



WGGB THE WRITERS' UNION

The Royal Society of Literature



# JOINT BRIEFING ON THE DIGITAL SINGLE MARKET AND AUTHORS' REMUNERATION

The organisations named above represent between them nearly 100,000 writers and authors working in the UK. We welcome the proposals contained to create a more balanced system for creators' contracts by enabling greater transparency and fairer allocation of remuneration in the proposal for a Directive on Copyright in the Digital Single Market.

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

“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.”

We support the provisions set out in articles 14, 15 and 16 in the draft Directive for Copyright in the Digital Single Market. 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](#). However, we believe that some amendments are necessary to ensure that these measures meet the objective set by the European Commission.

## Transparency

The draft Directive introduces transparency measures which would ensure authors receive regular adequate information on the exploitation of their works from those to whom they have licensed or transferred their rights. We consider transparency to be central to fair contracts for authors

We agree that these obligations should be “proportionate and effective” and reflect the varied customs and practices applicable in the different sectors in which authors' works are licensed. We do however suggest some amendments to ensure that these clauses are clear and workable and our suggested detailed amendments can be found in the Appendix, while the rationale for the changes are set out below.

### Article 14 Transparency obligation

1. Member States shall ensure that authors and performers receive on a regular basis **and no less than once a year** and taking into account the specificities of each sector, timely, adequate, **accurate** and sufficient information on the exploitation, of their works and performances from those to whom they have licensed or transferred their rights **as well as subsequent transferees or licensees**, notably as regards modes of exploitation revenues generated and remuneration due.

2. *The obligation in paragraph 1 shall be ~~proportionate and effective~~ and shall ensure ~~an appropriate~~ **a high level degree** of transparency in every sector, **as well as a right of authors to audit**. However, in those cases where the administrative burden resulting from the obligation would be disproportionate in view of the revenues generated by the exploitation of the work or performance, Member States may adjust the obligation in paragraph 1 **under the condition that the level of disproportionality is duly justified, and** provided that the obligation remains effective and ensures an appropriate level of transparency.*
3. ~~Member States may decide that the obligation in paragraph 1 does not apply when the contribution of the author or performer is not significant having regard to the overall work or performance.~~

The challenge lies in achieving reliable reporting with clear and accurate information for authors. It is therefore important that Member States consult all relevant stakeholders within each sector to help determine requirements and establish standard reporting statements and procedures. In addition, we would like this reporting obligation to be accompanied by an audit right for authors when they believe the report is not accurate. This audit procedure could also be organised through the collective agreements which will establish the standard reporting statements and procedures. The transparency obligation should be an incentive for producers and distributors of authors' works to develop automated reporting statements for authors.

We would suggest sections of the article allowing exceptions to transparency such as in those cases where the resulting "administrative burden" would be "disproportionate in view of the revenues generated by the work" are considered more carefully. As it stands this is too general and would lead to abuses of the right to transparent reporting that is the objective of this Directive. To prevent this we propose an amendment to Article 14(2) requiring that any derogation from the reporting obligation must be duly justified. The same is true for paragraph 3 which, as drafted, is too vague and could potentially undermine the effectiveness of the whole article.

## Contract adjustment

The contract adjustment measures alongside the transparency obligations would improve the position of authors who increasingly see the value of advances declining in addition to a greater use of buy-out contracts that lead to no further payment of royalties. Creators and performers are not always in a position to renegotiate existing contracts at present and may want the opportunity to revisit unfair terms, particularly in older contracts that did not provide sufficiently for new technologies. We feel Article 15 is a step in the right direction and would like to see it implemented. However amendments to Article 15 would further support the principle of fair remuneration for authors.

### *Article 15 Contract adjustment mechanism*

1. *Member States shall ensure that authors and performers are entitled to **proportionate and equitable remuneration of the revenues derived from the exploitation of their works**.*
2. ***Member States shall ensure that authors and performers or any representatives appointed by them are entitled to request claim additional,** ~~appropriate~~ remuneration from the party with whom they entered into a contract for the exploitation of **any of** the rights when the remuneration originally agreed is disproportionately low compared to the subsequent ~~relevant~~ revenues and benefits derived from the exploitation of the works or performances.*
3. ***All Member States shall ensure that contracts include a rights reversion mechanism to enable the authors to terminate a contract in case of insufficient exploitation, payment of the remuneration foreseen, as well as insufficient or lack of regular reporting.***

The contract adjustment mechanism is based on the principle that authors are entitled to fair remuneration for the use of their works. It should be affirmed as an EU principle in the first section of the article. The entitlement must include 'representatives' in order to enable collective representation. Additionally, the wording must reflect the wider exploitation of intellectual property; this is to ensure that authors do not see the rights established in this Directive are bypassed through other means such as indirect licensing of works.

