-sharing service providers are liable for acts of communication to the public or making available to the public under the conditions laid down in this Directive, Article 14 (1) of Directive 2000/31/EC *does not apply to the liability* arising from the provision of this Directive on the use of protected content by online content-sharing service providers.[57]

On the contrary, if the platform is not covered by the definition of an OCSSP in the DSM Directive, the national implementation of the E-Commerce Directive is applicable.

It remains to be seen whether or to what extent the new platform liability regime in the DSM Directive Article 17 and the various national implementa-

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[54] The European Parliament and EU Member States recently made an agreement on changes to the legal environment for online distribution and e-commerce, by passing the Digital Services Act (DSA), proposed by the Commission in December 2020. In the press release it is stated: "The DSA sets out an unprecedented new standard for the accountability of online platforms regarding illegal and harmful content. It will provide better protection for internet users and their fundamental rights, as well as define a single set of rules in the internal market, helping smaller platforms to scale up."

[55] DSM, art. 2 (6).

[56] Cfr. Opinion of European Copyright Society, 27 April 2020, p. 3.

[57] DSM preamble, recital 65.

tions will improve the income situation for authors and performers[58] – at least this seems to be the intention of the legislators.[59]

3.3 Commercial Situation – and Current Remedies

So why is the constant decrease in income for performers and authors, as demonstrated by the music report, alarming?

All copyright regulation, both national and international, states the importance of payment for the use of copyright-protected content, because *it is fair*[60] and *ensures new, cultural production*.[61] In the preamble of the Information Society Directive it is stated that appropriate remuneration is necessary for ensuring that authors and performers will continue their creative and artis-

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[58] Whether the DSM Directive will manage to reach the right balance of interest between the different players in the field (rightholders, platforms and users/consumers) is "loudly" discussed. For a good overview over the implementation process and the content of the DSM Directive, look into Sebastian Felix Shwemer. *Article 17 at the intersection of EU Copyright Law and Platform Regulation*, NIR 3/2020, p. 400; Also Séverine Dusollier, in collaboration with Lionel Bently, Martin Kretschmer, Marie Christine Janssens and Valérie-Laure Benabo Petter. *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*(2020); Axel Metzger and Martin Senftleben. *Comment of the European Copyright Society on Selected Aspects of Implementing Article 17 of the Directive on Copyright in the Digital Single Market Into National Law* (2020); Peter Schiønning. *Implementering af DSM-direktivet i Norden.* NIR 1/2020, p. 175, Vieca Still. *DSM-direktivets förverkligande i Norden.* NIR 1/2020, p. 181; Aurelija Lukoshevins. *The contractual protection of authors in Copyright in the Digital Single Market Directive – does the reality live up to the expectations?* NIR 2019 W16; Eleonora Rosati. *Copyright in the Digital Single Market. Article-by-Article Commentary to the Provisions of Directive 2019/790.* Oxford Universal Press 2021; European Copyright Society; Sebastian Felix Schwemer and Jens Schovsbo, *What is Left of User Rights? – Algorithmic Copyright Enforcement and Free Speech in the Light of the Article 17 Regime* in Paul Torremans (ed), Intellectual Property Law and Human Rights, 4th edition (Wolters Kluwer, 2020), pp. 569–589.

[59] DSM preamble, recital 72, 73. Jens Schovsbo et al. *Reforming Intellectual Property*. *Making sure copyright works – safeguarding authors' and users' rights*: Edward Elgar Publishing Limited (2022), p. 208 ff.

[60] Ole-Andreas Rognstad; *Opphavsrett* [Copyright Law], Oslo: Universitetsforlaget (2019), p. 35.

