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Guidelines on Copyright Buyouts

Current developments and the implications for creators' remuneration

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1 Introduction: Revolution in the audiovisual market

The audiovisual market is fast developing with new digital services, which are increasingly investing in the production of more diverse and attractive offers for consumers. A recent market survey confirms this trend in the global Video on Demand (VoD) market, with a growing estimate from USD 38.9 billion in 2019 to USD 87.1 billion by 2024, at a compound annual Growth Rate of 17.5%[1] [2].

For example, Netflix has over 158 million paid memberships across 190 countries. The top 5 consumer countries (U.S., China, U.K., Japan and Germany) account for 70% of consumer spending on Streaming Video on Demand (SVoD), and there is enormous potential in this market for developing countries such as India or Brazil[3].

From films to TV series to documentaries, the growing success of digital services has been due in large part to increases in the overall quality and availability of audiovisual and musical works online. The creators behind these works, however, are often **unable to reap the rewards of their efforts**, as much of the value derived from their works is retained by the platforms instead of being passed along to the creators.

In many cases, digital platforms, channels and broadcasters are not just the distributors of works; they have also become the producers. This has increased in general the use of a contractual phenomenon known as "copyright buyout". Authors consenting to buyout clauses surrender full control of their work upfront in exchange for a lump sum payment, and therefore waive any share of the future income that might be derived from all types of exploitations of the work for the entire duration of the copyright. In addition, the amount of the lump sum or buy out fee is also affected by the traditionally weaker negotiating power of creators.

These revenues can be significant: royalties represent a significant source of income and continuing royalties for a work can range from thousands of dollars to millions for a single composition or score.[4]

As the audiovisual online market is **globalized**, online services and broadcasters take advantage of the international character of the services. When negotiating with creators, they can select for the contract the governing laws that permit the author to surrender full control of the future exploitation of the work, either by a transfer of rights embodied in the buyout clauses or because the law assigns to the producers the copyright *ab initio*.

These Guidelines provide an analysis of buyout practices and their potential impact on creators. The paper covers different buyout scenarios: one is the full assignment of rights in the audiovisual production contract in exchange for a lump sum payment; another is where an employer or the party commissioning the work is presumed by law to be the copyright owner and author of the work (as occurs under the "**work made for hire"** doctrine and similar legal regimes.

2 What are "buyout" clauses?

Copyright buyout clauses come in different forms depending on the territory or situation. In certain countries/territories, the "buyout" clause contained in copyright contracts refers to the **transfer of all rights** in a work for the **entire duration of its copyright** in exchange for a **lump sum payment** covering all exploitations listed in the contract. And those exploitations may be listed as broadly as possible.

In the United States, buyout clauses are typically used under the "**work made for hire**" doctrine. In a work-made-for-hire scenario, the employer or commissioning party (i.e., the producer), rather than the creator, is deemed to be **the owner** of the copyright in, and **the author** of, the work. As a result, the creator (e.g., the composers, songwriters and/or authors) cannot authorize or prohibit uses of his/her works. Furthermore, moral rights and the termination or reclamation right may not apply in a "work made for hire" scenario, or, in case these rights are recognized, as an additional effect of buyout clauses, creators usually waive them.

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[1] *Global Video-on-demand (VoD) Market 2019-2023*, Technavio.

[2] This trend is even more pronounced since the Covid-19 crisis has started. Netflix's paying subscriber-base worldwide grew by nearly 16 million (+23%) at the end of March 2020 compared to the same data at end December 2019. For its part, the Disney+ platform, launched in several new territories early April 2020, added over 21 million new subscribers in just a few weeks. Future source estimates a 31% rise in SVOD subscription revenue in 2020.

[3] *Futuresource SVoD Status & Outlook Report*, 2019

[4] *See* "Earning a Living vs. Getting a Gig: What Composers Need to Know." Your Music Your Future. Available at: https://yourmusicyourfuture.com/composer-compensation/.

EXAMPLE:

"…such musical works, together with all such other musical material created under said Agreement shall constitute a "work made for hire" (for the purpose of U.S. copyright law and all other copyright laws throughout the universe) for Producer".

The "work made for hire" doctrine, while an element of copyright law in the US, in Commonwealth countries and in Japan, is becoming prevalent in audiovisual production contracts all across the world, **regardless of whether or not the parties or the transactions are located in the U.S**.:

EXAMPLE

"If or to the extent for any reason in any country, any or all such musical works and/or other musical material is not recognized to be a "work made for hire" then Composer hereby irrevocably exclusively and absolutely assigns to Producer all of Composer's rights (copyrights, rights under copyright and otherwise, whether now or hereafter known)…"

3 Why is the use of buyout clauses becoming more widespread globally?

The laws of some countries (especially in common law jurisdictions) allow buyout fees as the only source of remuneration of authors. Many VoD platforms try to **impose such laws to govern their contractual relationship** with both U.S. and non-U.S. productions in spite of potentially applicable national laws which protect creators against buyout practices.

