SUBMISSION

Modernising the European Copyright Framework

6 December 2016

The Society of Authors' Response to the Intellectual Property Office's Calls for Views on the European Commission's Draft Legislation to Modernise the European Copyright Framework

The Society of Authors exists to protect the rights and further the interests of authors. It has more than 9,800 members writing in all areas of the profession.

> *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

Preliminary Submissions:

- The Society of Authors (SoA) welcomes the proposed legislation, which maintains the balance between rightsholders and users necessary for a strong creative economy.
- In particular we welcome the provisions in relation to transparency and fairness announced in the Draft Directive on copyright in the Digital Single Market ("the Directive") Articles 14 to 16. These, together with the accompanying recitals are very important first steps to balance the playing field for creators in line with the SoA's CREATOR principles.[1]
- Britain's creative industries generate £84.1bn a year for the UK economy[2]. Over 40% of book sales are overseas exports. The European Union is an important market for our creative industries.
- The last few years have seen detailed and rigorous review and debate of copyright legislation both domestically and in Europe. The result for the UK is a legislative framework that is balanced in respecting the rights of users and creators and well able to deal with the complexities of the 21st Century. Copyright is good for authors and the publishing industry. Authors wish to maintain strong copyright protection and to guard against that protection being weakened. 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.

[1] http://www.societyofauthors.org/Where-We-Stand/C-R-E-A-T-O-R-Campaign-for-Fair-Contracts

[2] (2014 figures from CIC).

- For all these reasons, the EU's Digital Single Market Strategy represents a significant initiative for UK rightsholders which the SoA would wish to see reflected within UK legislation.
- The SoA therefore urges the UK to continue to follow future EU copyright law. Stability for application of existing EU Regulations and transposition of EU Directives which form part of our copyright law must be maintained as part of the Great Repeal Bill.
- While supportive of the package of Digital Single Market proposals, the SoA recognises that specific proposals in the Directive (see our comments below and suggested amendments in the Appendix) require clarification, adjustment and alignment with real market conditions.
- It is essential that UK Government and UK rightsholders continue to play an influential role in the process of formulating and then developing the proposals within the European Commission, Parliament and Council and that adjustments and amendments are made to those proposals in the next two years. We welcome recent assurances from Government and IPO that the UK Government will play an active part in the discussion on Digital Single Market related issues including copyright and that it still has a voice at European level.
- We also welcome the assurance that the Government is aware of the importance of the issues which the Digital Single Market proposals are attempting to address and remains committed to doing so whether or not the UK remains subject to EU regime as an outcome of Brexit negotiations.
- The SoA is aware that some of the draft directives and regulations are due to be implemented before Brexit but others are unlikely to be adopted until after the UK leaves the EU (or adopted before with required transition periods that will expire after the UK leaves the EU). UK legislation on Digital Single Market issues must reflect those of Europe as far as is possible to avoid distortions in the digital marketplace.
- The SoA is concerned as to how future legislation in the UK might provide for implementation or transposition of the proposals which are currently under consideration at EU level under the UK's new constitutional model. The SoA believes that it is important for this issue to be addressed alongside the importance of retaining existing copyright rules contained within EU Regulations in order to provide stability for industry during the Brexit process, when copyright and other intellectual property issues are addressed in any Great Repeal Bill.

Our detailed comments on the Directive are set out below and in the Appendix. The SoA is grateful to the British Copyright Council and the Authors' Group[3] for some of the comment and detailed analysis below.

Article 1—Subject matter and scope

No comment.

Article 2—Definitions

The SoA has concerns over some of the definitions used in Article 2. These cover potentially ambiguous wording within the definitions of "research organisation" and what amounts to a "press publication".

"research organisation"

We question the intended scope of what is meant by "any other organisation" in order to meet the criteria otherwise set out in this definition. "Organisations may cover groups of people who

[3] The Authors' Group is Europe's leading authors' network representing more than 500,000 authors

work together in an organised way for a common social purpose". It is unclear how the use of the word addresses important differences between:

(i) research undertaken in an individual capacity, and

(ii) research undertaken for what is the equivalent of a corporate/administrative entity.

This difference is important when considering who may be regarded as having "lawful access" to works for undertaking scientific research.

The definition in Article 2 should expressly exclude those organisations which Recital 11 states should not be considered as research organisations.

