



THE VALUE OF WRITERS' WORKS

**Proceedings of the European Writers' Council
2014 Authors' Rights Conference**

Brussels, 3 November 2014

The European Parliament

With the patronage of Julie Ward, Member of the European Parliament

Sponsored by the Authors' Licensing and Collecting Society and VG Wort

ALCS

protecting
and promoting
authors' rights



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EWC- FAEE was established in Belgium in 2006 as an "association internationale sans but lucratif" (AISBL), and was first founded in 1977 in Munich as a private association under the name of European Writers' Congress.

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2014 EWC Authors' Rights Event

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The European Parliament**

Proceedings of the European Writers' Council
2014 Authors' Rights Conference

Under the patronage of Ms. Julie Ward MEP, Group of the Progressive Alliance of Socialists and Democrats in the European Parliament, and United Kingdom Labour Party the event was organised by EWC, and sponsored by the Authors' Licensing & Collecting Society as well as by VG Wort.

- I. The Writers' Keynotes**
- II. Towards Fair Contractual Agreements and Practices**
- III. Challenges and Solutions for Remuneration and Compensation**
- IV. Concluding Remarks**
- V. Contributors**

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Introduction

Myriam Diocaretz, Editor, EWC Secretary

“The Value of Writers’ Works” was an **evidence-based** forum addressing the challenges that concern European authors in the text and book sector in all genres, including screen-writers and literary translators. The threefold thematic platform gave the opportunity to professional writers to discuss their perspectives; it also aimed at calling the attention of the Members of the European Parliament to follow-up from the study on copyright contract law and contractual practices requested by the European Parliament Legal Affairs Committee (JURI); it was important also to receive an update on recent and forthcoming studies by the European Commission. The interconnection between the digital and its effects on the authors’ remuneration and compensation was at the crossroads of several topics.

The data on the authors’ generally weaker negotiating position is still incomplete, with significant surveys and reports in progress. Yet the evidence so far demonstrates that in several if not the majority of Member States writing as a main profession is becoming increasingly difficult, and that there is a regular decrease in the number of professional writers. This phenomenon should be worrying not only in terms of the job market but also because it impoverishes the European landscape of culture and language diversity. In view of this tendency, the question, as a red flag is: **what can be done to stop the writing profession from gradually disappearing?** Part of the known causes is the inequitable level in the contractual negotiations between individual writers and their publishers, or between individual authors and their producers, which materialise in a number of unfair clauses and contractual agreements lessening authors’ earnings.

In the context of the EU copyright legislative framework and the impending 2015 review, the European Parliament and the European Commission have a key role to play to prevent that the diversity and multiplicity of works offered in Europe declines. Cultural diversity and the quality writing as well as the professions related to writing by professionals are at stake in Europe.

The keynote speakers included two best-selling writers, one fully established and one emerging; researchers on copyright law whose work serves as an important basis for future approaches; legal counsels, experts on digital matters from the United States and Norway; representatives of collective management organisations; the European Commission, and Members of the European Parliament. Through such a range of expertise, the evidence-based conference provided “concrete perspectives to be considered for much needed solutions in order to improve the working conditions of professional authors”, as stated by EWC President Dr. P. Hiidenmaa. In the next paragraphs I shall give a mere overview of the key themes, which does not do justice to the overall richness of the contributions.

For Ms. Julie Ward MEP, who initiated the dialogue, copyright and fair remuneration are crucial at a time in which digital technologies makes us re-think digital contents, and it is essential “to ensure that policy makers make fair decisions.” In The Writers’ Keynotes, Ms. Joanna Trollope, whose art and imagination have given us many characters and worlds that have reached also the TV screen, stresses that copyright is working well, and her career is evidence of this; she asks for help to achieve the “author-share” because writers are often the only person not being paid in the chain, especially in the providers’ business models; finally, her analysis and testimony validates the fact that copyright protects and sustains the whole industry. Mr. Goce Smilevski presented a vision as warning against the contemporary trend of “graphomania” in the digital age, in which “everyone is an author”. He distinguishes between authors and graphomaniacs, because authorship requires that we value words and literature. Mr. Smilevski also addresses the fruitful impact which the European Union Prize for Literature for emerging writers in contemporary fiction has had on his career, and makes an appeal to the Members of the European Parliament that they continue to support the funding of this EU initiative.

In section II “Towards Fair Contractual Agreements and Practices”, Prof. Silke von Lewinski considers key challenges to the harmonisation of copyright contract law, explores how to approach it, and how to regulate to obtain fair terms and conditions in individual contracts. In her research, Prof. von Lewinski has found evidence that within the different systems in the Member States, copyright contracts “are not fully satisfactory for authors.” She states: “...in the frame of individual contracts, authors are typically in a weaker bargaining position than their contractual partners.”

Prof. von Lewinski’s proposal to solve the lack of balance in the authors’ weaker positions in contractual negotiations and practices includes: a directive, and collective solutions for equitable remuneration. But this is not all. She proposes that the EC Rental Directive model – earlier formulated by Prof. von Lewinski herself – could be extended, and “could be a way to handle the issue, [...] combining an exclusive right and allowing for authors a residual right to equitable remuneration,” with the Collective Management Organisations’ intervention as a key role.