This is made possible because, according to a basic principle of private international law, parties to an international contract **are free to choose the law applicable to their contractual relationships** (e.g., platforms making use of the U.S. law where the work made for hire is authorised and buy out mechanisms are allowed). Therefore, the buyout problem does not seem to have an easy solution, since platforms can "shop" around for a jurisdiction with favorable laws that do not provide strong creators' protections.

4 Why is this an issue for the creative community?

Implications for Creators

When creators contractually give up their ownership of copyright and associated rights to any future income from the work (i.e., royalty payments), in exchange for a lump sum payment, they may not be aware of the significance of these many different revenue streams over time, and the true amount of revenue that they may have generated.

The imposition of the buyout by such platforms is widely seen as weakening of creators' bargaining power in the face of powerful new global players in the sector. As noted by the organization Your Music, Your Future:

Whether you write a composition for streaming services, television, film, or video games, there are so many opportunities to make money beyond the original composing or package fee…[B]ackend royalties are generated over many decades, wherever and whenever your music is used. This includes airings on broadcast, cable, streaming platforms, traditional and satellite radio plays, and streaming service performances. You can also receive royalties from consumer products, including interactive dolls and toys, electronic and physical greeting cards, holograms, Broadway shows and soundtrack album sales, advertising commercials – even online musical instrument lessons.

In the US, new models of buyout clauses are also affecting the traditional "work made for hire" agreements in the audiovisual industry. Such agreements used to reserve to authors and composers the right to receive back-end performance royalties through their chosen CMO. However, the new model of "complete buyout" agreements deprives composers and authors of this traditional flow of remuneration.

Ultimately, **buyout practices may divorce the creator from the success of the work.** Creators give up the copyright of the work, for all uses and all territories, they do not participate in royalties that may be generated by the work over time.

Implications for Collective Management Organizations (CMOs)

Buyouts are often done without the knowledge of CMOs, which in turn has the effect of undermining the support and protection that they traditionally provide their member creators.

One of the traditional functions of authors' rights societies and other, is to protect weaker bargaining parties (often authors, performers) and to promote balanced outcomes in negotiations between rightsholders and users. This is part of the reason why certain rights are subjected to exclusive assignment to the CMOs in the first place (as is the case in the EU).

However, when creators directly negotiate with major users, such as VoD service providers, on deals including work made for hire / buyout language, they weaken the bargaining power of CMOs. This situation is further exacerbated as creators may also **relinquish rights already entrusted to** CMOs. This practice ultimately endangers the efficiency and reliability of the collective management system.

5 Legislative advocacy

The legal situation in Europe

In some jurisdictions in the EU, laws ensuring equitable remuneration to rightsholders have proven to be an appropriate measure for protecting rightsholders' interests when faced with issues relating to buyout scenarios.

Examples can be found in **France**, **Italy** and **Spain**, where the law requires that the remuneration of creators must be proportional to the income derived from the exploitation of their works[5].

In order to ensure that creators participate in the success of their works, certain countries allow for the revision of remuneration amounts due to authors and performers when the remuneration originally agreed becomes too low, what is known as the "best-seller clauses". This is possible in Belgium, Germany, Hungary, Poland and Spain.

In addition, a number of countries like **Belgium, Germany, Netherlands, Spain, Nordic Member States, Austria and Portugal** grant to authors the possibility to claim back their rights in case their works are not sufficiently exploited ("right of revocation").

Other EU Member States include stronger measures that provide for an overriding mandatory rule prohibiting or limiting the use of copyright buyout contracts, such as **Germany** and the **Netherlands**.

A number of recent legislative developments in the European Union, currently in the process of implementation at Member State level, have presented opportunities to improve creators' rights in the SVoD market.

The European DSM Directive

The recently approved Directive on Copyright in the Digital Single Market (DSM Directive[6]) contains certain provision helpful for creators. The Directive:

- establishes the principle of **appropriate and proportionate remuneration** where authors and performers license or transfer their exclusive rights for the exploitation of their works (art. 18 and recital 73). Lump sum payments used for example in buyout provisions are considered exceptional.

- provides for the **mandatory nature in the EU** of certain rules relating to the **remuneration of authors in copyright contracts**. It applies to the provisions regarding **transparency** and best-seller clauses **contract adjustment mechanisms** when the remuneration originally agreed becomes too low, what is called the "**best-seller clause**" (arts. 19 and 20 and Recital 81). Their **mandatory nature** implies that these rules shall apply even if the parties submit the contract to a law of a non-EU third country.