"lawful access"

It should also be made clear that lawful access means access by means of purchase or subscription or otherwise with the consent of the rightsholder.

"press publication"

In Article 2 (4), this definition seems difficult to reconcile with the style of online publications. The definition seems to aim to apply to "individual items" within a periodical or regularly updated publication. However, the way in which articles are presented online does not map the layout of traditional print publications. This needs further clarification.

Article 3—Text and Data Mining

Overall this article mainly echoes the UK's existing exception. However, we are concerned at the Commission's Option 3 preference for limiting the exception by beneficiary and not by purpose. This has resulted in an Article 2.1 definition which includes "any other organisation" and this is problematic for the reasons stated in our commentary on Article 2 above.

The focus on beneficiaries rather than purpose also the leaves the way open for the exception to be used for commercial purposes. This would not satisfy the Berne three step test. The Government was careful to limit the UK exception to use for non-commercial purposes. We urge the Government to press for Article 3 to be similarly limited and to ensure that the exception is not applied in a way that allows organisations to carry out text and data mining for exploitation, particularly commercial exploitation, without a licence from the rightsholder.

While noting that the European Commission has recognised the need to regulate access (Article 3.3 and Recital 12), the BCC asks UK Government to consult relevant rightsholders on whether CDPA s.296ZU on Technical Protection Measures provides sufficient cover to allow rightsholders to achieve the objective laid out in Article 3.3.

Finally, Article 3 should provide for any copy made under the exception to be securely stored and to be deleted once the mining has been completed.

Article 4—Use of works and other subject-matter in digital and cross-border teaching activities

The exception aims to address the evolving usage of technology in teaching and the increasing importance of remote access to learning materials. Subject to the comments below regarding remuneration and definitions, we (along with the Authors' Licensing and Collecting Society) view the exception as a progressive and workable solution to the issues it seeks to address.

Copyright exceptions for education strike a fine balance between access for teaching and learning and reward for those creating educational materials. The remuneration that authors and publishers receive from licensed educational use is essential in supporting the development of new works for the education sector, a point acknowledged in the Impact Assessment accompanying the Directive:

> *A study carried out in the UK in 2011 reported that for UK educational authors a 20% reduction of the secondary licensing income would result in a 29% decline in output (which would mean 2,870 less new works being created annually).*[4]

The current situation in Canada, where educational publishing is in danger of becoming unsustainable, demonstrates what can happen when the balance between permitted activities and remuneration is lost.[5]

Art 4(2) of the Directive provides for licences to override the exception. This recognises the UK approach whereby the educational use exceptions in sections 35 and 36 of the Copyright, Designs and Patents Act (1988) ('CDPA') are displaced to the extent that licences are available covering the relevant activities. The UK system was updated relatively recently, following the Hargreaves review, and there would be no need for any amendment of the CDPA to implement Article 4 of the Directive. Within this updated framework, section 32 of the CDPA is a fair dealing exception for teaching purposes that cannot be restricted by the terms of a licence. The discretion granted to Member States by Article 4(2) allows for the dual approach in the UK whereby certain educational activities are subject to licences and remuneration while others are not. Current IPO guidance confirms that section 32 applies only to "minor uses", while the terms of licences granted pursuant to section 36 restrict usage to reasonable extracts, typically a chapter from a book or an article from a periodical. Where existing limits on uses such as the above apply to exceptions recognised under national laws linked to use "for the sole purpose of illustration for instruction/teaching", these limits should continue to be recognised as relevant to the justification of the non-commercial purpose to be achieved.[6]

Recital 16 of the Directive currently refers to uses "such as the use of parts or extracts of works" for teaching and learning purposes. This is potentially very broad and could create uncertainty within the UK system. We suggest that the wording for this Recital be amended to clarify the point that the exception only applies to limited extracts from works. To add further clarity and distinguish the activities covered by the teaching exception from other exceptions and limitations that operate in the context of education, Recital 16 could be further clarified by adopting the wording used in the Impact Assessment:

> *The notion of "illustration for teaching" can be understood as allowing a teacher to use a work to give examples, to explain or support his/her course.*[7]

Further, access to the copied works should be limited to the students or pupils directly involved in the particular teaching activities of the educational establishments where the work is used.

