



New Rights for Directors!

A Legal Guide for Screen Directors



New Rights for Directors

The latest European Copyright Directive (2019) or “ECD” was implemented in Irish law¹ on November 12th 2021 by Statutory Instrument 567 of 2021. This law introduced very significant changes to remedy the weak bargaining position of European creators including Directors. The key objective of the legislation is to ensure that creators get a **fair share of remuneration** from exploitation of their work.

Summary of New Rights

There are now new rights covering fair and proportionate remuneration, audit, contractual adjustment and revocation. **You may be asked by producers to waive these rights and/or to agree to a buy-out and you should not do so.** Instead, we recommend that you add wording setting out the new rights in your contracts with producers. We have set out wording that you should use in the second part of this document.

General Principal of Appropriate and Proportionate Remuneration - Regulation 26

The most important changes for Directors are contained Articles 18-23 of the ECD and correspond to Regulations 26-29 of the [new Irish legislation](#) (Part 6) which assert an artist’s right to ‘**appropriate and proportionate remuneration**’.

The new legislation reads, in **Regulation 26** as follows:

- (1) Where an author or a performer licenses or transfers his or her exclusive rights for the exploitation of his or her works or other subject matter, he or she shall be entitled to receive appropriate and proportionate remuneration.
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- (2) Remuneration under Paragraph (1) shall be considered appropriate and proportionate where it is proportionate to the actual or potential economic value of the licensed or transferred rights, taking into account the author’s or performer’s contribution to the overall work or other subject matter and all other circumstances of the case, such as market practices or the actual exploitation of the work or other subject matter, including, where applicable, merchandising revenues

Lump sum payments/buy outs are, however, still possible, though the Irish legislation is silent on this point. The European Directive “ECD” states that:

“A lump sum payment can also constitute proportionate remuneration, but it should not be the rule.”

Nevertheless, the ECD grants Member States the freedom to define specific cases for the application of lump sums, **taking into account the specificities of each sector**. This can be done 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”.



SDGI recommends that you do not consent to such a buy out.

In addition, a producer may ask you to agree in your director's contract that the sum you receive for your work as a director constitutes 'fair and proportionate remuneration.' However, it is not technically possible for a director to know in advance of the commercialization of the work if the money they received for it during the contracting period is 'fair and proportionate' e.g. a director cannot know if their film or tv drama will be widely distributed throughout the world or will instead get limited distribution.

Therefore, we recommend that you use SDGI's wording for correspondence.

Annual Audit Information Must Be Given - Regulation 27

Producers are now legally obliged to **issue to right holders an annual, detailed, breakdown in writing of the profits and losses** from all productions to which you have contributed, with particular emphasis on "(...) modes of exploitation, all revenues generated and remuneration due." The ECD recognizes that:

"As authors and performers tend to be in the weaker contractual position when they grant licences or transfer their rights, they need information to assess the continued economic value of their rights, compared to the remuneration received for their licence or transfer, but they often face a lack of transparency."

The solution is based on a goal set out by the ECD of enabling right holders to fully assess the economic value of their rights:

"Authors and performers need information to assess the economic value of rights of theirs that are harmonised under Union law."

So, Regulation 27(1) of the new Irish legislation reads as follows:

- (1) A party to whom an author or performer has licensed or transferred his or her rights or his or her successor in title (in this Regulation referred to as a "first contractual counterpart"), shall, at least once each year provide the author or performer with:
- (a) a clear, detailed description of how any work or performance the subject of that license or transfer has been exploited worldwide during the relevant period,

 - (b) an itemised list of the euro value of all copyright revenues generated worldwide during the relevant period, including, where applicable, merchandising revenues, and

 - (c) notification of the author or performer's rights under this Regulation.

Additional Payment/Contractual Adjustment Mechanism - Regulation 28

The new law also entitles right holders to seek **additional, appropriate and fair remuneration** if the fee received is **not proportionate** to financial success of the revenues generated by the project. This is referred to as a 'Contract Adjustment Mechanism' in the ECD:



“(…) a remuneration adjustment mechanism should be provided for as regards cases where the remuneration originally agreed under a licence or a transfer of rights clearly **becomes disproportionately low** compared to the relevant revenues derived from the subsequent exploitation of the work or fixation of the performance by the contractual counterpart of the author or performer. All revenues relevant to the case in question, including, where applicable, merchandising revenues, should be taken into account for the assessment of whether the remuneration is disproportionately low”.

