

## JOINT BRIEFING ON THE DIGITAL ECONOMY BILL

We are calling for the Digital Economy Bill to be amended to include the safeguards for authors and performers announced in the EU Draft Directive and to extend Public Lending Right to remote offsite ebook lending ([see our separate briefing](#)).

- See the [EU Draft Directive on the Digital Single Market](#) (PDF)

*“I welcome this draft directive, especially for its emphasis on transparency and the bestseller clause. Authors badly need the sort of natural justice that these clauses embody, not least because our work contributes substantially to the wealth of the nation. I hope that our government will see the rightness of these proposals and embody them firmly in the law of our land to ensure that they continue when we leave the EU.”*

Phillip Pullman, President of the Society of Authors

The Society of Authors and ALCS welcome the provisions to balance the playing field for creators announced in the EU Draft Directive on the Digital Single Market and urge that they be incorporated in to our domestic law through the Digital Economy Act.

The Directive proposes two important safeguards for authors:

- **Transparency:** a right to regular, timely, adequate and sufficient information on the exploitation of their works and performances from those to whom they have licensed or transferred their rights, including details of modes of exploitation, revenues generated and remuneration due. This right will apply even if copyright has been assigned and will allow authors to assess how their work has been used.
- **The so-called ‘bestseller clause’:** a right to claim additional, appropriate remuneration if the contractual remuneration is disproportionately low compared to the subsequent revenues and benefits derived from the exploitation of the works or performances. One area this could have a substantial impact is in educational publishing, where publishers are increasingly paying authors only a low flat fee. This clause would help avoid current practice where an author typically receives no further payment even if the book later becomes a highly successful curriculum textbook used in every school.

The Directive says: *“authors and performers often have a weak bargaining position in their contractual relationships, when licensing their rights. In addition, transparency on the revenues generated by the use of their works or performances often remains limited. This ultimately affects the remuneration of the authors and performers. This proposal includes measures to improve transparency and better balanced contractual relationships between authors and performers and those to whom they assign their rights.”*

The clear need for such measures is demonstrated in the accompanying [Impact Statement](#) p173 to 191. These proposals are not new or radical. Similar provisions for transparency in the book sector already exist in 14 EU Member states.

## HOW IT WILL WORK

Authors and performers would have a right to detailed and full statements of the uses of and revenues from their work (unless such reporting is disproportionate). That in itself would be an enormous improvement on the present situation where authors often do not know how widely their work is used and have no way of checking whether payments made to them are

correct. This problem has become more acute in the digital age where work can be disseminated in many ways and there is no physical stock which can be counted to ensure that accounting is correct.

Once authors and performers have such information they would be able to consider whether the share they have received is disproportionately low in all the circumstances (including taking into account the publisher's investment and risk). If it seems to be disproportionately low they can ask the publisher to renegotiate and if agreement cannot be reached the matter can be referred to an agreed dispute resolution mechanism (such as the Publishers Association's Informal Disputes Resolution Scheme). The contract adjustment mechanism could remedy those cases in which a lump-sum/buy-out deal turns out to be unfair, and it also addresses outright unbalanced deals as well as changed circumstances.

## WHAT WILL IT COST?

The Impact assessment concludes that the cost of these measures is very low.

- Accounting. Licensees and assignees will already have systems in place for recording usage and revenues and reporting to creators. These systems are increasingly detailed in the digital age and could easily be adapted to take account of any increased requirements. The Impact Assessment reports that according to a medium-sized book publisher, reporting on 600 titles on the basis of spreadsheets takes 80 man-hours per year, and the average time required for compiling and sending a report on a title is 8 minutes (simpler cases can be dealt with in 2-3 minutes while the more difficult ones can take 10-15 minutes). To make reporting even more efficient, they are now investing in an accounting and reporting software, the one-off cost of which is approximately €10,000.
- The costs of setting up the dispute resolution mechanism would depend on the system of dispute resolution chosen but many industries already have dispute resolution mechanisms for CMOs commercial users and creators in place and could therefore build on the existing structures. The EU Comments *"As a matter of comparison, when the implementation of dispute resolution mechanisms aimed at solving disputes arising between CMOs and their members was assessed, it was reported that the costs of establishing such mechanisms would be in the range of €35,000, and the operating costs in the range of €11,000 per year. Given the similarities between the envisaged dispute mechanism and the one assessed for CMOs, MS will arguably bear similar costs to the ones reported above."* It is highly likely that the knowledge that there is a remedy for creators will encourage users to negotiate and agree without needing to use the mechanism. That has been the experience in European member states which already have such provisions in place.

No negative indirect impacts on consumers are expected, for example due to compliance costs passed on to them.

## SOCIAL IMPACTS

The advantages far outweigh any cost. The Impact assessment concluded

*"Better transparency and bargaining position for creators would help reaching the goal of appropriate remuneration thereby making creative careers more attractive, which would result in a greater number of professional creators and more creative output altogether. Transparency would give a powerful message to consumers as they indicate to be more willing to pay for copyright protected works if they know that a fair remuneration would reach the original creators."*

*"The contract adjustment mechanism and the dispute resolution mechanism would encourage contractual relationships between creators and contractual counterparties to become fairer and more balanced. This would improve collaboration between creative stakeholders and incentivise a more conducive environment for creation. These mechanisms would also highlight the protection of creators to everyone in the value chain, including consumers."*

Creators have been pressing for these changes for some time as part of the [CREATOR campaign for fair contracts](#) which also calls for reasonable and limited contract terms and regular reviews to take into account new forms of exploitation.

Commenting on the directive Nicola Solomon, CEO of the Society of Authors, said:

*"Publishers too often fail to give their authors full information on sales and exploitation of their work. Many more gain an unfair windfall when a work is an unexpected success but do not share any of that gain with authors. This unfairness leads to many authors no longer being able to make a living from writing and if unchecked threatens the creative excellence of our publishing industries. Having provided evidence of such unfair contract terms to the Commission we are delighted that the EU accepts there is a problem and is suggesting sensible and proportionate measures to improve the position for creators. We*

*believe these provisions will help avoid unfair practices that currently prevent authors making a living from writing. We will be pressing the UK Government to implement these clauses without delay.”*

## WHY LEGISLATE NOW?

The Directive is now subject to further consideration and review and may take 12–18 months to adopt. However, it seems to us that the UK has an unparalleled opportunity to create a fairer playing field for creators with the vast social impact and minimal cost outlined above by incorporating these provisions into the Digital Economy bill.

As the Directive says: *“Overall, the measures proposed in title IV of the proposal aiming at achieving a well-functioning market place for copyright are expected to have in the medium term a positive impact on the production and availability of content and on media pluralism, to the ultimate benefit of consumers.”*

In his State of the Union address on 14 September 2016 Jean-Claude Juncker, President of the European Commission, said:

*“As the world goes digital, we also have to empower our artists and creators and protect their works. Artists and creators are our crown jewels. The creation of content is not a hobby. It is a profession. And it is part of our European culture.”*

Britain’s creative industries generate £84.1bn a year to the UK economy (2014 figures from CIC) and over 40% of book sales are overseas exports. It is important that we maintain a strong copyright regime, harmonised with the rest of Europe to ensure that we can still export to major markets- and it is important that the rights of creators be supported so they can benefit from their creations and continue to produce innovative, informative and creative works that are in demand worldwide.

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