

# ECSA'S VISION ON HOW EUROPE CAN PREVENT BUYOUT CONTRACTS

An insight into buyouts affecting audiovisual composers and actual solutions to prevent them

Co-funded by the Creative Europe Programme of the European Union



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#### ECSA REPORT

### **EXECUTIVE SUMMARY**

In Europe and all over the world, audiovisual composers and their organisations have launched awareness and education campaigns to stop buyout contracts, which deprive them from a fair and proportionate remuneration. ECSA fully supports those campaigns and pays tribute to all the composers standing against buyouts.

For the last 3 years, our Alliance also launched various initiatives to measure the impact of those practices, to study how they were implemented in Europe, and to propose solutions to prevent those contracts and their harmful effects. In a context where global Video on Demand (VOD) platforms are booming, our survey shows that:

- 53% of our members have experienced buyout contracts.
- 63% have experienced a growth of those contracts in the last three years.
- 66% of them have been offered contracts which forced them to sign away partial rights such as synchronisation or mechanical rights.

A total "buyout" contract refers to a contract covering all services performed by an author, as well as future exploitations, in exchange for a single lump sum payment. **Such a contract means that the author will receive no royalties in the future, regardless of the success of the work.** In addition, the composer is often required to accept that his or her contribution will be qualified as a "work made for hire" (pursuant to the provisions of a non-EU law) and be subject to foreign non-European jurisdictions. If an author refuses or objects, this can have serious consequences on his/her professional opportunities and career.

### **EXECUTIVE SUMMARY**

The European Commission has recognised that those practices raise a challenge for creators, as they impose an extra-territorial application of foreign law in Europe, in contradiction with the 2019 Copyright Directive, as well as several national copyright laws. To prevent abusive buyout contracts, ECSA urges European and national policy makers to take the following actions:

- As many EU Member States have not yet implemented the 2019 Copyright Directive, we urge them to implement Article 18 (Principle of appropriate and proportionate remuneration) in a mandatory manner and ensure it applies to all copyright contracts. France has adopted a similar approach by prohibiting contracts that could deprive screen composers from their right to a proportional remuneration, regardless of the applicable law of the contract.
- We also ask all EU Member States to implement Article 19, which requires authors' contractual counterparts to provide transparent information regarding the exploitation and revenues generated by the works, in a comprehensive and ambitious manner.
- We urge the European Commission to ensure that competition law does not prevent collective bargaining agreements between authors and their contractual counterparts. Such collective bargaining agreements could contribute to create fairer contractual terms and secure that royalty payments cannot be circumvented through contracts, including by the choice of laws in contracts.

Read our full paper to better understand buyout's detrimental effects on composers' livelihoods and why policy makers should prevent them to the benefit of all authors and the future generation of European creators.

#### ECSA REPORT

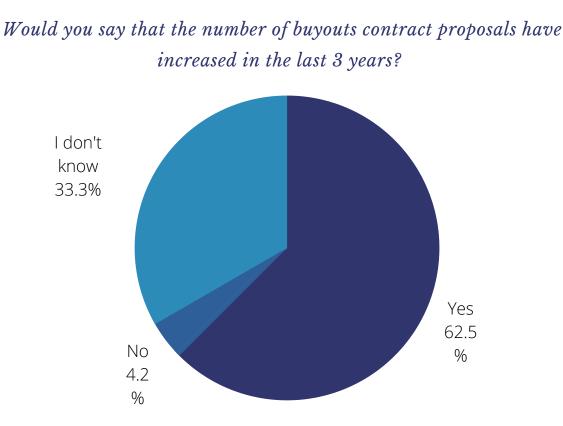
### INTRODUCTION

For the last three years, ECSA and its members have reported an increasing number of buyout contracts proposed to composers by various kinds of companies, both in the audiovisual and music field.

Around the world, screen composers and their organisations have launched awareness and education campaigns aimed at preventing the existence and development of buyout contracts, which are growing with the expansion of global streaming Video-on-Demand (VOD) platforms. ECSA very much supports actions taken by our colleagues in the US, through the Society of Lyricists and Composers or the "Your Music, Your Future" initiative, with whom CISAC joined forces to better educate and inform composers around the world. We also very much support the "#ComposersAgainstBuyouts" campaign organised by our member organisation, the Ivors Academy, in the UK. ECSA encourages its members to actively participate in these campaigns and make their voices heard.