## Dispute resolution

In order to provide effective measures, and to safeguard authors' and performers' rights, alternative dispute resolution procedures should be binding or there should be a final binding authority. We suggest that in the UK this could be the Intellectual Property Enterprise Court (including the Small Claims Track if appropriate).

### *Article 16 Dispute resolution mechanism*

1. *Member States shall provide that disputes concerning the transparency obligation under Article 14 and the contract adjustment mechanism under Article 15 may be submitted to a voluntary alternative dispute resolution procedure. **Authors and performers or any representatives and representative organisations appointed by them may bring a claim to the alternative dispute resolution procedure.***

Since authors often don't have the means to take expensive legal actions for fair remuneration the dispute resolution mechanism should be free of charge for authors. Processes should be put in place in each Member State to allow for mediation of disputes (which can use already existing arrangements on a sector-by-sector basis, for example the Publishers Association Informal Disputes Settlement Scheme). Such mediation processes must allow binding arbitration and parties must be able to be represented by their representative organisations or other representatives in order to avoid the risk that authors are unwilling to engage in a dispute resolution system without the support provided by representative organisations. Collective agreements negotiated between authors/ performers and broadcasters/ publishers/ producers may set the terms of the adjustment mechanisms and therefore allow for full involvement of all rightsholders in the process. Such collective agreements may also cover minimum terms agreements and competition law should be reviewed to ensure that there are no bars to this process.

## The importance of transparency and remuneration

The advent of digital media has provided new opportunities for content producers and distributors and huge value to consumers but creators are still not sharing in the rewards on offer from these evolving markets and services. In fact, the opposite is true: between 2005 and 2013, UK authors' earnings fell by 29%. The provisions of the draft directive on transparency and fair remuneration have an important role to play in redressing this imbalance and we urge the European Parliament to support Articles 14, 15 and 16, subject to the changes set out in this briefing.

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.*

## About ALCS, the Royal Society of Literature, the Society of Authors and the WGGB

The Authors' Licensing and Collecting Society Limited (ALCS) is the UK collective rights management organisation representing the interests of authors. The current membership (currently over 95,000) includes creators working across diverse genres for print, audio, audio-visual and digital publications. Established in 1977 ALCS exists to ensure that authors receive a fair reward when their works are used in situations in which it would be impossible or impractical to offer licences on an individual basis. To date ALCS has paid over £400m to authors.

Founded in 1820, the Royal Society of Literature (RSL) is Britain's national charity for the advancement of literature. The Society aims to encourage and honour writers, engage people in appreciating literature and act as a voice for the value of literature. As well as organising a selection of literary events and publishing The RSL Review biannually, the RSL administers a number of literary prizes and awards. These include the RSL Ondaatje Prize, the V. S. Pritchett Memorial Prize for short stories and the RSL Encore Award for best second novel of the year. The RSL also runs a schools outreach programme in collaboration with the literacy charity First Story. Membership of the RSL is open to all. The organisation currently has almost 1,000 members and approximately 500 Fellows, elected by the RSL council, who represent the very best writers at work today.

The Society of Authors is a trade union for all types of writers, illustrators and literary translators, at all stages of their careers. It has almost 10,000 members and has been advising authors and speaking out for the profession since 1884.

The Writers' Guild of Great Britain (WGGB) is a trade union representing professional writers in TV, film, theatre, radio, books, poetry, animation and videogames. Our members also include emerging and aspiring writers. We have national agreements with key industry bodies in the UK, including the BBC, ITV, Pact; ITC, UK Theatre National Theatre, Royal Court and Royal Shakespeare Company. We lobby and campaign on behalf of writers, to ensure their voices are heard in a rapidly changing digital landscape.

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# APPENDIX: DETAIL OF AMENDMENTS SUGGESTED

## Article 14 Transparency obligation

1. Member States shall ensure that authors and performers receive on a regular basis **and no less than once a year** and taking into account the specificities of each sector, timely, adequate, **accurate** and sufficient information on the exploitation, of their works and performances from those to whom they have licensed or transferred their rights **as well as subsequent transferees or licensees**, notably as regards modes of exploitation revenues generated and remuneration due.