The study on “Contractual Arrangements Applicable to Creators: Law and Practice of Selected Member States”, focused on the provisions of copyright contracts for writers, composers, film directors, and visual artists. It addressed the concerns of the Legal Affairs Committee of the European Parliament, providing important evidence and conclusions on the situation in eight countries (Belgium, France, Germany, Hungary, Poland, Spain, Sweden and the United Kingdom). Dr. M. Iglesias, a co-author of the study, underlined that until now copyright contracts have been “absent from the EU copyright agenda”. In her presentation Dr. Iglesias emphasized the findings of the research which demonstrate that both “the weaker position of the author in the negotiation process” and the due adequate remuneration “are not sufficiently ensured by law.” Moreover, in terms of the new digital models the majority of contracts do not ensure proper solutions; the study also proposes

the adoption of “an unfair terms model” that would be a reference to prohibit a number of provisions that are at the root of the lack of balance between authors and their publishers/ producers. There is a further reference to service providers in the context of several forms of exploitation and other key contractual clauses and provisions. The conclusion and key recommendations can be found in the study, pp. 100-105.

Mr. Trond Andreassen explains the effective role which a “standard contract” can fulfil, and sets a clear difference between model contracts and standard contracts and guidelines. The Norwegian standard contract for writers and translators is a binding agreement, which resulted from years of long and difficult discussions between writers’ and publishers’ organisations. Several challenges existed outside the frame of the contractual agreement, inter alia, the Competition Authority (CA) determining the book market rules and trying to eliminate the standard contract. These CA plans were eventually overruled by politicians. In addition to the recommendation to adopt standard contracts in the EU, Mr. Andreassen reiterates in this conference his appeal first pronounced at the time when he was the first President of the European Writers’ Council in 2006, that the EU launches an initiative (paper or report) on “How to Strengthen the Role of the Author in Europe”, a much needed stance to solve the current situation.

November 2014 was the first month of the new European Commission, and the EWC conference was held on the very first working day of its official mandate. In this transition period, Ms. Judit Fischer, the Copyright Unit Policy Officer representative, presented a synthesis of the development of the EC’s work on fair contracts for authors since 2002, when the first study was carried out, and offered an insight into the forthcoming study planned for 2015 on contractual practices. To the present, there has been no EU legislation on the contracts issues because it has been up to the national competence. An important source of data was obtained by the EC through the public consultation on the review of the copyright legal framework. The authors’ and performers’ responses pointed to their weak negotiating positions, and among others, highlighted their concerns about the lack of clarity in the clauses on digital uses, and the need for more transparency in the accounting. The EC’s results also drew conclusions on the role of collective bargaining. Significantly, Ms. Fischer states that the findings were in line with the conclusions in the EP 2014 JURY study (see Dr. Iglesias’s presentation). The EC, she confirms, continues to investigate the contractual agreements and practices, and as a follow-up of the 2014 study on the music and audio-visual sector, the next step in 2015 is an economic and legal study covering the text-sector. In short, the EC is examining the different approaches that are feasible if there would be any EU intervention in the framework of the internal market, to address the issues of contracts and remuneration for authors and performers in all the relevant sectors.

Section III, “Challenges and Solutions for Remuneration and Compensation” continues the evidence-based strand with a report by Ms. Barbara Ann Hayes on

the two research initiatives undertaken by ALCS on the authors' earnings in the UK. The first one had a focus on freelance journalists, and the second one dealt with a wider scope of professional writers. The findings are simply “disturbing”. Ms. Hayes provides details about the surveys and offers some comparative figures to reveal that the percentage of freelance journalists that **“do not earn enough to support themselves”** is high (77%).

The second research initiative focused on the “professional author”, to update the ALCS 2005 survey, when 40% could make a living on their writers' work. Several years later the percentage of writers who earn their income as an author is only 11, 5%. Parallel to this or as a cause and effect phenomenon, the earnings of professional authors also **declined considerably**. With additional evidence on minimum income and other financial input, the ALCS research makes an unambiguous case to show **the decline or slow disintegration of writing as a core profession in the UK**: “Imagine a world where there are no professional writers because we haven't made it financially viable for them.”

The ALCS in-depth report on the disquieting findings also offers some answers and solutions: what do authors need? Fair contracts; a supportive copyright framework for creators to make a living from their work; and equitable terms on rights and payments for freelance contributors. What are the next steps? Lobbying; working together with publishers; education on the importance of copyright, not just for the general public but for creators as well; and **for politicians the mission to ensure that an effective copyright environment is allowed to function**.