After thorough discussions with our members, ECSA launched various initiatives to measure the impact of buyout practices, to study how and why they are taking place in Europe and to propose solutions to prevent those contracts and their harmful effects. We surveyed our members to get their feedback on real situations encountered by composers. The responses generally show that, all over Europe, more and more composers are being asked to give up on their rights and royalties against a one-time lump sum. If they refuse or object, this can have serious consequences for their future professional opportunities and careers.

This field experience, together with our analysis of relevant laws in Europe, enables us to recommend hereafter policy measures that can be adopted to protect European composers and preserve their artistic freedom by enabling them to receive an appropriate and proportionate remuneration for their work.



Source: ECSA Survey on Buyouts (May 2021)

To better understand the disruptive effect of buyouts on composers' economic situation, we will quote some economic data related to video streaming platforms, as well as composers from our network. We will then provide a brief description of traditional contracts that have prevailed in Europe for decades, and explain what buyout contracts are. Finally, we will advocate for ambitious policy measures against abusive buyout contracts, notably in the context of the implementation of the <u>2019 Copyright Directive</u>.

# FACTS & FIGURES

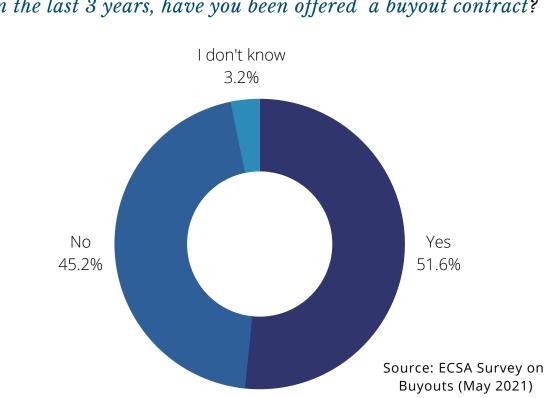
### What is at stake

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### THE A. ECONOMIC **ENVIRONMENT**

According to the conducted by ECSA among its want their works to be seen members in May 2021, **the** and heard by as many people increase of buyout contracts as coincided with the growing support the development of production of audiovisual these programs by video streaming expect and deserve to be **platforms.** These platforms represent formidable opportunity European films, documentaries, and vision and TV shows to be seen by multinational companies. audiences around the world.

survey Composers, like all creators, possible and as such services. Yet, they streaming treated fairly, considering the a immense economic benefits for that their artistic expression bring to these



In the last 3 years, have you been offered a buyout contract?

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Consumers' appetite for audiovisual works is steadily increasing. In addition, the Audiovisual Media Services Directive promises to bring investment into European more works and more opportunities for European screen composers. This Directive, namely, strengthens notably cultural diversity, by introducing obligations for Video on-Demand services to ensure at least a 30% share of European content in their catalogues and to give prominence European to works.

(cc) ( 🛊 )

Since 2019 and throughout the COVID-19 crisis, video streaming platforms have developed their activities exponentially and worldwide: double digit increases in subscriptions, investments in programs and revenues. A recent **European Parliament study on the cultural and creative sectors in post-COVID-19 Europe** states that "the real winners of the crisis are definitely streaming sites".

### **The Billion-Dollar Content Race**

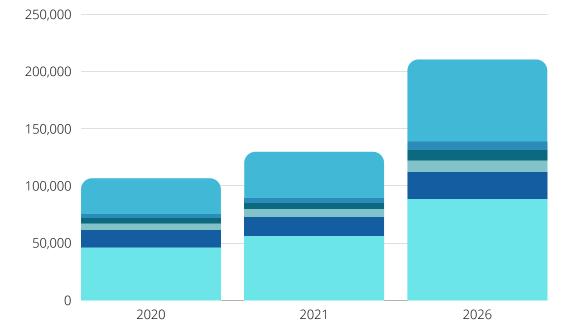
Estimated non-sports video programming expense of selected companies in 2019\*



\* all expenses are on a profit and loss basis, i.e. as recognized in the income statement Sources: MoffettNathanson, Company Reports



statista 🍒



#### Global OTT TV & video revenue forecasts by top countries (\$ million)

	2020	2021	2026
Others	31,191	40,153	71,710
Germany	3,640	4,557	7,359
Japan	4,655	5,420	9,193
UK	5,503	6,885	9,915
China	15,471	16,389	23,848
USA	46,018	56,186	88,267

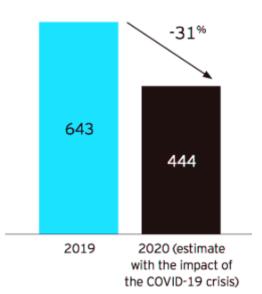
Source: DigitalTV Research

While at the same time the turnover generated by the cultural and creative industries has taken a big dive, as shown by this graphic.