- grants creators a **right of revocation** in the case of exclusive assignment of rights where there is a lack of exploitation of the work.

[5] In Spain, since 1996, the law has granted audiovisual authors remuneration for each form of exploitation of their work and subject to mandatory collective management.

[6] 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.

The Directive adopted in the EU in 2019, is a promising step towards protecting the interests of creators and rightsholders from inequitable buyout practices. The implementation stage of this Directive presents an opportunity for Member States to revise their national laws, and buyout practices should be expressly addressed. Therefore, adequate transposition of the Directive, especially as related to inequitable buyout practices, is essential.

Creators and their representative organisations are encouraged to lobby local governments to ensure that the provisions included in the DSM Directive are adequately transposed into national law.

In particular:

- ➔ **Making the principle of appropriate and proportionate remuneration [Art. 18] a mandatory rule,** in a way that inhibits the proliferation of buyout contracts.[7]

- ➔ **Ensuring the mandatory nature of the "Bestseller" clause [Chapter III, Art. 20],** which allows for the revision of remuneration due to authors and performers in case of commercial success.

- ➔ **Ensuring the mandatory nature of the reporting obligations** on the use of the works from licensees [Art. 19].

- ➔ **Extending to copyright** the rules that address the imbalance in a contractual relationship by limiting the choice of applicable law to **protect weaker parties, like employees and consumers** (e.g., Rome I Regulation)[8].

- ➔ **Ensuring the promotion and distribution of European productions** on VoD media services operating in the EU. This could be achieved through the transposition of the Audiovisual and Media Services Directive. The Directive provides that VoD media services under its jurisdiction secure **at least a 30 % share of European works** in their catalogues and ensure prominence of those works. Further, Member States may require media service providers under their jurisdiction to **contribute financially** to the production of European works[9], including via direct investment in content and contribution to national funds.

Asia-Pacific and Latin America regions

In the **Asia-Pacific region**, a detailed analysis by University of Hong Kong University Professor Alice Lee, under the guidance of the Asia-Pacific Music Creators Alliance (APMA), looked at the contractual laws in selected jurisdictions (**Australia, Hong Kong, Indonesia, Japan, Macau, South Korea, Thailand and Vietnam**).

Some jurisdictions have implemented provisions on automatic revocation of copyright transfer and assignment, typically when the works are not exploited. This is the case of **Indonesia**, **Thailand** and **Macau**, where if copyright in a work has been assigned for an unlimited duration, the assignment will be automatically revoked after a certain period of time.

In **Japan**, new legislative provisions that regulate **unfair standard form contracts** are promulgated, but how they can be applied to copyright buyout contracts in practice remains unclear. In the rest of the jurisdictions, there are only provisions that regulate unfair terms in consumer contracts, which are not extended to cover copyright buyout contracts.

In **Korea**, a "cinematization" doctrine encouraging buyout practices has been developed under the Korean Copyright Act (article 99)[10]. This establishes that, when the producer obtains permission to reproduce a work by means of cinematization, there is a legal presumption that the author has also granted his/her right to broadcast, publicly perform and/or transmit the work. This provision also affects the interest of the music creators when their works are used in the cinematographic work. This doctrine is abused by the online platforms and broadcasting companies order to avoid paying royalties.

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[10] Article 99.:"If the holder of author's economic right authorizes another person to exploit his/her work by means of cinematization, such authorization shall be presumed to include the following rights, unless otherwise expressly stipulated: …., To publicly screen a cinematographic work aiming at a public screening, To broadcast a cinematographic work aiming at broadcasting, To interactively transmit a cinematographic work aiming at an interactive transmission, …."

In **Latin America**, a number of countries, including **Nicaragua, Chile, Colombia, Ecuador, Panama, Mexico** and **Uruguay**, have established an inalienable remuneration right in favor of the authors, accompanied by a legal presumption of transfer of rights to the producer. In **Nicaragua, Mexico** and **Uruguay**, the authors of musical works are expressly mentioned in the law as beneficiaries of the remuneration, while in **Chile** and **Colombia**, the remuneration is established for audiovisual authors, directors and scriptwriters. In **Uruguay**, a recent reform of the copyright law has extended the scope of the remuneration (previously limited to the authors of musical works incorporated in the audiovisual work) to directors and screenwriters. In **Mexico**, a legal provision prevents the transfer of rights over musical works incorporated in audiovisual works.