Article 4(4) allows for compensation in cases where the exception applies in the absence of a "licensing override". For UK authors this is relevant as they currently receive compensation from other member states from levy systems and statutory licences. This compensation follows the requirements of the Information Society Directive whereby rightsholders are compensated in respect of harm resulting from certain uses permitted by exceptions.

The current wording of Article 4(4) is ambiguous as it says Member States "**may** [our emphasis] provide for fair compensation" which could be read as providing Member States with discretion as to whether they provide for compensation in cases of harm. Given that this Article is introducing a mandatory exception, it should be amended to make this clear, i.e. the word "may" should be amended to "must".

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[4] Page 99, Commission Staff Working Document, SWD(2016) 301 final

[5] http://publishingperspectives.com/2016/06/canadian-textbook-publishers-copyright-law/#.WCRhjC2LSpp

[6] For example, the current exception in the UK under s 32 CDPA 1988 (as amended by S.I. 2014 No 1372) provides Fair dealing with a work for the sole purpose of illustration for instruction does not infringe copyright in the work PROVIDED THAT the dealing is

(a) for a non-commercial purpose

(b) by a person giving or receiving instruction (or preparing for giving or receiving instruction) and

(c) accompanied by a sufficient acknowledgement (unless it would be impossible for reasons of practicality or otherwise).

[7] Page 88, SWD(2016) 301 final

Article 5—Preservation of cultural heritage

Under UK law (CDPA s.42 (2)), the exception is limited by the fact that copies should not be available for purchase. We are concerned that the EC's proposal does not have this limitation. The exception should be limited to preservation by cultural institutions and should in no way deal with making available. Subject to provisions relating to out of commerce works (see our comments below) and the existence of appropriate licensing schemes, it is not appropriate to construe an exception linking, for example, making copies for preservation under the new Article and then using these copies to remotely e-lend (unduly applying the CJEU judgment in Case C 174/15, Vereniging Openbare Bibliotheken v Stichting Leenrecht).

Article 6—Link with other Directives

No comment.

Article 7 —Use of out-of-commerce works by cultural heritage institutions

The SoA understands the challenges faced by cultural heritage institutions in clearing rights to enable the digitisation of collections and the rationale for including this provision within the Directive. The SoA has been working with the British Library and others to agree workable protocols for clearing such works.

However, we have a number of concerns about the proposed provision:

- While cultural heritage institutions have an obligation to make their collections accessible to the public, care should be taken to ensure that this provision is not used by such institutions to extend their activities, to the extent that they become publishers.
- It is likely that the proposed exception would not satisfy the principles laid down by the CJEU in its judgement in the Doke & Soulier case (C 301/15) which stated that "every author must actually be informed of the future use of his work by a third party and the means at his disposal to prohibit it if he so wishes" (para 38) which would seem to contradict the very purpose of Extended Collective Licensing arrangements, which is to avoid the need to clear rights on a per-work (or per-rightsholder) basis.
- From a UK perspective, it will be necessary to analyse the extent to which the kind of licences envisaged by Article 7 could operate under The Copyright and Rights in Performance (Extended Collective Licensing) Regulations 2014. For example, the Regulations require a licensing body to show it has "significant" representation of relevant rightsholders, compared to the "broadly representative" standard in the Directive. It will be difficult for a licensing body to meet either test when dealing with older (say early 20th century) works which are still in copyright.
- The definition of "out of commerce" in the Directive should be more adaptable, addressing the specific conditions within different sectors. For example, the current definition in the Directive would prevent a book author whose works are available in the second-hand market, (from which the author receives no remuneration) from participating in and receiving fees from an extended licensing scheme. This point was recognised in the wording relevant to published works adopted in the Memorandum of Understanding that was agreed between the representatives of rightsholders and potential users of out-of-commerce works:

> *A work is out of commerce when the whole work, in all its versions and manifestations is no longer commercially available in customary channels of commerce, regardless of the existence of tangible copies of the work in libraries and*

among the public (including through second hand bookshops or antiquarian bookshops).[8]

- However, this definition is too vague because there is no definition of "customary channels of commerce" and, in particular, new and emerging channels are not included. Past practice tends to confirm that what libraries (and perhaps national legislators and regulatory agencies implementing the Directive) define as "customary" becomes limited to the most traditional (publisher-centric) formats, business models, and distribution channels. A typical example is the Wellcome Digital Library Project in the UK[9], which has often been cited as a model of best practices:

> *Previously, the Wellcome Library had worked with ALCS, PLS and the British Library on the ARROW initiative (Accessible Registries of Rights Information and Orphan Works), a 'network of databases and rights registries designed to enable the identification and rights clearance of works to support mass digitisation throughout Europe.' It was decided that books found to be in-commerce (that is: still in print, and available for sale) would not be published on the WL website, as publication would constitute clear infringement and the availability of digital copies might have a negative impact on the market for such works. Alongside ARROW, the Bowker Books in Print website was used to check whether books were in-commerce in non-ARROW countries, resulting in a total of 252 works being identified as in-commerce. The list of remaining books was then sent to ALCS and PLS to run through ARROW....*

In other words, Bowker Books in Print was used as the sole criterion of "in commerce" status for works published outside the EU. And ARROW, which suffers from many of the same defects, to an only slightly lesser degree, for EU-published works. Writers' efforts to revive and make available their backlists through new self-published or self-distributed non-ISBN digital editions, posting on websites for free or as paid downloads, etc., were not considered part of "normal commerce" yet these are now the routes that many authors use to monetise their works- and are well understood by the public to be a route to finding works.

The Directive should require explicitly that self-published and digital versions be included in the definition of "normal commercial channels" for determining whether a work is "out of commerce".

- As similar problems arise with other types of work, the matters subject to stakeholder dialogue in Article 9 of the Directive should be expanded to include defining the meaning of "out of commerce" works on a sector-specific basis.

- The Directive should require a single opt-out applicable to all "out-of-commerce" licensing schemes in all EU countries. This is consistent with the goal of integration of the single EU market. It should not be necessary for an author to opt out separately from each scheme in each country where her work might have been published. Not all authors will want to opt out. But if an author has already made their work available online through self-publication or licensing they are unlikely to want to have competing online versions made available.

- Any opt-out scheme should be simple, well-advertised and free for authors to use.

- Opt-out should be available on a per-writer, not just per-work, basis. (It is prohibitively burdensome, and often impossible, for an author to itemise all of their works, especially if they might have been published under different titles in different editions. This should be mandated in the Directive, not left to the discretion of national legislation.

[8] Memorandum of Understanding (MoU) on Key Principles on the Digitisation and Making Available of Out-of-Commerce Works, 2011

[9] http://www.create.ac.uk/publications/copyright-risk-scoping-the-wellcome-digital-library-project/

- Finally, it should be explicit that any collective management scheme should provide for equitable remuneration to be paid to the rightsholder of any such work, otherwise the Article will not be just and would not satisfy the three step test.

Article 8—Cross-border uses

No comment.

Article 9—Stakeholder dialogue

No comment on this particular provision other than a general comment that the proposed Directive relies on stakeholder dialogue in areas relating to text and data mining (Art 3(4)), Art.9 in relation to out of commerce works, and Art.13(3) in relation to certain uses of protected content by online services as noted below. We accept that the complexity of copyright issues in the digital age may require a higher degree of cooperation between stakeholders and welcome mechanisms for stakeholder dialogue and collective bargaining. We would also welcome clarification and legislation to ensure that such dialogue is not stilted or made unworkable by the operation of competition law.

Article 10—Negotiation mechanism for audiovisual works

No Comment.

Article 11—Protection of press publications concerning digital uses

We see no need for the proposed right. It does not seem to be evidence-based and press publishers in the UK are already protected adequately by copyright and database right.

While the clarification in Article 11(2) that the proposed new right for press publishers should not affect existing rights of authors is welcome as an expression of principle, we see no need for creation of further related rights which have the potential to interfere in the balance of rights between rightsholders.

If such rights are to be granted:

- They should be as narrow as possible.
- It is important that the definition of "press publication" is carefully reviewed to ensure that the related right envisaged by Article 11 can properly apply to the defined works as they are published in both online digital and non-digital formats.
- In terms of the actual operation of these rights, to the extent that press publishers are successful in licensing digital reuses of their publications, authors should participate in this new revenue stream on fair terms specified in their contract, in accordance with our comments below on a remodelled Article 14.
- The provisions in Article 11.2 indicating that the new right in no way affects any rights provided in Union law to authors and other right holders, in the works and other subject-matter incorporated in a press publication, are important and must be respected.