"The seriousness of the crisis is illustrated by the fall of around 35% in royalties collected by collective management organisations (CMOs) for authors and performers, whose revenues will be sharply reduced in 2021 and 2022"



Total turnover generated by CCIs in the EU-28 (in € billion)



Sources: Eurostat; GESAC; professional organizations; Oxford Economics - Global Industry, Second Wave Scenario, as of 7 September 2020; EY modeling and analysis 2020.

#### **ECSA REPORT**





To me, it's very simple. Buyouts prevent us creating the content to share any profit and success that our music has helped bring to a film, game or song.

The creator's royalty instead goes to investors, shareholders and companies who seldomly re-invest their profits in the cultural value-chain as it is often done when the revenues reach the authors and performers. A loss for creators, the public and society as a whole.

Alfons Karabuda (ECSA, IMC and SKAP President, Sweden)

According to a survey ECSA conducted with its members at the beginning of the COVID-19 crisis (April-May 2020),

74%

# of them cannot live from their artistic profession only.

This situation has only been exacerbated by the COVID-19 pandemic, which has a dramatic and long-lasting impact on our members and on many players in the cultural and creative sectors. Too often, the economic situation of many composers is not at all proportionate to the revenues generated by their works on video streaming platforms.



#### Audiovisual composers describe:

Lower commissioning fees for the development and music recording. A one-time lump sum covering assignment of all rights in perpetuity by screen composers. Those practices mean that they will not benefit from any royalties for the performance or reproduction of their works, no matter how successful the work is. Those practices are what we refer as "buyout contracts".

Very often, buyout contracts can be partial, in the sense that they will deprive composers from certain royalties for certain exploitations (mechanical or synchronisation royalties for example). If they refuse to sign those contracts or object to certain clauses, they will often be blacklisted, and this will have serious consequences on future opportunities and their careers.

# But what are the main characteristics of buyout contracts?

To understand the new paradigm, let's first review the usual contractual practices that have been working in Europe for decades.

### B. CONTRACTUAL PROVISIONS AND ROYALTIES

In Europe, the most common contracts cover two main separate periods of time, each one representing a basis for a composer's remuneration:



A commissioning fee usually covers the period during which the composer creates and develops the film score or original songs. This creative process may take months, from the development through the rewriting, revisions and recording. It also usually covers the cost of production for the composer (studio, performers, production, etc.).

2

The royalties covering the composers' participation to the revenues generated by the audiovisual work. A film or TV series can potentially produce economic returns from theatres, TV, VOD, cable, merchandising... etc. for decades and longer.





Those royalties represent an essential revenue for music composers. Since the adoption of the first copyright laws more than two centuries ago, composers have fought to make sure that they benefit from the revenues generated by the work they create, for as long as the work is exploited and protected by copyright.

This is the essence of what royalties are, and why **Collective Management Organisations (CMOs)** were created: a fair economic right enabling authors to live from their art.



Knowing your rights is as important as knowing your music software. The long-established and hard-won royalty model is by far the fairest way of music creators sharing in the success of their intellectual property. Our music is our future - don't sell it out.



Kevin Sargent (Ivors Academy Board Member, UK)

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### C. THE UNFAIR DISRUPTION OF BUYOUT CONTRACTS

This is what a buyout clause may read in a contract proposed to a music composer:



In full and complete consideration for Composer's full and faithful performance of all services hereunder and for all rights granted to Company hereunder (including, without limitation, all right, title and interest in and to the results and proceeds of Composer's services rendered hereunder), provided Composer is not in material breach hereof and subject to Company's rights of suspension and/or termination in the event of force majeure, disability or default, Composer shall be entitled to be paid an "all-in" fee of XXX dollars.