[61] Jens Schovsbo, Morten Rosenmeier and Clement Salung Petersen; *Immaterialret* [Copyright Law], Copenhagen: Jurist- og økonomiforbundets forlag (2018), p. 47.

tic work.[62] The same is enacted in Norway's national copyright legislation (NCA).[63]

Thus, the copyright ecosystem depends on payment for deliverances to ensure that more content is produced. It also relies on the content being *valued in a fair manner*, both out of a sense of fair-mindedness and because cultural production is not thought to be sustained otherwise.[64] Services that do not acknowledge the content's value attract users at the expense of licensed providers. This depletes the system and counteracts creative development.[65]

The preamble of the Information Society Directive confirms the importance of remuneration being of a certain amount: "If authors or performers are to continue their creative and artistic work, they have to receive an appropriate reward for the use of their work."[66] National legislation also covers the importance of copyright and fair remuneration to ensure investments and production of creative content.[67]

Moreover, socioeconomic reasoning suggests that remuneration must be of a certain amount so that marginal costs are in line with new content.[68] But where is the limit? What is fair remuneration?

The definition of what is fair depends on one's position, market structures and statutory regulations.

In the EU's Remuneration report from 2015, it is stated: "The growth of digital forms of distribution of content represents new and serious challenges for authors' and performers' right to adequate and fair remuneration."[69] The assessment presented two ways of strengthening income for authors and performers: (1) By *expanding* what are *relevant arenas for payment* (2) and/or by *changing the split* between the recipients of remuneration in favor of the creatives.

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[62] Information Society Directive preamble recital 10. The DSM Directive states that it expands on and corresponds with other EU directives, and preamble recital 63 states that the Directive must ensure a high level of copyright protection, which is in keeping with one of the stated objectives of the Information Society Directive.

[63] E.g. section 1 of the Copyright Act states that the law must ensure incentives for cultural production.

[64] Jens Schovsbo (2018), p. 47.

[65] Gaustad (2021), p. 69.

[66] Information Society Directive preamble (Infosoc), recital 10.

[67] Section 1 of the Copyright Act and Prop. 104 L (2016–2017), p. 9.

[68] Erling Eide and Endre Stavang, *Rettsøkonomi* [Business Law] 2nd edition, Oslo: Cappelen Damm (2018), p. 231.

[69] Remuneration report (2015), p. 18.

I have already mentioned Article 17 DSM Directive as a possible remedy for the first point.[70]

Concerning the split and the securing of a fairer share of the value of the content, the DSM Directive expresses in Article 18 the *principle of fair remuneration*. This can be considered a legal premise for the contracts between stakeholders in a recording, securing artists and performers a fair share.[71]

In addition, the DSM Directive contains an important regulation through Article 19, the *transparency obligation* clause. Through this article the rightholders can acquire yearly information to control whether they have received proportionate revenues of the total income for a work or a performance. The DSM Directive also contains an *adjustment clause* in Article 20, enhancing an increase of remuneration if the actual value of a content exceeds the remuneration initially paid.

The principle of fair remuneration is also stated as a *general principle for payment* for the creatives' content, which aims to secure the creatives a proportional and appropriate part of the income.

In an article on the matter of fair remuneration for authors and performers, it is pointed out that *the principle of fair remuneration* in the DSM Directive and the clauses supporting this obligation provide for:

> a "level playing field" for copyright contracts by counterbalancing the inequality, which typically exists between authors and their contractual counterparts…By including even procedural and institutional aspects aimed at transparency, the Directive has ventured way beyond the traditional confines of substantive law. The combination represents an interesting – and according to me – even laudable attempt at making sure that "copyright works".[72]

Further, it is stated that the regulation and the requirement for *appropriate and proportionate remuneration* is no longer voluntary for EU Member States to choose to fulfill or not. The *obligation is totally harmonized.* Defining the level is no longer a national matter either, but a question for the CJEU. The Member States must seek guidance from the EU court to define the concept.[73]

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[70] Yngvar Kjus and Roy Aulie Jacobsen. *Will the EU's directive on copyright in the digital market change the power balance of the music industry? Views from Norway.* Nordisk Kulturpolitisk tidsskrift. Universitetsforlaget (2022), p. 28.