We suggest that:

- “On a regular basis” be defined as “no less than once a year.”
  - An obligation that accounts be “accurate” should be added.
  - It should be made clear that the obligation also applies to subsequent transferees or licensees, otherwise the benefits may be rendered nugatory. For example, if a publisher licenses rights to Amazon, this clause is of no use unless Amazon also has to account for sales.
2. *The obligation in paragraph 1 shall be proportionate and effective and shall ensure an appropriate **a high level degree** of transparency in every sector, **as well as a right of authors to audit**. However, in those cases where the administrative burden resulting from the obligation would be disproportionate in view of the revenues generated by the exploitation of the work or performance, Member States may adjust the obligation in paragraph 1 **under the condition that the level of disproportionality is duly justified, and provided that the obligation remains effective and ensures an appropriate level of transparency.***
    - We are concerned at the potentially broad caveats set out in (2) and (3) which permit subjective judgements by the party subject to the obligation and which could therefore negate the impact of this whole measure and/or create conflict between authors and publishers/producers. A better approach would be to apply a high degree of transparency as the basis for developing sector-specific minimum rules to be arrived at through discussion by authors and publishers/producers representative bodies.
    - Authors should have the right to audit in order to increase transparency.
    - There is not enough specificity as to what would be disproportionate. We suggest that to be exempted from the reporting obligation there must be due and proven justification by way of a reasonableness test.
  3. ~~*Member States may decide that the obligation in paragraph 1 does not apply when the contribution of the author or performer is not significant having regard to the overall work or performance.*~~

We suggest that:

- The obligation to provide transparency in the value chain particularly applies to creators and performers who are, in the main, lower paid contributors. Such contributors are not in a position to have to prove significant added value and should not have to do so.
- We are concerned at the use of the word “significant” which may be interpreted as referring to topics of joint authorship or to the quality and originality of a work and may be subject to wide interpretation. Moreover, it is not clear whether the wording refers to quantity in terms of content. These issues will have a direct impact on the authorship rules in the EU. This was not evaluated in the Impact Assessment.
- In addition, “overall work” has no meaning in terms of copyright law and might be interpreted as “published edition” in order to exclude entire sectors from the transparency obligation (such as journalism).
- Instead, any derogation to the transparency obligation should be discussed as part of sectorial collective agreements establishing standard reporting statements and procedures within the transitional period of one year (art 19).

## Article 15 Contract adjustment mechanism

1. *Member States shall ensure that authors and performers are entitled to **proportionate and equitable remuneration of the revenues derived from the exploitation of their works.***
2. ***Member States shall ensure that authors and performers or any representatives appointed by them are entitled to request claim additional, appropriate remuneration from the party with whom they entered into a contract for the exploitation of any of the rights when the remuneration originally agreed is disproportionately low compared to the subsequent relevant revenues and benefits derived from the exploitation of the works or performances.***
3. ***All Member States shall ensure that contracts include a rights reversion mechanism to enable the authors to terminate a contract in case of insufficient exploitation, payment of the remuneration foreseen, as well as insufficient or lack of regular reporting.***

- We believe that this Article should go further: Such a contract adjustment mechanism is based on the principle that authors are entitled to fair remuneration for the use of their works and that should be affirmed as an EU principle. As we said above, the Directive should include the overarching principle that authors and performers have the unwaivable right to receive adequate remuneration, (including through collectively managed rights) for each use of their works, and that such remuneration must be specified in their contracts.
- “Representatives” must be added in order to enable collective representation.
- Authors or their representatives should be able to claim and not just request remuneration.
- “Relevant” needs to be deleted because it is unclear in legal terms and may encourage publishers, broadcasters and producers to engage in indirect licensing activities in order to avoid paying additional remuneration to authors.
- Authors should have the right to reversion of contracts if the works are not being exploited (the so-called “use it or lose it” clause.) Since copyright contracts are often concluded for the period of the whole copyright term, due to different reasons transferees often become unable or unwilling to exploit the authors' works in full, yet can be reluctant to relinquish the rights. In some EU countries authors have the right to ask for the rights to be reverted if they are not being exploited. It is important to add this provision to the Directive to ensure an equal regulatory framework in every Member State. It will also prevent works from becoming out of commerce when authors remain keen and willing to exploit the works.