Source: Gordon, Steve "11 Contracts Every Artist, Songwriter and Producer Should Know", 2017



A buyout contract usually includes:

A one-time payment is proposed to the composer to compensate, now and forever, their contribution to the work, against the transfer of all rights for the full duration of copyright.

A full buyout contract provides that the composer will receive no royalties for the exploitation of the work, neither performing nor mechanical rights.

In addition to the lump-sum provision, the composer is often required to accept that his or her contribution will be qualified as a "work made for hire", pursuant to the provisions of a non-EU law, for example the US copyright law.



The Parties agree that all work product information or other materials created and developed by The Independent Contractor in connection with the performance of The Services under this Agreement and any resulting intellectual property rights (hereafter referred to collectively as the "Work Product") are the sole and exclusive property of The Company. The Parties acknowledge The Work Product shall, to the extent permitted by law, be considered a "work made for hire" within the definition of Section 101 of the Copyright Act of the United States and that The Company is deemed to be the author and is the owner of all copyright and all other rights therein."

**> > -**

Source: clause provided by an ECSA member, extracted from a contract proposed to a composer

In the United States, the "work for hire" doctrine is specific to the production of audiovisual works. In a nutshell, this doctrine, enshrined in the provisions of the U.S. Copyright Act permit agreements transfer all that rights of authorship in a commissioned musical work for a single, one-time fee to audiovisual producers. US film composers have been working under this "work for hire system" for decades, and yet, in their thanks contract. to an understanding between PROs and production companies or traditional broadcasters. the composer, even as an employee, would be entitled to receive all or a part of the performance royalties, if any, collected worldwide for the exploitation of the work.

The same goes for screenwriters and directors who get paid in the proportion to revenues generated by their works through collective bargaining agreements negotiated with production companies by their respective unions.

Thanks to statutory provisions in US legislation, exempting labour unions from competition/ antitrust rules, the Writers' and Directors' Guilds (WGA and DGA) negotiate Minimum Basic agreements every three years, covering all economic and creative aspects of their <u>members</u> activities. In Europe, competition law often prevents such agreements (see below). Yet, US film composers are also experiencing <u>disruptive</u> practices denying them their performance royalties.

It is important to add that, in video general, streaming platforms do not negotiate directly with film composers. They often delegate the production development and activities to production companies that they hire. European production companies have themselves complained about the new disruptive practices imposed by global platforms.

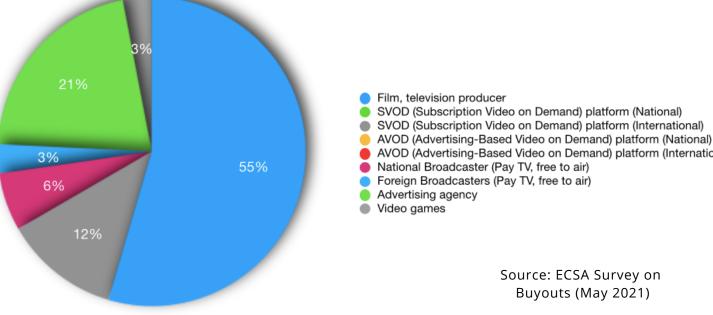
If you take a piece of paper and draw a horizontal line on it. The starting point being when you got commissioned to write a score for a film, or TV-show, and the end being somewhere in the future when you no longer receive royalties from the project. How long that line is, is entirely dependent on the success of said film/TV-show. Sometimes the line will be short, sometimes it will last your entire life. You rarely know.

Working in the field of audiovisual music, royalties play an important part of the longevity of composers. They allow us to hone our craft though periods of little work, keep up with technology, and make sure we are able to sustain our careers through ups and downs. Now make a dot on that piece of paper. That is a buy-out.

One of the issues with that, along with those mentioned in this paper, is that that dot should be placed significantly higher up, representing an equally higher initial fee. But it rarely is. In fact, the trend is that it is very close to the figures we are used to seeing but without any of the benefits that ensure that we can continue to provide highlevel film music to European projects.

> Jesper Hansen (Board member: DJBFA, BFM, KODA, Denmark)

To which of the following categories did the commissioner of the screen music belong?