[71] Schovsbo et al (2022), p. 208 ff. In the article the importance of additional regulation is discussed (for instance contract regulation clauses like in ch. 3 of the DSM), to assure a fair remuneration and a real balance between the parties are reached, not just *formal rights.* Also, end user "rights" are enlightened in the article.

[72] Schovsbo et al (2022), p. 208 ff.

[73] Schovsbo et al (2022), p. 208 ff.

Even though the EU through the DSM Directive[74] clearly has an ambition to secure performers and authors a fair share of the value in the digital content market,[75] at this stage it is difficult to anticipate what "fair remuneration" is and whether the regulation itself will be sufficient to change the continuously weakening position of the creatives in the digital market.

Specialist groups express their skepticism of whether the obligations in the DSM Directive are sufficient to secure a fair share to creatives and suggest additional obligations. In the next section I will focus on some other means that have been suggested as additional measures to change the development.

4. SUGGESTIONS TO SAFEGUARD FAIR REMUNERATION FOR CREATIVES IN THE STREAMING ECONOMY

4.1 New or Extended Mandates to National CMOs and Trade Unions

The question is how one can *improve the market balance* and secure creatives a *fair share* of income from streaming their content – in addition to the attempts the EU is initiating through the DSM Directive.

I believe changes can be achieved, and a fairer sharing of the value of the content, by letting collective management organizations (CMOs) and unions handle the rights on behalf of authors and performers. In the following this will be substantiated.

A CMO is defined in the CMO Directive[76] Article 3 as "any organisation which is authorised by law or by way of assignment, license or any other contractual arrangement to manage copyright or rights related to copyright on behalf of more than one right holder, for the collective benefit of those rightholders, as its sole or main purpose." In addition, the CMO either has to be "owned or controlled by its members" or "organised on a not-for-profit basis"

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[74] And also through the tightening of the regulation in the E-Commerce Directive with the DSA Directive (Regulation of the European Parliament and of the Council on a Single Market for Digital Services (Digital Services Act) and amending Directive 2000/31/EC).

[75] DSM preamble, recital 61: "Those licensing agreements should be fair and keep a reasonable balance between both parties. Rightholders should receive appropriate remuneration for the use of their works or other subject matter."

[76] 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.

to be within the definition of a CMO according to the directive.[77] Often CMOs handle only certain, *specific rights*.[78]

In addition, there are *unions* for different kinds of authors or performers.[79] Unions have *not* traditionally *administered their members' rights*. Instead they elaborate standard contracts and negotiate tariffs on behalf of their members. A union's counterpart is often an *organization representing the "other side"* – producers, employers, or platforms. Lately there have been some changes in the rightholder market structures in Norway. In the audiovisual area, for instance, a union for rightholders in film and TV series now *administers some of its members' rights* and negotiates tariffs and contracts with distributors like Netflix, to secure the members revenues from the streaming of their content.[80]

The regulations and the market structures within the creative industry is quite complex.[81] A CMO or a union has more expertise, experience, and a stronger bargaining power than a single performer or author to negotiate contracts within this realm.[82] The importance of *strong bargaining power* is reinforced by the fact that most performers and authors are freelancers. Their position in the market is vulnerable because of their need for a job.[83] This also increases the risk of being pressured into accepting unfair terms.

On that account, I believe that establishing mandates for collective organizations and unions to handle the streaming markets for performers and authors could be a way of securing *higher revenues* for these rightholders, but also securing a *greater degree of transparency*.[84] In the music field, CMOs for composers (and lyricists and publishers) have been crucial for generations to secure composers a decent position in the music market.[85] Numbers from the music report also reveal that a CMO for *composers was able to get a greater revenue from streaming businesses than the performers received* for the *same*

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77 CMO Directive art. 3(a)(i) and (ii).