In the digital age the e-book is slowly but surely becoming a familiar reading resource. The challenges for fiction writers in Norway are put in a nutshell by Ms. Mette Møller, Attorney-at-Law. The title is telling: “same content, improved usage, less money”. First, we note a recognition of the many advantages of e-books, especially in terms of reading. Nevertheless, in an age when everybody “wants digital”, and when the writers' are going through a “drastically reduced income”, Ms. Møller asks the crucial question: “How do we keep the professional writer in a digital environment where everything is expected to be free” [of cost]? **Her vision is a sustainable e-book value chain to prevent that the full-time professional writer spends time in other jobs, and to prevent the weakening of literature and the loss which this means for the reader**. I must underline that this is a point that was explicitly brought up in varying ways by all speakers in the conference. A fundamental principle for this sustainability, according to Ms. Møller, is fair remuneration for the writer in terms of a reasonable ROI for his/her time invested, and preventing low prices for e-books and for services such as streaming; above all, a demand for fair contracts. Finally, she asks the politicians, and all involved: **“Do we still want to have professional authors?”**

The e-book is still incipient in Europe due to several barriers (i.e. interoperability, device and/or software incompatibility, market fragmentation, etc.). In the United

States the digital uses and corresponding clauses appeared much earlier. In her essay, Ms. Jan F. Constantine, General Counsel of the Authors' Guild (New York) brings to light several topics under "The American Publishing Landscape in the Digital Age" from an authors' perspective. The first section: "Amazon's Rise to Dominance", shows the historically intricate and changing relations between Amazon and the publishers in a bit more than two decades, and in particular, refers to the present conflict in the USA which has also engaged best-selling authors. The Amazon manoeuvres in the book market are already affecting the European scene, with unpredictable effects for authors and publishers. The outline presented by Ms. Constantine is therefore quite opportune and informative. Not surprisingly, for example, we witness that the e-book publishing business in the U.S. is not equitable when it comes to pay the advance and the royalties to authors. Equally enlightening is the section on the "Amazon's Antitrust Problems" demonstrating the colossal control exercised by Amazon in pricing e-books and exercising marketing strategies which work to the detriment of authors and publishers. Ms. Constantine's analysis of the recent Amazon events is a clear warning to authors and policy-makers about the risks involved when such a giant is allowed to disrupt and dominate the business environments, which makes the e-book market and authors vulnerable. Also noteworthy are her reflections on the emerging e-book subscription models and her call for wider awareness of the German antitrust complaint against Amazon, and the effects of book discount schemes threatening independent bookstores in France and Germany.

The digital developments have also had an influence on the "private copying" levies, and this outlook is presented by Mr. Robert Staats, Joint CEO of VG Wort, lawyer and expert in copyright law. Mr. Staats's comprehensive view begins with "The Situation in Germany", on discussions from 1966, through 1985, to the copyright legislation in 2008 in terms of which devices and storage media were subject to the levy. The complexity of the levy system and the evolution of the technological digital devices have prompted several court cases which are listed in this article. The next section, "The European Situation" for the levy system, is an excellent mapping of, on the one hand, the current opposition to it (i.e. devices manufacturers), and on the other, of the previous decisions of the European Court of Justice, as well as the pending cases. Concerning the digital world, which also prompts a review of the private copying and levies system, the key questions addressed include whether licensing would be a solution; whether alternatives to the levy system would work; and cloud computing. The final section contains six helpful measures proposed by Mr. Staats on how to improve the levy system.

In the concluding remarks, Mr. Olli Rehn, Member and Vice-President of the European Parliament, draws together a cohesive and perceptive vision as an elected politician, as a writer, and as an active reader. His valuable observations include but are not limited to a recognition of the crucial role of literature – through its writers – in the construction and development of the ideas and principles of Europe and nation-building, and the role of "contemporary works and writers for the world

of tomorrow.” Furthermore, on the main policy topic of the conference, Mr. Rehn refers to the conclusion of the EP/INPO study on contractual practices for creators, and the key function fulfilled by writers in the value-chain as well as in the generation of jobs. Therefore, he suggests, the EU policy needs to support the creative industries. Moreover, the copyright system “should enable that the writers in the beginning of the chain will get an appropriate remuneration for their work. Only this will guarantee that the whole chain can prosper.” Equally reassuring is Mr. Rehn’s final statement, which we quote in full:

“Therefore, we as lawmakers should make sure that the writers have the legal foundation for sound and solid contracts, so that their jobs and creations are being rewarded on fair terms, even taking into account the pressure of evolving technologies and modern times”

Enjoy reading this collection!

Welcome

Julie Ward MEP, Group of the Progressive Alliance of Socialists and Democrats in the European Parliament, and United Kingdom Labour Party, MEP for the North West of England. ¹

“Julie opened the speech by welcoming the participants and underlining the importance of having a conversation on this crucial issue that is copyrights and fair remuneration of writers, in the context of the digital revolution the cultural and creative world is facing. Nowadays digital technologies offers immense opportunities to share content and this cannot be done without being aware of the risk of abuses.

Julie gave an overview of her particular background. Julie is not only a politician but an artist – a poet and theatre maker – and has worked as a cultural practitioner engaged with community for thirty years before engaging politically and being elected as an MEP.

She is very eager to get involved on the copyright issue and to listen to all the voices concerned. At this early stage of the legislative process, her priority is that everyone engaged with this issue is listened to and that stakeholders enter a dialogue to ensure that policy makers make fair decisions keeping the common good in mind. Finally she reminded everyone that creators are at the heart of the issue, as without creators there would be no content to share.”