Note that this assessment has to be done on a case-by-case basis and is to include consideration of the circumstances of each case and all revenue including merchandising revenue:

“(…) [the adjustment] should take account of the specific circumstances of each case, including the contribution of the author or performer, as well as of the specificities and remuneration practices in the different content sectors, and whether the contract is based on a collective bargaining agreement.”

The new Irish legislation implemented this new right in Regulation 28, and reads as follows:

- (1) An author or a performer or his or her representative may claim additional, **appropriate and fair remuneration** from the party with whom he or she entered into a contract for the exploitation of his or her rights in a work or performance, or from the successors in title of such party, when the remuneration originally agreed turns out to be **disproportionately low** compared to all the subsequent relevant revenues derived from the exploitation of the work or performance.
- (2) (...)
- (3) The assessment of a claim made under paragraph (1) as to whether the remuneration originally agreed turns out to be disproportionately low shall take account of the following matters:
- (4)
 - a. all revenues relevant to the rights at issue, including, where applicable, merchandising revenues;
 - b. the specific circumstances of each case, including the contribution of the author or performer;
 - c. the specificities and remuneration practices in the different content sectors;
 - d. whether the contract is based on a collective bargaining agreement.

A producer may also say to you that you agree in your director’s contract to make ‘no further claims’. Regulation 28 of the S.I allows rights holders to seek additional remuneration and since this right arises from legislation, and thus, applicable to directors irrespective of the contract a director signs (see Regulation 31 of Statutory Instrument 567 of 2021).

Revocation - Regulation 29

The new legislation also includes a right of revocation, in Regulation 29:

- (1) Where an author or a performer has licensed or transferred his or her rights in a work or other protected subject matter on an exclusive basis, the author or performer may revoke in whole or in part the licence or the transfer of rights **where there is no exploitation of that work or other protected subject matter**.
- (2) The right of revocation provided for in paragraph (1) may only be exercised after a reasonable time following the conclusion of the licence or the transfer of the rights.
- (3) The author or performer referred to in paragraph (1) –



(a) shall notify the person to whom the rights have been licensed or transferred and set an appropriate deadline by which the exploitation of the licensed or transferred rights is to take place, and

(b) may, after the expiry of the deadline referred to in subparagraph (a), choose to terminate the exclusivity of the contract instead of revoking the licence or the transfer of the rights.

- (4) Paragraph (1) shall not apply if the lack of exploitation is predominantly due to circumstances that the author or the performer can reasonably be expected to remedy.

The usage of this right by SDGI members will likely be limited given the nature of a director's work. However, in cases where the director is also the author of the script, it will also increase substantially in relevance.

Non Applicability of Certain Contractual Agreements - Regulation 31

Another key part of the law sets out that **contractual agreements which prevent the application of the Contractual Adjustment and Fair Remuneration provisions are unenforceable:**

31. Any contractual provision that prevents compliance with Regulation 27 or 28 shall be unenforceable in relation to authors and performers.”

Conclusions

It's clear that directors cannot assess whether they have received 'fair and proportionate' remuneration if they cannot access viewing figures for their works i.e. unless they can audit. Even if they could, entering into a buy-out or 'lump-sum' contract will prevent them seeking additional payment if a project is successful. Directors cannot assess what might be proportionately fair unless the revenue derived from exploitation of their work can be assessed in hindsight. Therefore:

- SDGI recommends that you do **not to sign agreements with buy-out/lump sum terms.**
- SDGI recommends that you do **not sign a clause which waives your right to 'fair and proportionate remuneration.**
- SDGI recommends that you do **not sign a waiver of your right to a contractual adjustment mechanism.**



- **SDGI recommends that you do not sign a waiver to your right of revocation.**

SDGI can help you ensure that your contracts comply with these provisions. In the second part of this document, we recommend contractual clauses setting out these new rights for inclusion in your agreements with producers. We will be pleased to advise you about wording which will protect your new rights and allow you to conclude contracts that protect your valuable work.