78 In Norway there are CMOs for *composers rights* (Tono) that also handle rights for publishers and lyricists, Tono is a daughter organization under the international Cisac network: https://www.cisac.org/. In addition we have Gramo, which handles *performer and producer's rights in sound recordings* (https://www.gramo.no/), Norwaco for *audio visual rights* (//norwaco.no/), and F@R, *audio visual rights on film and TV series* (https://filmforbundet.no/fr-vederlagsfordeling-2022/).

79 We have many and strong unions for the rightholders in the content area, for actors, musicians, writers, etc.

80 F@R; https://filmforbundet.no/fr-vederlagsfordeling-2022/.

81 Remuneration report EU (2015), pg. 135; DSM preamble, recital 61.

82 Remuneration report EU (2015), p. 149.

83 This is also expressed in several policy documents and also in the preamble of the DSM Directive; see DSM preamble, recital 61.

84 Lack of transparency is pinpointed as a problem in the EU report, the study from WIPO, and the statement from the European Copyright Society.

85 Towse (2020), p. 1463.

content and the same use through the record labels.[86] That should indicate that CMOs to a greater degree secure rightholders a greater share of the revenue from streaming than the record labels do: "Due to the underlying contractual arrangements, signed artists have less control over the earnings from their performances than song writers, whose CMOs make the deal."[87]

In a digital environment – with global exploitations and distributors on huge platforms like Netflix, YouTube and Apple – *bargaining power* will be of great importance to secure performers and authors of all kinds of content, a balanced position in the market.[88]

As mentioned previously, we have CMOs in Norway owned by the record labels and the artists (Gramo),[89] where the organization administers rights in soundtracks *communicated to the public*. In spite of the data from the report, I still think the record labels' competence, networks and experience can be of benefit for the total revenue level in the streaming market, as long as the revenue is shared in a fair way between the performers and the labels.[90] Gramo, for instance, could have its mandate extended to comprise "making available" rights for the same rightholders. By channeling the cash flow through a CMO, one will ensure transparency and the cash flow shared in a fair manner. Business models are not giving sufficient revenue back to the rightholders,

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[86] Music report p. 94. Performers are getting far less from CMOs than composers. If performers could channel their on-demand rights through a CMO, maybe their revenue stream would become higher. Towse (2020), p. 1474.

[87] WIPO's study on artists in digital music (2021), p. 49; Towse (2020), p. 1474.

[88] DSM Directive, preamble, recital 72: "Authors and performers tend to be in the weaker contractual position when they grant a licence or transfer their rights, including through their own companies, for the purposes of exploitation in return for remuneration, and those natural persons need the protection provided for by this Directive to be able to fully benefit from the rights harmonised under Union law."

[89] About Gramo: https://www.gramo.no/.

[90] As the Music report reveals, this has not been the practice so far. Labels are keeping their position in the digital era, while performers are left behind. CJEU states in the RAAP-case (C-265/19), to *keep the revenue by themselves*, is not *sharing* and is not "ensuring further creative and artistic work of authors and performers, by providing for harmonised legal protection which guarantees the possibility for them of securing an adequate income and recouping their investments" (RAAP, recital 96). To compensate the loss of income by taking a greater share of the total revenue, like the producers seem to have done in order for their income stream not to be reduced as much as it would have been, is not securing the performers a "proportionate" part of the value as the DSM requires, as I see it. But where this line goes will at the end be up to CJEU to decide.

either.[91] On that account it is necessary to get a whole new, comprehensive system in place.[92]

I therefore support the different views and the proposed suggestions from WIPO and the EU's remuneration report: to *let the CMOs and unions handle the rights for the creatives*.[93] CMOs and unions also have *transparency* and *good governance* obligations through the CMO Directive.[94]

4.1.1 Unwaivable rights handled by CMOs

The preamble of the DSM Directive refers to already existing collective licensing schemes as a possible solution for implementing obligations under the DSM.[95]

In Norway there is a well-functioning *compulsory license system* in place when music is communicated to the public (NCA § 21). A provision in the NCA stipulates that remuneration must be paid to Gramo[96] for music that is performed publicly.[97] The statute regulating Gramo's mandate, explicitly *excludes on-demand* use from the compulsory license (NCA section 21, paragraph 1, 2nd sentence). On-demand use is a typical streaming activity. Consequently, on-demand use becomes part of music artists' exclusive rights, most often transferred by the artists to a record label company.