Article 12—Claims to fair compensation

While this provision is not directly applicable to the UK, UK rightsholders receive revenue from countries where compensation systems operate. For authors, through its membership of the Copyright Licensing Agency (CLA), ALCS is part of an established system of reciprocal agreements between reproduction rights organisations (RROs) that enable published works to be copied across Europe and the resulting payments from licences or levies to be collected and distributed to domestic rightsholders. Historically this system has recognised payments to both creators and publishers providing funds to enable them to commission and create new works. On that basis we support a mechanism that will underpin the current model whereby shares of compensation due in respect of copying exceptions are available to both creators and publishers.

We support the permissive wording in this clause: there are some areas, such as Public Lending Right, where the Member State should not be obliged to compensate the publisher even if rights have been transferred.

While legislation recognises and supports a share of fair compensation for publishers, and others in the value chain, it should in no way reduce or remove the obligation to provide fair compensation for authors or performers.

Article 13—Use of protected content by information society providers storing and giving access to large amounts of works and other subject-matter uploaded by their users.

The SoA supports this provision. It will go some way towards addressing the issue of service providers who play an active role in the distribution of content and who benefit commercially from providing access to unauthorised and infringing content. It is entirely just that such service providers should be obliged to take appropriate and proportionate measures to ensure that content is authorised and that access to unauthorised content is prevented.

The provision does not affect the e-Commerce Directive provisions on safe harbour for service providers, where they play a passive role in storing content.

13.1—Further work is needed to ensure that effective content recognition technologies are recognised and applied, including measures to prevent the stripping of metadata. Any exception for text and data mining must also take those concerns into account.

13.2—Effective complaints and redress services are welcome but they are merely a passive response. It is not fair to put the onus on the rightsholder- we very much welcome the intent of this article which is that Internet Service providers must take **active** steps to identify content and prevent piracy.

13.3—Nothing in Article 13.3 should weaken or prevent the main intent of this article. While the SoA welcomes cooperation with information service providers, rightsholders have attempted to cooperate with service providers on many occasions previously. Such attempts have met with little success: the inequality of size and bargaining power between large multinational service providers and individual creators means that such discussions, while most welcome, are likely to prove ineffective without supporting legislation.

Chapter 3—Fair Remuneration in contracts of authors and performers

The SoA welcomes the provisions to balance the playing field for creators announced in the Directive (the so called "transparency triangle") and urges that they be brought into both EU and domestic legislation at the earliest opportunity.

We welcome the recognition in the Explanatory memorandum to the Directive that:

> *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.*

We agree that the situation needs urgent redress.

This is underlined by the new EC study on authors' remuneration[10] which surveyed authors, journalists, translators and illustrators across Europe, and makes important recommendations to improve the contractual position for writers. The study found that:

[10] https://ec.europa.eu/digital-single-market/en/news/commission-study-remuneration-authors-books-and-scientific-journals-translators-journalists-and

- Average annual incomes for UK authors, including advance, royalties and ALCS and PLR payments was about £12,500 in May 2015, when the survey was run.
- Average annual incomes for UK journalists were also around £12,500, around half the average levels reported by journalists in Germany and Denmark, where there are far more legal protections for creators.
- Average incomes for UK translators and visual artists were a little higher at around £17,850, still well below the UK average wage.
- The average total income from a UK author's latest book was less than £6,000.
- Only half of book authors view their primary activity as their only or main source of income.
- UK authors do not enjoy the same legal safeguards as their counterparts in other EU countries to ensure that contracts are fair.
- The provision of legal safeguards improves an author's financial position.

We welcome the three policy recommendations proposed in the report and would suggest that these also are brought in to EU and UK legislation.

- A legal requirement for written contracts to specify in detail how a work can be exploited and how its author will be remunerated, and a right for the author to receive accounts.
- Place limits on transfers of rights to future works and future modes of exploitation.
- Allowing freelancers who work mainly for one or two employers to claim employee status and rights.

Even more important, to set Articles 14, 15 and 16 in a context that could achieve the EU's stated policy aim of improving the remuneration received by authors and performers, 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.

Authors should also have the right to have rights reverted if they are not being utilised by the transferee.

Article 14—Transparency obligation

We welcome the recognition that Article 14 gives to the need for transparency in the value chain and for fair remuneration to all who participate in that chain, including not only authors but also as it applies to the relationship between content providers and internet service providers.