Pirjo Hiidenmaa

EWC President

First of all, I wish to thank Ms. Julie Ward for her kind patronage. I also welcome the writers present today who have come from more than fifteen European countries. Moreover, we thank all representatives of European authors and cultural organisations who have joined us.

We – writers and literary translators – came here today to raise important issues that are essential for authors to do their professional work. Among these issues are the authors’ rights, remuneration, and contracts. When the world is going more and more digital, we all need to get the benefits of these increasing options to create, distribute and access our works. It is not fair if all other stakeholders get the benefits but authors only lose.

Therefore, today we are pleased to present very concrete perspectives that can be considered for solutions towards an improvement of the working conditions of professional authors.

¹ [Editor’s Note]: Ms. Ward, MEP, a playwright and literary creator, gave the audience a warm welcome, presented her key activities and wholeheartedly gave an insight into her interests in and concerns about literature, culture and societal issues. The present summary was kindly provided by Ms. Julia Pouply, Parliamentary Assistant to Julie Ward MEP.

I The Writers' Keynotes

The Principle of Copyright

Joanna Trollope OBE

Ladies and gentlemen – It is a great pleasure and distinction to be asked to talk to you this morning, and I am very grateful for both the invitation and the opportunity.

My name is Joanna Trollope. I am a collateral – not, sadly for journalists, a direct – descendant of the Victorian novelist, Anthony Trollope, and even though I think of him as the real Trollope, I am the first member of the family to be a published writer since he died in 1882.

Like many of my generation who grew up before the ubiquity of the screen, I was probably reading before I was five, and, from the evidence of my busy juvenilia, writing at about the same age. Judging by the quantity of earnestly handwritten notebooks filled with stories and poems of extremely uneven and doubtful quality, writing stuff down was as necessary and natural to me as breathing.

I didn't know it then, as filling those notebooks was plainly instinctive, but what I was doing was exercising my imagination, exploring that powerful inner life, which all of us have and which sustains us, enriches us, advances us, entertains us, and stops us from going mad. It is a subject that I will return to later, as it is crucially important to the current issue of changes to copyright law in the European Union.

So, writing as my way of communicating with, and joining, my fellow men, was obviously there from the beginning. I read English Language and Literature at Oxford, in the 1960's, in the days when there was only one woman student for every seven men. I wrote my first full length novel – unpublished to this day, possibly for very good reasons – in my very early twenties, and had to wait for over a decade, two children and two other careers later, to hold my first published novel solidly in my hands. The moment didn't compare with holding my two daughters as newborns, but it ran those experiences a close second.

I have been a published writer now for more than forty years, and in the bestseller top ten in the UK, without a break, for over half that time. My jackpot, turning point novel was *The Rector's Wife*, which was a paperback number one for months in 1992. In August 1993, I had three titles in the paperback top ten. I cite these dates in order to demonstrate that copyright and I have been very well known to each other for at least a quarter of a century.

As a novelist, my subject is human relationships. Marriages, parenthood, love affairs, friendships, stepfamilies, sibling rivalries, work colleagues, adulteries, mothers-in-law. I look at whatever has seized public attention at any given time, be it wills and inheritance, or adoption, or women and work. My source material is the world around me, but what I do with that material, what fashions it into a novel which draws the reader in, irresistibly, is my imagination.

The imagination – or creativity perhaps, in modern parlance – is what lies at the heart of the debate now going on about copyright in the European Union.

It is often assumed that imagination and fantasy are almost interchangeable as concepts. This could not be a more inaccurate and careless yoking together of two entirely different mental processes. A fantasy is essentially a caprice, a preoccupation with objects and goals that are unobtainable, a dream wish. But the imagination is, quite literally, the stuff of our lives, as well as the fuel for creative writing. The imagination thinks, and conceives, and devises, and wonders, and plans. Without it, we would not be sitting on these seats in this hall, all of which were thought up by the creative imagination. And look at your smart-phones. I would guess that everyone in this room has a smart-phone. Without the content, devised by numerous imaginations, that smart-phone is just an empty shell of plastic and metal. The imagination has, quite literally, made our modern world what it is, for good or ill.

Those people who can harness their creative imaginations are, in consequence, crucial to life as we know it. I could cite endless manifestations of creativity, such as engineering or composing, but our concern today is the writer, the author. That human being who sits alone, with a laptop, or in my case, still paper and pen, and no accompaniment otherwise but the inside of their own heads, and produces something that then sustains the livelihoods of millions of their fellow men.