AVOD (Advertising-Based Video on Demand) platform (International) National Broadcaster (Pay TV, free to air) Foreign Broadcasters (Pay TV, free to air) Source: ECSA Survey on

Buyouts (May 2021)



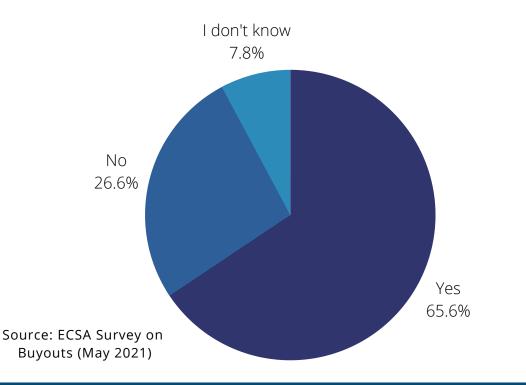
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ECSA wants to stress that the "work for hire" concept is purely adapted to the history and legal culture of the United States. It should never apply to contracts between composers and audiovisual production companies in Europe, despite attempts to impose this doctrine through contracts in Europe.

The ECSA survey on buyouts also revealed that another practice has been developing long before the development of those buyout contracts: for many years now, many screen composers have been asked, by contract, to give up their mechanical royalties, to the benefit of the production company. The commissioning fee would include all mechanical royalties, hence the importance of combatting the expansion of general buyout contracts. Little by little, if composers are left alone to negotiate their individual contracts, without the of collective guarantee the of their negotiation power professional organisations and collective management organisations for continued royalties, the risk is that those unfair practices become the new rule and continue to spread in Europe and all over the world.

Have you been offered contracts which grant you some royalty participation but force you to sign away partial rights such as Sync or Mechanical rights with a buyout?





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### D. WHY BUYOUT CONTRACTS ARE IMPOSED ON EUROPEAN CREATORS

There are some loopholes that permit the introduction of foreign legal practices in EU Member States:

**One of them is the lack of harmonised prohibition of buyout contracts in copyright laws.** Several EU Member States have clear legal and mandatory provisions prohibiting buyouts, imposing that music composers receive a remuneration proportionate to the revenues generated. However, they remain national by nature, and most of the times do not avoid circumvention through the choice of applicable law.

Another one is linked to the choice of law applicable to the contract between a screen composer and a production company. Our members have informed us that many contracts are under the jurisdiction of a foreign law, for example US copyright law, where the "work for hire" is the rule.

**European authors are almost always in a very weak bargaining position when they sign contracts with VOD platforms or audiovisual producers.** If they refuse to sign or object to buyout contracts, this can have serious consequences on future professional opportunities and their careers.

This practice developed by some global video platforms only retains the most harmful aspects of US law for music authors, in a context where they cannot benefit from certain safeguards through unions and collective bargaining. It also intends to impose US law to composers in Europe, even though there is no connection with the US. This extraterritorial application contradicts the <u>2019 Copyright Directive</u> and its principle of proportionate remuneration, as well as several national copyright laws. Composers rightfully expect that European law should apply in Europe, despite attempts to circumvent those rules.



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### A. EUROPEAN COMMISSION'S ACTION PLAN TO SUPPORT RECOVERY AND TRANSFORMATION OF EUROPE'S MEDIA IN THE DIGITAL DECADE -DECEMBER 2020

In December 2020, the European Commission published its communication "Europe's Media in the Digital Decade: An Action Plan to Support Recovery and Transformation". It acknowledges that buyout contracts are a challenge for European creators also for European independent producers. This but communication states that "the application by platforms of what could be defined a "work for hire" model (i.e. the acquisition of all intellectual property rights from the producer and/or from individual creators since the start, worldwide and in perpetuity) can "lock in producers/talents with platforms in question". The European Producers Club recently published a 'Code of Fair Practices for VOD Services when commissioning new works from independent producers', which shows that European independent producers also suffer from the contractual practices of VOD platforms.

ECSA appreciates the Commission's clear reference to the current difficulties encountered by creators when dealing with the practices of global streaming platforms and welcomes this communication when it states that "the effective and consistent implementation of the revised AVMSD and copyright rules at national level will be key to make sure they deliver".

However, the Commission unfortunately does not plan dedicated actions to address the issue of buyout contracts. But solutions exist.