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.

14.1

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.
- the publisher should also be under an obligation to report on what has been done by way of promotion as well as in relation to sales. A publisher's job includes promoting an author's work, but in many instances the publishers lose interest in promoting the author after the initial sales period while continuing to benefit from the exploitation of the rights. The reporting obligation should therefore also disclose the activities undertaken to promote the work.

- 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.

14(2)

- 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.

14.3

- 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

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:

- 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.

Article 16—Dispute resolution mechanism

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).

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)[11]. Such mediation processes must allow binding arbitration and parties must be able to be represented by their representative organisations or other representatives. 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.

Articles 17 to 24—Final Provisions

No comment.

Feel free to contact us for any further information.

Society of Authors December 2016

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[11] http://www.publishers.org.uk/about-us/useful-links/informal-dispute-settlements/

APPENDIX
SUGGESTED AMENDMENTS TO THE DIRECTIVE CHAPTER 3

	ARTICLE 14 – TRANSPARENCY OBLIGATION			
	Original text	**Suggested changes**	**Consolidated text**	**Reasoning**
Art 14 § 1	Member States shall ensure that authors and performers receive on a regular basis and taking into account the specificities of each sector, timely, adequate and sufficient information on the exploitation of their works and performances from those to whom they have licensed or transferred their rights, notably as regards modes of exploitation, revenues generated and remuneration due.	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 and promotion 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.	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 and promotion 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.	To be of use to authors and performers, it is essential that the reporting is reliable, accurate and regular. As recital 40 states, licensing and transferring of rights does not stop once rights have been transferred to the authors' contractual counterpart: to provide authors and performers with a full picture of how the works have been exploited, the mandatory reporting obligation must include all subsequent transferees or licensees. A publisher's job is also to promote the authors, but in many instances the publishers lose interest in promoting the author after the initial sales period but continue to benefit from the exploitation of the rights. The reporting obligation must therefore also disclose the activities undertaken to promote the exploitation of the work.

	ARTICLE 14 – TRANSPARENCY OBLIGATION			
	Original text	**Suggested changes**	**Consolidated text**	**Reasoning**
Art 14 § 2	The obligation in paragraph 1 shall be proportionate and effective and shall ensure an appropriate level of transparency in every sector. 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, provided that the obligation remains effective and ensures an appropriate level of transparency.	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.	The obligation in paragraph 1 shall ensure a high 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.	A high degree of transparency means that authors have the right to know how their works are being exploited. Authors shall have the right to audit in order to increase transparency. There must be due justification in order to fall under the exception of the reporting obligation.

	ARTICLE 14 – TRANSPARENCY OBLIGATION			
	Original text	Suggested changes	Consolidated text	Reasoning
Art 14 § 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.	To be deleted.		The wording "overall work" and "contribution (…) significant" 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			
	Original text	**Suggested changes**	**Consolidated text**	**Reasoning**
Art 15	Member States shall ensure that authors and performers are entitled to request additional, appropriate remuneration from the party with whom they entered into a contract for the exploitation 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.	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.	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 claim additional, 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 revenues and benefits derived from the exploitation of the works or performances.	Such a 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. 'Representatives' must be added in order to enable collective representation. Furthermore, authors or their representatives should be able to claim and not just request remuneration. Also, 'relevant' needs to be deleted because it is at best 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 the authors.
Art 15 b		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 and promotion.	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 and promotion.	Since copyright contracts are mostly concluded for the period of the whole copyright term, due to different reasons transferees might be rendered unable or unwilling to exploit the authors' works. In some EU countries authors have the right in such cases to revoke the exploitation rights. It is thus important to add this provision to ensure an equal regulatory framework in every Member State.

	ARTICLE 16 – DISPUTE RESOLUTION MECHANISM			
	Original text	**Suggested changes**	**Consolidated text**	**Reasoning**
Art 16	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.	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 an ~~voluntary~~ alternative dispute resolution procedure. Authors and performers or any representatives appointed by them may bring a claim to the alternative dispute resolution procedure.	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 an alternative dispute resolution procedure. Authors and performers or any representatives appointed by them may bring a claim to the alternative dispute resolution procedure.	In order to provide effective measures and to safeguard the authors' and performers' rights it is important that alternative dispute resolution procedures are binding or that there is 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.