I am not exaggerating. Without that solitary imaginative idea – in the case of a novelist, couched in a made up narrative peopled by made up characters – there would be, globally, no libraries, no publishing industry, no retail book industry, no online distribution giants, never mind the warehousing and transport involved, never mind the limitless opportunities offered for spin offs into film and television and merchandising. Be those writers poets or philosophers or storytellers or analysts, it all comes down to the same thing – that the articulation of ideas and thoughts and narrative in a shareable written form, is the generator of unbelievable amounts of interesting occupation for vast numbers of our fellow citizens. And those numbers take no account of the only category in the writing industry which matters as much as the writer, which is, of course, the reader. The reader is the whole point of the solitary creativity of the writer, and I only don't make more of the reader in this lecture because a) it is a whole topic in itself and b) I am focussing on the practical effects of the exercise of the imagination, which is, in this case, occupation and employment as a consequence of the written word.

Nobody minds that. On the contrary, most writers rejoice to be of indirect consequence to so many people they will never meet. Book associated work of every kind, quite apart from reading, is a profoundly warm, human, bonding and engaging experience.

But what is happening now, is that the very creativity that provides so much content and employment for so many, is in danger of being stolen in the name of progress, and the mistaken assertion that the consumer is automatically king. And when I say stolen, I mean it. As everyone in this room knows, intellectual property is much easier, and more comfortably ambivalent in ethical terms, to steal than diamonds.

Don't get me wrong. I am emphatically not asking for special pleading. I am just asking, given the vital role of the writer in this whole process, that copyright – which,

I have to say, seems to be working perfectly well at the moment, as far as I can see – is protected, in order that writers are paid their due. Copyright, after all, protects a whole huge industry, as no editing or publishing or promotion can happen without it. Writers are not asking for more, they are simply asking that the protection of their ideas as copyright, be implemented as an unshakeable principle.

The reason for this is not just the palpable unfairness of aspects of the current situation, but the grave plight of too many writers right now. Many established names in the library borrowing world live on unimaginably low incomes. As publishers get larger and larger, they can, often overbearingly, dictate harsher and harsher terms to writers who do not generate the money of the – extremely rare – mega sellers. In the UK each year, of the very roughly, 250,000 titles published, rather under 10% of that number will make a profit, but the ideas generated by a commercially unsuccessful book can be useful as content to a multi-national corporation, whose aim is to seduce the consumer into assuming that all knowledge and entertainment is theirs for no payment, via a specific provider. This means, in bald terms, that the creator – the writer – is providing content for free which subsidises that provider's business model. And how can one person alone, even if they fully understand their rights under copyright law, stand up to something the size of Amazon?

It was a relief indeed to hear that the new president of the Federation of European Publishers is aware of this unhappy David and Goliath situation. He has recently said:

"We need to send a non aggressive message to the younger generation so that they understand content has to be paid for if it is to remain of a high quality."

But unfortunately, that would only address one problem. In the melee of ways that a work of the creative imagination can be exploited, the originator, the writer, is often the only person not being paid. We need to be paid for secondary licensing rights. We need to be certain that we will be paid for reversion rights. We need to know that contract terms legislation, which currently, and bizarrely, covers everyone involved except the writer, will be amended. We are not asking for anything extra, or out of the ordinary, only that we should be paid fairly for our fundamental contribution.

And so, we need – and I ask this most urgently, on behalf of all writers, especially those who are struggling – the help and the might of those now considering the future of copyright. There will inevitably be some modification of authors' rights over the coming years, but nothing more should be changed or taken away without having our opinion sought, and our consent given.

We are thrilled to see the world go forward. We are excited by, and supportive of, technological progress. But we are suspicious of those who blithely take advantage of our creativity and talk of how much they care about us. I think I speak for almost all writers when I say that author care is all very well, but what we want, and look to the European Union to help us achieve, is author share.

Our Obligation and Responsibility towards the Words

Goce Smilevski, European Union Prize for Literature for the Republic of Macedonia 2010 (FYROM)

At the very beginning of his book “The Waning of the Middle Ages”, Johan Huizinga wrote: “*When the world was only half a thousand years younger, all events had much sharper outlines than now. The distance between sadness and joy, between good and bad fortune, seemed to be much greater than for us; every experience had that degree of directness and absoluteness that joy and sadness still have in the soul of a child*” (Huizinga, 1). Following Huizinga’s notions, we can assume that the words also had much sharper outlines than they have now, and that they had that degree of directness and absoluteness they still have in the soul of children. For everyone, and not only for the children, they must have been always new. Each word must have had resonance in the ears of the human beings as if it was heard for the first time, or even more, as it was pronounced for the first time. As if each word was invented and created at the very moment when it was pronounced and heard. At that time, when the world was only six hundred years younger, the words must have been always like just born.

Huizinga published his book after the end of the First World War, in the year 1919. Almost a century has passed since then, and the words may have lost something else besides the sharpness and newness – and we may wonder – what and why? Maybe poets and novelists have already given the answer about what words have lost and why.

Less than three decades after Huizinga published his book on the ending of the Middle Ages, the Polish poet Czesław Miłosz wrote the poem *Dedication*. In the poem, he asks: “*What is a poetry which does not save / Nations or people?*” (Miłosz, 74). These verses were written after the end of another World War, the second one. A few decades have passed since the end of the war and the time when authors had this inevitable feeling of obligation and responsibility towards the words, and obligation and responsibility when using the words.