### B. THE KEY SOLUTION: A FAIR AND AMBITIOUS IMPLEMENTATION OF ARTICLES 18 TO 23 OF THE 2019 COPYRIGHT DIRECTIVE

<u>The Directive 2019/790 on Copyright in the Digital Single Market</u> includes market regulation elements aiming to achieve "Fair remuneration in exploitation contracts of authors and performers" (Title IV, Chapter 3, Articles 18 to 23). Articles 18 to 23 set out a new harmonised framework for the contractual relationship between authors and their contractual counterparts which stems from the explicit acknowledgement by the EU legislator of the systemic weak bargaining power of authors negotiating their individual contracts:

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.

Recital 72

This Chapter 3 includes three mandatory Articles (19, 20 and 21) which should not be circumvented by contracts because Article 23 provides that "*Member States shall ensure that any contractual provision that prevents compliance with Articles 19, 20 and 21 shall be unenforceable in relation to authors and performers*".

### ARTICLE 18: THE PRINCIPLE OF APPROPRIATE & PROPORTIONATE REMUNERATION

In addition, the Directive includes Article 18, which sets out a principle of appropriate and proportionate remuneration: "Member States shall ensure that where authors and performers license or transfer their exclusive rights for the exploitation of their works or other subject matter, they are entitled to receive appropriate and proportionate remuneration."

In order to limit buyout practices to the minimum, we ask EU Member States to implement Article 18 in a mandatory manner and ensure it applies to all copyright contracts, as for Articles 19, 20 and 21. In addition, a clear definition of the exceptional cases where lump-sum payments can be deemed constituting proportionate remuneration should be provided: only where there is no prospect of a work earning any other income in the future. If the work has the possibility to earn income in the future, proportionate remuneration based on actual exploitation of the work must apply.



On 12th May 2021, France has adopted a similar approach by prohibiting contracts that could deprive screen composers from their right to a proportional remuneration under French law, regardless of the choice of applicable law by the parties. We strongly believe that all other EU Member States should follow such an approach. It is worth mentioning here that certain provisions of EU law and national laws already limit the choice of applicable law in contracts, for example for European consumers. The "raison d'être" of such provisions is to protect the weaker contractual party from the application of foreign law that would be less protective.

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No one can ever predict the full range of exploitation for a piece of music. Therefore, it's not possible to ensure appropriate and proportionate remuneration for an author via a lump sum payment. Furthermore, a streaming service's honest attempt to pay an appropriate one-time fee would be unnecessarily bad the business because it would have for to compensate for payments that actually would have to be paid by other users like TV stations, concert halls, physical distributors or third-party streaming services. Only time can tell an appropriate remuneration from an inadequate one. Collective rights management is the most effective and fairest way to ensure an author's participation in the economic benefit that his or her work brings.



Anselm Kreuzer (Composers Club, Germany)

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## ARTICLE 19: TRANSPARENCY OBLIGATION

How many viewers watched a film, a TV series in all countries where the streaming platform provides services? Where is this series most successful, in Europe, in Asia? What are the revenues generated by the series worldwide? How can the author be informed?

Article 19 requires authors' contractual counterparts to provide **transparent information regarding the exploitation and revenues generated by the works.** It is the cornerstone of the EU legislator's approach to fair and proportionate remuneration in authors' contracts: transparency on the exploitation of their works and revenues generated is a pre-requisite for the valuation of the rights transferred/licensed.

The implementation of Article 19 will provide more transparency to all authors when they sign contracts with their contractual counterparts. It will also provide more transparency to authors for certain markets where there is no collection through CMOs. A clear and mandatory implementation is needed to make sure all companies which generate revenues through the works created by authors, communicate the relevant financial information to them. This type of information has never been so easy to compute and transmit, thanks to the very efficient digital data management used and developed by VOD platforms.