As I see it, there is no reason why *a stream* should not be treated *comparably to a recording* in the old, analogue regime – most often transferred to the record labels from the artists and then within the record labels' traditional business area. A stream is more comparable with "communication to the public," and can be governed by the different CMOs, often established

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[91] WIPO's study on artists in digital music (2021), p. 24–39;Towse (2020), p. 1474 and 1475.

[92] WIPO's study on artists in digital music (2021), p. 49, 50; Towse (2020), p. 1474; https://www.theguardian.com/music/2021/apr/10/music-streaming-debate-what-songwriter-artist-and-industry-insider-say-publication-parliamentary-report, visited January 2022.

[93] Remuneration report EU (2015), p. 9.

[94] 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, preamble, recital 9.

[95] DSM preamble, recital 23.

[96] See https://www.gramo.no/.

[97] The statute is an implementation of the section 21, subsection 1 of the Copyright Act: "Phonograms of the performances of performing artists may be made available to the public, against remuneration, through public performance and transfer to the public. This does not apply to transfer in such a way that the individual can choose the time and place of access to the phonogram."

nationally, like in Norway.[98] Gramo's mandate could be *extended to include streaming of music*.[99] All income from communicating music to the public is *shared equally* between the record labels and the artists, through obligations in law. By including streams (on demand) and the *making available right* as part of the remuneration right regime and as a "communication to the public," the income from streaming will be shared equally between the record labels and the artists and administered by a CMO. To consider a stream as a part of "communication" to the public is also recommended in the WIPO study[100] and in the remuneration report from the EU.[101]

In the WIPO study it is also recommended to keep performers' streaming rights *outside a recording agreement*: "…equitable remuneration are best fulfilled by a streaming remuneration in the nature of a communication to the public royalty that is outside of any recording agreement, is not waivable by the performer and … collected and distributed by performers' CMOs."[102] The lack of substantial revenues to performers makes it necessary to find new solutions:

> This streaming-fueled success has not trickled down to performers, especially non-featured performers. The more global revenues surge, the harder it is for performers to understand why the imbalance is fair – because it is not. It is also difficult to accept a sustained effort to block fair payments to performers when the record companies have not put their own house in order on performer royalties.[103]

The European Copyright Society expresses similar: "unwaivable right of remuneration that authors or performers cannot transfer (except upon death or for administrative purposes to a CMO) … that could be managed and collected by CMOs" is recommended as a solution to establish a better balance.[104] Also

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[98] Ruth Towse, in her article on the economy in streaming services, is also questioning the necessity of a making available right: "The creation of a making available right as an individual right (rather than a collective right entitling performers to equitable remuneration) has if anything reduced payment to performers", Towse (2020), p. 1474.

[99] Towse (2020), p. 1474. Towse finds that CMOs are able to get more income to songwriters from the online market than the artists get through their contracts with the record labels.

[100] WIPO's study on artists in the music field (2021), p. 49, 50.

[101] Remuneration report EU (2015), p. 9.

[102] WIPO's study on artists in digital music (2021), p. 49, 50.

[103] WIPO's study on artists in digital music (2021), p. 43.