	RECITALS			
	Original text	Suggested changes	Consolidated text	Reasoning
Recital 40	Certain rightsholders such as authors and performers need information to assess the economic value of their rights which are harmonised under Union law. This is especially the case where such rightsholders grant a license or a transfer of rights in return for remuneration. As authors and performers tend to be in a weaker contractual position when they grant licenses or transfer their rights, they need information to assess the continued economic value of their rights, compared to the remuneration received for their license or transfer, but they often face a lack of transparency. Therefore, the sharing of adequate information by their contractual counterparts or their successors in title is important for the transparency and balance in the system that governs the remuneration of authors and performers.	Certain rightsholders such as authors and performers need information to assess the economic value of their rights which are harmonised under Union law. This is especially the case where such rightsholders grant a license or a transfer of rights in return for remuneration. As authors and performers ~~tend to be~~ are in a weaker negotiating contractual position when they grant licenses or transfer their rights, they need information to assess the continued economic value of their rights, compared to the remuneration received for their license or transfer, but they often face a lack of transparency. Therefore, the sharing of ~~adequate~~ information by their contractual counterparts and subsequent transferees or licensees, as well as by ~~or~~ their successors in title is important for the transparency and balance in the system that governs the remuneration of authors and performers.	Certain rightsholders such as authors and performers need information to assess the economic value of their rights which are harmonised under Union law. This is especially the case where such rightsholders grant a license or a transfer of rights in return for remuneration. As authors and performers are in a weaker negotiating contractual position when they grant licenses or transfer their rights, they need information to assess the continued economic value of their rights, compared to the remuneration received for their license or transfer, but they often face a lack of transparency. Therefore, the sharing of information by their contractual counterparts and subsequent transferees or licensees, as well as by their successors in title is important for the transparency and balance in the system that governs the remuneration of authors and performers.	Publishers, broadcasters and producers must be bound by a reporting obligation; that is the obligation to report on a regular basis the modes of exploitation undertaken and the revenues yielded by all exploitations imposed on first transferees but also on other content providers and exploiters in order to enable authors and performers to have a broader understanding of the financial flows and their actual share in their work's economic exploitation.

	RECITALS			
	Original text	Suggested changes	Consolidated text	Reasoning
Recital 41	When implementing transparency obligations, the specificities of different content sectors and of the rights of the authors and performers in each sector should be considered. Member States should consult all relevant stakeholders as that should help determine sector- specific requirements. Collective bargaining should be considered as an option to reach an agreement between the relevant stakeholders regarding transparency. To enable the adaptation of current reporting practices to the transparency obligations, a transitional period should be provided for. The transparency obligations do not need to apply to agreements concluded with collective management organisations as those are already subject to transparency obligations under Directive 2014/26/EU.	When implementing transparency obligations, the specificities of different content sectors and of the rights of the authors and performers in each sector should be considered. Member States ~~should consult~~ shall ensure that the representative organisations of all relevant stakeholders ~~as that should help~~ determine sector-specific requirements and establish standard reporting statements and procedures for each sector. Collective bargaining should be considered as an option to reach an agreement between the relevant stakeholders regarding transparency. Member States shall ensure a high degree of transparency within these sector specific transparency obligations. Moreover, the sharing of information should occur at least once a year. To enable the adaptation of current reporting practices to the transparency obligations, a transitional period should be provided for. The transparency obligations do not need to apply to agreements concluded with collective management organisations as those are already subject to transparency obligations under Directive 2014/26/EU.	When implementing transparency obligations, the specificities of different content sectors and of the rights of the authors and performers in each sector should be considered. Member States shall ensure that the representative organizations of all relevant stakeholders determine sector-specific requirements and establish standard reporting statements and procedures for each sector. Collective bargaining should be considered as an option to reach an agreement between the relevant stakeholders regarding transparency. Member States shall ensure a high degree of transparency within these sector specific transparency obligations. Moreover, the sharing of information should occur at least once a year. To enable the adaptation of current reporting practices to the transparency obligations, a transitional period should be provided for. The transparency obligations do not need to apply to agreements concluded with collective management organisations as those are already subject to transparency obligations under Directive 2014/26/EU.	When sector specific standards for reporting are discussed, it is essential that relevant representative of all stakeholders are involved in the discussion, to reach a binding agreement within the transitional period of one year (art 19). To ensure the usefulness of the transparency obligation, a minimum timeframe for reporting back to authors and performers should be set and should not overtake one year.