### ARTICLE 20: CONTRACT ADJUSTMENT MECHANISM

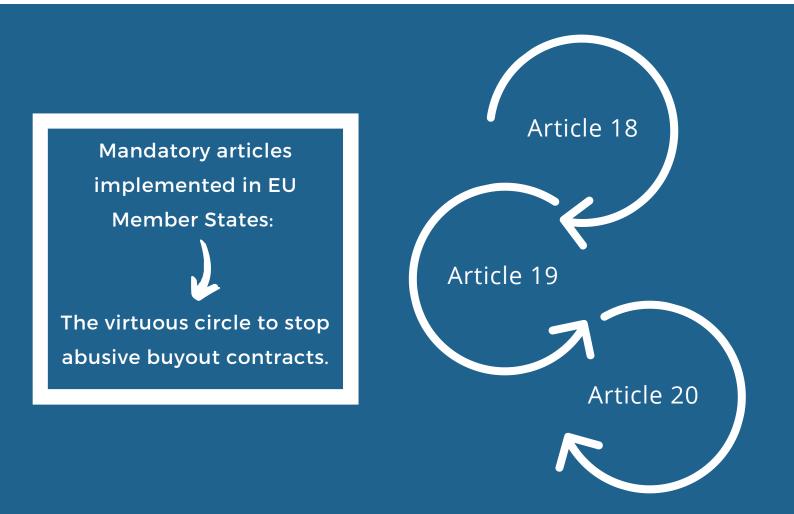
Article 20 sets out that "authors [...] are entitled to claim additional, appropriate and fair remuneration [...] when the remuneration originally agreed turns out to be disproportionately low compared to all subsequent relevant revenues derived from the exploitation of the works". The ability of authors to use this mechanism requires:

- an ambitious, comprehensive and forward-looking implementation of Article 19 to allow for a fair assessment of the level of remuneration.
- a clear definition of the right to appropriate and proportionate remuneration based on the actual exploitation revenues of the work.
- that "disproportionately low" is understood as "not proportional" and not in a more restrictive way.

This contract adjustment mechanism provides an additional safeguard after several years when the remuneration initially agreed was disproportionally low. However, it cannot by itself solve the issues of buyout contracts, which changes the ownership of the work and deprives authors from royalties from the outset - when they sign contracts. In addition, triggering such a mechanism could be costly and lead to lengthy procedures, dependent on the authors' contractual counterparts. Last but not least, the author engaging in such a process might be blacklisted and fear the consequences of such proceedings on his career. That is why preventing buyout contracts from the outset remains key to ensure a fair and proportionate remuneration for authors.

Articles 18 to 23 are completely interconnected. Without a mandatory right to a proportionate and appropriate remuneration, the added value of Article 19 will remain very limited. Furthermore, without Article 19, it would be almost impossible or even useless to evaluate whether the author received a disproportionately low remuneration when signing the contract.

Each EU Member State has the opportunity to establish a level playing field where the promotion and development of a strong and successful audiovisual industry is based on a fair and proportionate remuneration for authors and the works that they create. If we let these unfair practices affect more and more composers working in the audiovisual industry, then they will expand to other new players like social networks, which are now investing in audiovisual programs.



C. WHY COLLECTIVE BARGAINING BETWEEN MUSIC AUTHORS AND THEIR CONTRACTUAL COUNTERPARTS CAN ALSO IMPROVE THE SITUATION



# of composers are self-employed or freelancers

Source: ECSA Survey among its members (May 2020)

In January 2021, the EU Commission consulted interested stakeholders on several options proposed to address the interplay between collective bargaining for self- employed or freelancers and EU competition law. In its response to the European Commission, ECSA and other authors' organisations consider that the application of competition law still constitutes a strong potential impediment to the implementation and the practical application of the 2019 Directive national level. Copyright at Removing this impediment will therefore be key to fully implement the provisions of the 2019 Copyright Directive.

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Such collective bargaining agreements between composers and their contractual counterparts can contribute to fairer contractual terms and better working conditions. They can also prevent the circumvention of royalty payments through contracts, including by the choice of laws. Therefore, they can be a key tool to limit buyout contracts.

Creators need to be able to join forces and negotiate a fair remuneration of their creative process, with any traditional or new player in the market, to maintain a level playing field, no matter who is entering the business. Composers' associations should be able to:

Establish minimum commissioning fees covering the creation of music.

Impose provisions securing their right to receive royalties in proportion to the revenues generated by works. This would be a key tool to limit buyout contracts.

Audiovisual composers all over the world currently face buyout contracts which prevent them to be fairly remunerated for their works. The COVID 19 pandemic has witnessed the growth of global VOD platforms but authors are too often not reaping the benefits of their creative successes, because of those contracts.

With this paper, ECSA explains buyouts' detrimental effects on composers' livelihood and why policy makers should prevent these practices now, to the benefit of European creators and future generations who want to write, compose and create.

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#### **ECSA - European Composer & Songwriter Alliance**

The European Composer and Songwriter Alliance is a European network of 61 members from 27 countries. Its main objective is to defend and promote the rights of music authors on a national, European and international level.

For more information about our organisation, please visit composeralliance.org

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