In **Brazil**, the full assignment of authors rights is legally permitted. For audiovisual works, the law establishes that the author's authorisation to the producer implies "consent for its economic use". Without prejudice to the continued use by the audiovisual producer for the period of legal protection of the audiovisual work, the law states that exclusivity for use of the work by the producer will occur for a period of ten years. At the end of this period, the author will be able to make use of their work again in any form or context. The law also allows, under certain strict conditions, the transfer of economic rights to third parties, totally or partially.

For musical works specifically, art. 86 of Brazilian Law on Copyright and neighbouring rights grants to the **authors of musical works incorporated in audiovisual works** a specific **performing right for secondary uses of their works**. Under this provision, any user that exhibits, communicates and transmits the audiovisual work should obtain a license and pay the corresponding fees to the authors of the music incorporated in it. However, this principle has never been recognized by SVoD platforms in practice. They argue that the author's exclusive and constitutional monopoly over their work allows, in theory, the full assignment of all rights to the platform that manages the entire chain of use of audiovisual work. As a result, authors are not benefitted from the rights they would be entitled to by law.

6 General Policy Recommendations internationally

The following general principles are recommended in lobbying for adequate and fair legislation in all jurisdictions:

- ➔ Ensure **appropriate and proportionate remuneration** for creators when they are transferring and/or licensing their creative works. This right should be established as **unwaivable**, as it is already the case in some countries in Europe and Latin America.

- ➔ Support the use of **"Bestseller" clauses**, which allow creators to revoke the copyright buyout contract when transferees or assignees fail to exercise the economic rights transferred or assigned. Bestseller clauses are useful to remedy the harmful consequences of buyout contracts in cases where they are not prohibited.

- ➔ Adopt provisions similar to those adopted in Brazil, which **limit the exclusivity** of the use of protected works to a certain period of time (10 years in Brazil). This does not solve the issue of full transfer of rights and does not guarantee an unwaivable right, but it does open a window for the future to offer the assigned works in new productions.

- ➔ Reinforce existing provisions granting performing **rights** to **musical authors for secondary uses of their works incorporated in audiovisual works**. Such provisions exist in Brazil, but in practice its application is hindered by SVoD platforms, depriving local authors of an important flow of remuneration.

- ➔ Adopt provisions similar to that established in Mexican law that **prevents the transfer of rights over musical works** incorporated in audiovisual works. This provision allowed local CMOs to reach agreements with large Amazon Prime Video-type platforms, Amazon Music and networks such as Facebook, without application of buyout clauses.

- ➔ **Regulate unfair terms in copyright buyout contracts.** In most jurisdictions, there is no regulation of unfair contract terms. Creators with weak bargaining power are pressured to accept buyout clauses in order to obtain composer contracts. In order to protect creators, particularly independent composers and lyricists from exploitation, there is a need to regulate unfair contract terms, and to encourage fair dealings for employee-created and commissioned works, where such regulation or other action is permitted by and is compatible with such jurisdictions' legal and regulatory framework.

7 Conclusions

Some key conclusions can be drawn from the studies and information available:

- **Copyright Buyouts are ubiquitous**: these are happening world-wide and the scope is not limited to SVoD or other similar services, but are also affecting broadcasters (U.S., México, Brazil, UK, etc.) and agreements concluded in the online video game sector (Japan and South Korea, among others).

- **Collective management organisations have an important role to play.** In jurisdictions where CMOs receive an exclusive assignment of rights from their members, collective management is a fundamental defense against imposed buyouts, providing individual creators with a vital "strength in numbers". By grouping authors together in CMOs, negotiating power can be better balanced against the bargaining power of major users. Where appropriate, it may be useful for CMOs to liaise with local screen producers' associations or agencies, which may face similar issues as authors do when negotiating with powerful SVoDs[11].

- **Legislative solutions are needed**: The right to continue to earn royalties for the use of their works is a fundamental issue of fairness of all creators. There is an overall need for adapting national laws (where the legal systems so permit) to regulate unfair contract terms, support the right to proportional remuneration and the right of revocation in cases of non-exploitation of the works. As EU Member States move into the implementation stage of the DSM Directive, and jurisdictions in Latin America (e.g., Brazil) contemplate changes to their copyright laws, this is the opportune moment to recognize the widespread issues presented by buyout contracts and to respond to those practices on a global scale.

- **Tailor-made approaches to adapting contractual laws are also essential at national level**: in different jurisdictions, the solutions required may differ depending on whether lobbying is required to amend the laws, or whether legal solutions exist but need to be enforced.

- **Pooling information** on an international basis and understanding shared legal arguments between CMOs and creators may help streamline solutions globally, when done so in conformity with competition laws.

[11] Positive experiences of cooperation have been recently reported in Australia, where Screen Australia and SPA (Screen Producers Australia) have joined with APRA AMCOS in raising the buy-out issue in the context of a creative industries working group on improving Australia's exports in services. .