[104] *Comment of the European Copyright Society on Selected Aspects of Implementing Article 17 of the Directive on Copyright in the Digital Single Market Into National Law*, 27 April 2020, pg. 16.

policy recommendations in the EU's report on remuneration imply similar solutions.[105]

In my opinion *rightholder organizations or unions* should be given *new or extended mandates* to negotiate contracts with the big platforms and the streaming services regarding licenses and payment for performers' and authors' streaming rights.[106] The structure *should be regulated by* law. *Unwaivable rights* does not prevent the rights *being administered* by a CMO or a union and licensed through an extended, collective license or a compulsory license, since a CMO is only *representing the rightholder*.[107] That would also *simplify the clearance* of the usage of the content.[108]

4.1.2 Contractual limitation of the transactions, no "buyout" contracts

National *contractual obligations and limitations* in the copyright law in favor of performers and authors are also means that can enhance securing the position of performers and authors in the content market.[109] In the EU's report this is identified as one of the policy recommendations to strengthen the position of these rightholders:

> 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.[110]

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[105] Remuneration report EU (2015), p. 9.

[106] WIPO's study on artists in the music field (2021), p. 49, 50, Opinion of ECS (2020), p. 10 and 16. Similar is stated as a *policy recommendation* (nr. 4) in the EU's remuneration report, se. p. 149: "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 organisation and enforcement."

[107] Like it is done in the remuneration right for making sound recordings in the rental directive 8. 2 cfr. NCA § 21 today.

[108] In Norwegian law we have extended collective licenses for any use of rights where a collective organization representative for such rights in Norway on certain condition can let large users get a license for certain types of use (NCA § 57 on the audio visual area).

[109] Policy recommendation 3, in the EU's remuneration report (p. 147).

[110] Remuneration report EU (2015), p. 8.

The policy recommendations in the EU's report are (1) *to specify remuneration for individual modes* of exploitation in the contracts of authors and performers; (2) *limit the scope of transferring rights for future* works and performances and future modes of exploitation.[111] Both recommendations go in the same direction: to limit the scope of the transaction to have greater control of the future income situation of the usage, and reduce the risk of exploitation due to an unsure future value of a transfer. It is seen to be more preferable to have *a new contract for further exploitation*, due to the lack of information of the value of the work *ex ante*:

> 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 in general will be those with less bargaining power).[112]

A demand for *specification of the usage* will also give more transparency to the income situation, which also has been a problem for the rightholders in the digital economy.[113] Even though this might raise the transaction costs and be less efficient than transactions with greater scopes, "buyout" contracts are not recommended. It is almost impossible to foresee the right value of a content at the time of entering a contract.[114] Especially young artists, more unsure of the value of their contribution, will have a great risk in "buyout" contracts. Also in the preamble to the DSM Directive, the EU expresses skepticism towards "buyout" agreements:

> A lump sum payment can also constitute proportionate remuneration but *it should not be the rule*…Member States should be free to implement the principle of appropriate and proportionate remuneration through different existing or newly introduced mechanisms, which could include collective bargaining and other mechanisms, provided that such mechanisms are in conformity with applicable Union law (emphasis added).[115]

Some scholars find the contractual limitations in the EU's DSM Directive *particular*, and a remedy that can "make copyright work again."[116] After placing

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[111] Remuneration report EU (2015), p. 9.
[112] Remuneration report EU (2015), p. 118.
[113] Remuneration report EU (2015), p. 7.
[114] Remuneration report EU (2015), p. 9, Towse (2018), p. 479.
[115] DSM Directive's preamble, recital 73.
[116] Schovsbo (2022), p. 215. The title of Schovsbo's article is "Making sure copyright works- safeguarding authors' and users' rights". Schovsbo is also applauding the position users are getting through the DSM Directive: "With the DSM Directive things

the contractual regulations (DSM Art. 18–22) into the copyright system in general, where national laws often have contractual limitations in the copyright law in order to secure "the weaker part" better,[117] it is stated:

> Art. 18 … is going to change the base line for the assessment. Instead of a focus on making sure that like parties are treated alike, courts relying on Art. 18 … are going to take into account not just "market practices" but also the author's status in copyright including his/her "contribution to the overall work or other subject matter.[118]

I also find these contractual obligations in the DSM promising. In combination with the other measures I have mentioned, I hope we will experience a new era for the revenues for authors and performers in the years to come.