Exactly at the middle between this moment when we are here to talk about the authors’ rights, and the moment when Czesław Miłosz wrote his poem *Dedication*, Milan Kundera in his novel *The Book of Laughter and Forgetting*, has described and explained the epidemic that then, in the 1970s, or may be just a decade earlier, was stepping on the soil of the Europe, and that has changed irretrievably the concept of what is an author and what it means to be a writer. The name of the epidemic is related with books and writing, and is called – graphomania. This is what Kundera writes about it: “Graphomania is not a desire to write letters, diaries, or family chronicles (to write for oneself or one’s immediate family). Graphomania is a desire to write books (to have a public or unknown readers). [...] Graphomania (a mania for writing books) inevitably takes on epidemic proportions when a society develops to the point of creating three basic conditions:

1. An elevated level of general well being which allows people to devote themselves to useless activities.
2. A high degree of social atomization and, as a consequence, a general isolation of individuals.
3. The absence of dramatic social changes in the nation's internal lives. [...]

But the effect transmits a kind of flashback to the cause. If general isolation causes graphomania, mass graphomania itself reinforces and aggravates the feeling of general isolation. The invention of printing originally promoted mutual understanding. In the era of graphomania, the writing of books has the opposite effect: everyone surrounds himself with his own writings as with a wall of mirrors cutting off all voices from without" (Kundera, 127). Now, several decades after Kundera's words about graphomania, in our digital age (which is only one phase of the age of consumerism), and after the invention of a few more media that disseminate what is written, graphomania has its culmination, the same as isolation. The isolation resulted with everyone's need to write (no matter that but a few of them are also readers), and everyone is – an author. The new media, such as social networks (that are, actually, antisocial), made everyone – an author.

Some of the big internet book-sellers gives an opportunity to anyone who wrote a book to make it available as a digital book. Without proof-reading, without language correction, without the suggestion of the editors that this book perhaps is not a book, that perhaps it is not literature. These web sites – the sellers, these giants of internet are becoming the black holes in the universe of culture that are ready to swallow everything written, and everyone will end in the same black hole, every work will disappear there – both authors and graphomaniacs who maybe never really read anything.

At that period before being swallowed by the black hole, during the period when the magnetic force will drive to itself everything that was and that is written – there will be a defeating effect of leveling out – that everything that is written is of same value. Are we living that age? Are we at the period before everything will be gone from that side of the virtual (and, at the same time, so real) black hole? So we come to the question: are we capable of making a difference between an authorship and a graphomania? Are we able to protect the author and author's rights? If we cannot, and if we do not, we will put all the books in a vacuum space.

I guess all of us remember that lesson in physics in the primary school, when we were taught that, in the vacuum space, the feather and the leaden ball fall with same speed. If we refuse or if we do not find a way to make a distinction, if we don't find a solution how to value the words, all the books will fall in that vacuum space with same speed, and at the end, they will be down there, at the bottom. There has to be a mode for the things to be changed. I am sure the black holes in the universe of culture will disappear before they manage to swallow the culture. I believe this is a just a crisis that will be overcome, and we have to participate in finding the solutions. We have to find a way to talk and promote the values of literature.

In our contribution to valuing words and the authors' rights, we have to find ways to promote literature. That is why I think that the founding of the European Union Prize

for Literature by the Culture Programme of the European Union, the European Commission, the European Writers' Council, the Federation of European Publishers, and the European Booksellers Federation is of an extraordinary importance to support the visibility of literary values of all European countries, both members and non-members of EU.

The Secretary-General of the European Writers' Council, Myriam Diocaretz, has kindly asked me to describe the success of my novel *Freud's Sister* after it was awarded with the European Union Prize for Literature. As I don't want it to sound like a self-boasting, I will give just a several facts, only to illustrate the importance of the prize. Here they are. If I have dreamt of being translated from Macedonian into some thirty languages (and I have to admit that I did dream about it), I had not expected that the dream would become true so soon. The European Union Prize for Literature has opened a door for my novel to sound in so many languages, and at the moment, the translators are translating it into Malayalam, Arabic and Korean.

The reviewers from all the countries where the book is published do mention the award, and they underline the importance of the EUPL; they do recognize how important it is for bringing the works of European authors into the literary scene and making them visible for the wider audience. The novel brought some controversies, and some people that misunderstood not only my novel, but also psychoanalysis and the works of Freud, people who think of Freud as of a cult and think that they should be keepers of the cult, made a serious campaign, or rather raid, against the novel, and one of the points was – how could this kind of novel receive such a prize? Which is, again, a compliment for the EUPL. But, despite the campaign and the raid, the novel continues with the success among readers and critics, and proved the value of the prize.