February 14th, 2022

Drafted for SGDI by David Sweeney, Barrister-at-Law

SAMPLE SDGI CLAUSES FOR CORRESPONDENCE AND CONTRACTS

Although these new rights are legally enforceable despite contractual provisions to the contrary (Regulation 31), SDGI recommends that every member of the Guild ensures that their contract includes explicit mention of the new rights contained in sections 26 to 29 of S.I. No. 567/2021 - European Union (Copyright and Related Rights in the Digital Single Market) Regulations 2021 as set out below.

Initially, in **correspondence** with producers you should make the following statement before signing a contract:

“This is to confirm, that in line with advice received from the Screen Directors’ Guild of Ireland, I cannot yet legally agree that payment herein for this work is ‘fair and proportionate’ as required by Regulation 26 of Statutory Instrument 567 of 2021.”

Below you will find some suggested wording for inclusion in your future **contracts** with producers:

- The Director’s remuneration shall be appropriate and proportionate, taking into account the Director’s contribution to the overall work, as set out in Regulation 26 of S.I. No. 567/2021, and within the framework of that legislation, this contract does not constitute a full buyout of the rights held by the Director on the work.
- The Director’s remuneration shall be appropriate and proportionate, taking into account the Director’s contribution to the overall work, as set out in Regulation 26 of S.I. No. 567/2021, and within the framework of that legislation, this contract does not constitute a full buyout of the rights.
- “This is to confirm, that in line with advice received from the Screen Directors’ Guild of Ireland, the Director cannot yet legally agree that payment herein for this work is ‘fair and proportionate’ as required by Regulation 26 of Statutory Instrument 567 of 2021.
- The Producer shall provide the Director, at least once a year, with a clear and detailed description (set of accounts/ gross audit report) of how the work has been exploited worldwide, as set out in Regulation 27 of S.I. No. 567/2021.”- also see wording below.
- The Director’s remuneration shall be adjusted, as foreseen under Regulation 28 of S.I. No 567/2021, when the remuneration originally agreed herein becomes be disproportionately low compared to all the subsequent relevant revenues derived from the exploitation of the work.”
- “The parties agree that all Rental and Lending Rights and Cable Retransmission Rights and any other Secondary Rights Payments collected by SDGI and/or any other Collecting Societies or future rights, including equitable remuneration rights are the sole entitlement of the Director. Therefore payments must be forwarded to the Director in should they be mistakenly or inadvertently paid to the Producer by any third party.
- “The parties agree that any exploitation of the work(s) covered by this Contract will, in addition to the provisions set out herein, be governed by Regulations 26

to 29 of Statutory Instrument No. 567/2021 – European Union (Copyright and Related Rights in the Digital Single Market) Regulations 2021 and in particular:

Post Contractual Requests and Claims

Regulation 27 Request:

We also recommend that you use the following or equivalent phrase in **correspondence** with producers, one year after the contract was concluded:

- “Dear [Producer Name], as the director and first contractual counterpart of the project (insert title) please can you send me a description of how (title) has been exploited and an itemised euro value of any additional revenues that have been generated as defined in regulation 27 of Statutory Instrument 567 of 2021.”

Regulation 28 Claim:

Once you have received your annual statements, and if you believe you have not received fair and appropriate remuneration you should put in a ‘Regulation 28 claim’.

- Step 1: Obtain a copy of itemised statements related to your project (see above for request).
- Step 2: Define your ‘claim estimation’. This is the amount you and/or your accountant estimate are the additional fees owed to you for exploitation of your work. Putting in a ‘claim estimation’ is optional, it is enough to put in a ‘claim’, stating the fees are not ‘fair and proportionate’ as the burden here is on the producer. You must have evidence from statements, and if necessary financial expertise to support your claim.
- Step 3: A director could put in a ‘Regulation 28 claim’ themselves with the following wording: “Dear [Producer Name], I have reviewed the annual statements of project [Project Name]. I wish to make a claim for additional revenue in my capacity as Director, as set out in Regulation 28 of Statutory Instrument 567 of 2021.”

Note: If you encounter difficulty and do not have full disclosure on financial statements on a project from a producer, we recommend you seek legal and financial advice.