4.2 A Dispute Settlement Body to Decide Fair Remuneration Efficiently

As a non-EU Member State associated with the EU legislation through the Agreement of the Economic Area (EEA), Norway is not yet bound by the DSM Directive, since it has not passed the legislative body of the EEA Agreement yet.[119] It will therefore take some more time to implement the directive in Norway. Nevertheless, Norway has already introduced a *fair remuneration clause* in its legislation when adopting a new Copyright Act (NCA) in 2018, which I think will be of importance to strengthen the remuneration level for authors and artists. The regulation is already forcing the players to meet the obligation the concept is implying.[120]

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might seem to be about to change and some weights to have been added in the scale to the advantage of users. Thus, following Art. 17(7) Member States shall 'ensure that users are able to rely on' the exceptions or limitations regarding (a) quotation, criticism, review and (b) use for the purpose of caricature, parody or pastiche when uploading and making available content generated on online contentsharing services. These specific types of uses are stated to be particularly important for the purposes of striking the balance between copyright (as a property right) and the fundamental rights laid down in the Charter of Fundamental Rights of the European Union (in particular the freedom of expression and the freedom of the arts) (point 70)", p. 216.

[117] In Norwegian law NCA § 67, 2. Paragraph – § 70, there are several statues meant to work in favor of the author/performer.

[118] Schovsbo et al (2022), p. 215.

[119] The EEA Joint Committee.

[120] As a lawyer, I have experienced contract situations on behalf of authors and performers where the concept of fair remuneration in the Norwegian Copyright Act (NCA § 69) obliges the other party to pay more than before, when new rights are being transferred. The regulation makes it easier to state that it is not proportionate to have *more rights transferred* with *no more compensation*.

DSM Article 21 obliges the national members to establish a dispute settlement body to solve disagreements concerning *transparency* and *adjustment issues* (cf. DSM art. 19 and art. 20). However, without at the same time providing for *a dispute settlement body to decide on the fair remuneration* issue in a rapid and cost-efficient way, I fear that the obligation of *appropriate and proportional remuneration* in Article 18 will not be very efficient. Figures from Norway show that there are very few copyright infringement cases taken to court.[121] The copyright system and the underlying ownership of the different exploitation modes is very complex.[122] On that account, the cost of running court cases becomes very high.[123] A dispute settlement body with competence to decide on the fair remuneration issues is therefore crucial to strengthen the position of creatives. It would also *improve the transparency* of the rates paid for the content and settle the conflicts *faster and at a lower price.* Such bodies are already in place for streaming right conflicts on other continents.[124]

4.3 Conclusions

As I have expressed above, the fair remuneration statute and other clauses in the DSM with the intention of *securing the original rightsholders*[125] are hardly sufficient to secure performers' and authors' situation in the digital economy. To accomplish the ambition of the EU's goal with the regulation, I believe that additional measures, like having *performers' and authors' rights unwaivable*, *administered by CMOs* as a part of the communication to the public rights, and maybe in an *extended collective license regime*, should be other tools initiated by EEA Member States. By implementing the different tasks and structures suggested above, this could improve chances that the goal of *a fairer distribution of value* between the different stakeholders in the content market in the digital era is reached to a greater degree.

This will not only make the streaming economy more *sustainable for performers and authors*, but also *strengthen the whole value chain* in the cultural economy in the digital era.

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[121] Eidsvold-Tøien, Irina, Monica Viken. *Hvor effektive er de norske opphavsrettslige håndhevingsregler?* NIR/4, (2019), p. 352.

[122] Towse (2020), p. 1471. This is also expressed in Remuneration report EU, p. 102.

[123] Eidsvold-Tøien, et al (2019), p. 352.

[124] Towse (2020), p. 1468.

[125] DSM art. 17–22.