The award opened a door to translations, and some of them brought new awards. I was awarded the Premio per la Cultura Mediterranea for literature (previous winners were Amos Oz, Tahar Ben Jelloun and Amin Maalouf, and a winner the year after me – David Grossman). Also, my translator into English, Christina E. Kramer, received an honorable mention award by the Modern Language Association of USA, for the translation of *Freud's Sister* into English, among the best translations made into English that year. I was invited to many book-fairs, festivals, residencies, book events, some of them focusing exactly on the value of the words and authorship, such as the Passa Porta Seminar in Belgium, this year, titled: *The Time of the Author*. I would like to thank to all the organizers of EUPL for the opportunity my novel to become available to the readers across the world, and I kindly ask the Members of the European Parliament to continue supporting the funding of the EUPL, and to support the rights of authors to earn a fair remuneration. There are books of great value, written in our time, that do deserve to find a broad readership. Let us do that not only for the sake of the authors and the readers of today only, but for the good of European culture and our European future.

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II

Towards Fair Contractual Agreements and Practices

The Value of Writers' Works: Fair Contractual Terms in European Copyright Law?

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The question of how to achieve fair terms and conditions in individual contracts between authors and exploitation businesses (such as publishers) has been a longstanding challenge in most countries of the world, including in Europe. For example, even within an EU Member State, Germany, there have been long-term problems fully to regulate the issue at national level alone: During the preparatory work for the current German Copyright Act of 1965, it had been proposed to include a comprehensive regulation of copyright contract law, including for different kinds of contracts (such as on musical performances, broadcasting, etc.). However, the legislature finally decided that such detailed provisions would require too much time to be elaborated and would thus inappropriately delay the adoption of the Copyright Act; in the end, only general rules on copyright contracts were adopted in 1965 as an 'interim step' – nevertheless, up to this date, the legislature has not achieved to complement these general rules with the envisaged specific ones. Overall, in the EU Member States, many different legal remedies and tools exist for different situations regarding copyright contracts; however, often, they are not fully satisfactory for authors.

EU Harmonization?

Recently, also the EU has shown interest in the issue of fair contractual terms in authors' rights contracts. In particular, the latest Consultation by the European Commission of 2013/2014 included questions on the topic, and both the European Commission and the EU Parliament have recently mandated different studies on individual questions of copyright contract law. This fact may evoke the question: Should there be EU harmonization of legal rules on fair contractual terms?

When considering this question, one should keep in mind the following challenges to such a harmonization: First, under EU law, there is no general legal competency of the EU to legislate in the field of authors' rights and related rights including contract law aspects, so that any single harmonization measure regarding contract law rules must be justified by its relevance for the Internal Market—a task that is not always easy to achieve. Indeed, the impact of the existing differences in national provisions on copyright contract law on the functioning of the Internal Market seems to be limited or even lacking, so that harmonization measures in this field may not be easily justified on the basis of the Internal Market competency of the EU. It is therefore no surprise that neither the Green Paper on copyright and related rights of 1988 nor the follow-up paper of 1990 included copyright contract law as an area for harmonization. Also later, on the basis of reactions of interested circles to the Green Paper on the Information Society, the Commission concluded that no need for harmonization existed in respect of the contract law issues submitted for discussion (in particular, the free choice of the law applicable to online transmissions, questions

of contract law regarding moral rights, and questions on the acquisition and exercise of rights in the context of multimedia works). Even the recent study mandated by the European Parliament has not clearly shown the internal market impact needed to justify EU harmonization measures.

Furthermore, even in the framework of general contract law, to which copyright contract law is inherently linked, a proposal of the European Commission to legislate comprehensively at the EC level hardly found any support from governments and stakeholders. This was not least due to the strong and longstanding diversity of civil or common law concepts and traditions, so that the Commission in the end restricted its approach to a “Common Frame of Reference”. This experience in general contract law shows that a full harmonization or unification (by way of a regulation) in a highly diversely regulated field (such as in that of copyright contract law) would seem very difficult.

In fact, in the field of copyright contract law (like – as a side remark – in that of exceptions or limitations of exclusive rights), the diversity and the level of detail of regulation is enormously high. The provisions of the Member States on copyright contract law vary enormously. Notably, in the Member States that follow the Continental European author’s rights system, such as in France and Spain, statutory provisions restricting the freedom of contract or influencing the interpretation of contracts in favor of the author are quite common; within this group of countries, the degree and contents of regulation differ. Such provisions typically are part of copyright acts and apply in addition to general contract law; they may contain, for example, obligatory rules on the interpretation of copyright licensing contracts or rules directly restricting the freedom of contract in order to strengthen the weaker party to a contract. Other Member States provide only some basic provisions in this regard.

Yet other Member States, namely typically those following the Anglo-Saxon ‘copyright system’ and common law in general, from the outset reject the idea of regulating copyright contracts by statute because, for them, the interference of the legislature with the principle of freedom of contract as a near sacrosanct principle hardly seems conceivable. Statutory provisions restricting the freedom of contract in principle are alien to that system. Under common law, only case law has assisted the author in balancing his weak position in specific circumstances compared to the relatively stronger position of businesses, such as a publisher. By the way, in order to spread this tradition with its industry-oriented approach to other countries, the US industry and government continuously strive for inclusion into US trade agreements of provisions on the free and separate transferability of rights and the full enjoyment of rights and their benefits by persons acquiring or holding any economic rights by contract – provisions directed against the above-mentioned protective provisions known in countries of the authors’ rights system.