	RECITALS			
	Original text	**Suggested changes**	**Consolidated text**	**Reasoning**
Recital 42	Certain contracts for the exploitation of rights harmonised at Union level are of long duration, offering few possibilities for authors and performers to renegotiate them with their contractual counterparts or their successors in title. Therefore, without prejudice to the law applicable to contracts in Member States, there should be a remuneration adjustment mechanism for cases where the remuneration originally agreed under a license or a transfer of rights is disproportionately low compared to the relevant revenues and the benefits derived from the exploitation of the work or the fixation of the performance, including in light of the transparency ensured by this Directive. The assessment of the situation should take account of the specific circumstances of each case as well as of the specificities and practices of the different content sectors. Where the parties do not agree on the adjustment of the remuneration, the author or performer should be entitled to bring a claim before a court or other competent authority.	~~Certain~~ Most contracts for the exploitation of rights harmonised at Union level are for the entire duration of copyright ~~of long duration~~, offering ~~few~~ no possibilities for authors and performers to renegotiate them with their contractual counterparts or their successors in title. Therefore, without prejudice to the law applicable to contracts in Member States, there should be a remuneration adjustment mechanism for cases where the remuneration originally agreed under a license or a transfer of rights is disproportionately low compared to the ~~relevant~~ revenues and the benefits derived from the exploitation of the work or the fixation of the performance, including in light of the transparency ensured by this Directive. Collective bargaining should be considered as an option to reach an agreement. ~~The assessment of the situation should take account of the specific circumstances of each case as well as of the specificities and practices of the different content sectors.~~ Where the parties do not agree on the adjustment of the remuneration, the author or performer should be entitled to bring a claim before a court or other competent authority.	Most contracts for the exploitation of rights harmonised at Union level are for the entire duration of copyright, offering no possibilities for authors and performers to renegotiate them with their contractual counterparts or their successors in title. Therefore, without prejudice to the law applicable to contracts in Member States, there should be a remuneration adjustment mechanism for cases where the remuneration originally agreed under a license or a transfer of rights is disproportionately low compared to the revenues and the benefits derived from the exploitation of the work or the fixation of the performance, including in light of the transparency ensured by this Directive. Collective bargaining should be considered as an option to reach an agreement. Where the parties do not agree on the adjustment of the remuneration, the author or performer should be entitled to bring a claim before a court or other competent authority.	Most contracts are actually for the entire duration of the copyright, meaning up to 70 years. This duration has to be stressed whereas "a long time" is vague and does not adequately reflect how important the renegotiating of contracts is. The language 'taking into account sector specificities and practices' must be deleted as it contradicts the purpose of the article. As the sectors' practices are buy-out contracts with no possibility to claim additional remuneration, how can an author apply article 15? Unless references to sectors' specificities are deleted, the publisher, broadcaster or producer will always claim that its sectors' practices prevent the introduction of transparency obligations.

	RECITALS			
	Original text	Suggested changes	Consolidated text	Reasoning
Recital 43	Authors and performers are often reluctant to enforce their rights against their contractual partners before a court or tribunal. Member States should therefore provide for an alternative dispute resolution procedure that addresses claims related to obligations of transparency and the contract adjustment mechanism.	Authors and performers are often ~~reluctant~~ unable to enforce their rights against their contractual partners before a court or tribunal. Member States should therefore provide for an alternative dispute resolution procedure that addresses claims related to obligations of transparency and the contract adjustment mechanism and that it is free of charge as well as accessible for authors. The dispute settlement resolution can also be agreed in collective agreements.	Authors and performers are often unable to enforce their rights against their contractual partners before a court or tribunal. Member States should therefore provide for an alternative dispute resolution procedure that addresses claims related to obligations of transparency and the contract adjustment mechanism and that is free of charge as well as accessible for authors and performers. The dispute settlement resolution can also be agreed in collective agreements.	Since authors often don't have the means to take expensive legal actions for their 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 in respect to contracts dealing with transfer of rights. Such mediation processes must allow binding arbitration and parties must be able to be represented by their representative organisations or other representatives. 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.