Another challenge of harmonizing copyright contract law at EU level is the political aspect: one may expect stronger opposition by exploitation businesses to any legislative activity at EU level than at national level, given the impact of any EU

rule, which is stronger than that of a single Member State. Therefore, it may be better to establish well-working rules at the Member States' level first. In any case, if the EU legislature will think about harmonization in the field of copyright contract law, the only realistic approach seems to be to focus on concrete, most urgent issues, and in no case to use the instrument of a regulation (which would replace national law), but only a directive, which leaves more leeway to national legislatures.

Examples for Rules for Authors' Rights Contracts

Examples for helpful contract law provisions (though with some set-backs) are provisions on a restrictive interpretation of assignment of rights if the contract is not clear, and interpretative rules under which the assignment of rights that are not explicitly mentioned only extends to those rights that are absolutely necessary for the fulfilment of the purpose of the contract (n.b.: the term "assignment" in this article is meant to include any similar forms that may exist under Member States' laws, such as transfer of rights, grant of licenses, etc). However, these provisions do not help the author where contracts have been drafted in a very detailed and clear manner, as is often the case especially with trade publishers. Another example for such legal provisions is the obligatory limitation of the duration of assignment, so that the author has a second chance to seek a better return for an assignment, especially if he has become famous in the meantime. Under another rule, assignments cannot cover any uses yet unknown at the time of the conclusion of the contract, so that, for example, the assignment of a reproduction right before the digital age did not cover reproduction on CD-ROMs and similar digital reproductions.

Moreover, one may mention the rule according to which the transferee of a right or licensee may further transfer or sublicense the right to another publisher only if he first gets the author's consent. Also the requirement that contracts have to be in writing may help authors to be aware of what they sign, and, if needed, try to negotiate better clauses. However, if the author, as often, is in a weaker negotiation position than the publisher, she may not obtain better conditions and sign the contract anyway, just to get a chance to have her work published; this situation is getting more acute in today's world of growing media concentration. Rules on remuneration include the so-called bestseller provision, according to which the author may claim a modification of the contract to achieve better remuneration, if both parties did not expect the success of the publication and therefore only agreed on a minor remuneration. Another example based on a collective model will be presented below.

Collective Solutions, in Particular for Equitable Remuneration?

Labor law

However, many of these rules have limited effects, because in the frame of individual contracts, authors are typically in a weaker bargaining position than their contractual partners, i.e. publishers and other exploitation businesses. Therefore, solutions based on collectivism may be better suited and more successful.

First, the model of labor law is to be mentioned. In the USA, for example, all audiovisual performers (who are in a position similar to that of authors in respect of remuneration) participating in a film made under US law, even if they do not enjoy

performers' rights in their performances, in principle must become members of a labor union or guild before concluding a contract with a film producer on their participation in a film. Likewise, US film producers under most guild agreements are obliged to conclude contracts only with performers who are members of the relevant guilds. Due to this obligation as well as to the mere size of the US film industry and the enormous, worldwide market for this industry, as well as due to the right of performers to go on strike (and thereby to cause considerable losses of revenues not only for the film production industry, but also for any related industries that are indirectly involved through delivery of products and services), these audiovisual performers are much more powerful than they could be on the basis of mere individual relations with the producers. Thereby, they have obtained, in the framework of their collective bargaining, quite favorable contractual conditions, which apply to all of the members of the guilds.

However, this model only works for employed authors (and performers) rather than for freelancers; also, it may work well only in countries where similar obligations to join such unions exist or where unions are strong for other reasons. But especially in countries with small markets (for example, due to narrow language areas or culturally specific demands of consumers), such labor law solutions may not show any success that would be comparable to that of US-audiovisual performers.

The Model of the German Copyright Contract Law of 2002

Another example for the replacement of individual negotiations by collective action is the German Copyright Contract Law of 2002 (§§ 32, 36 of the German Copyright Act). In essence, it grants authors and performers a right to receive an equitable remuneration as a guaranteed counterpart for the grant of licenses. While the claim to obtain such equitable remuneration (if this is not anyway provided in the individual contract) still must be made by the individual author against his publisher or other contractual partner, the collective element plays its role in the negotiation of what is to be considered as 'equitable'. Such determination may either be made in negotiations between labor unions on the one hand and employers of authors (or performers, who are covered also but will no longer be mentioned herein) on the other hand, or, in their absence – and this is the main innovation of the 2002 copyright contract law – in negotiations between associations of authors on the one hand and individual publishers (or other exploitation businesses) or their associations on the other hand. Such collective negotiations would set standards of what is to be regarded as 'equitable' in different branches, such as for translators of fiction works, authors of children's books, etc. The individual author may then claim from his contractual partner payment of a remuneration according to this standard (if the remuneration is not settled in the contract) or he may claim the consent by his contractual partner to modifying the contents of the contract according to such standard, if the agreed remuneration is lower than this standard.

After many years of negotiations and court proceedings initiated by authors in Germany, this model has shown some positive effects for authors. However, among the practical obstacles to a broader application in practice of this model one may

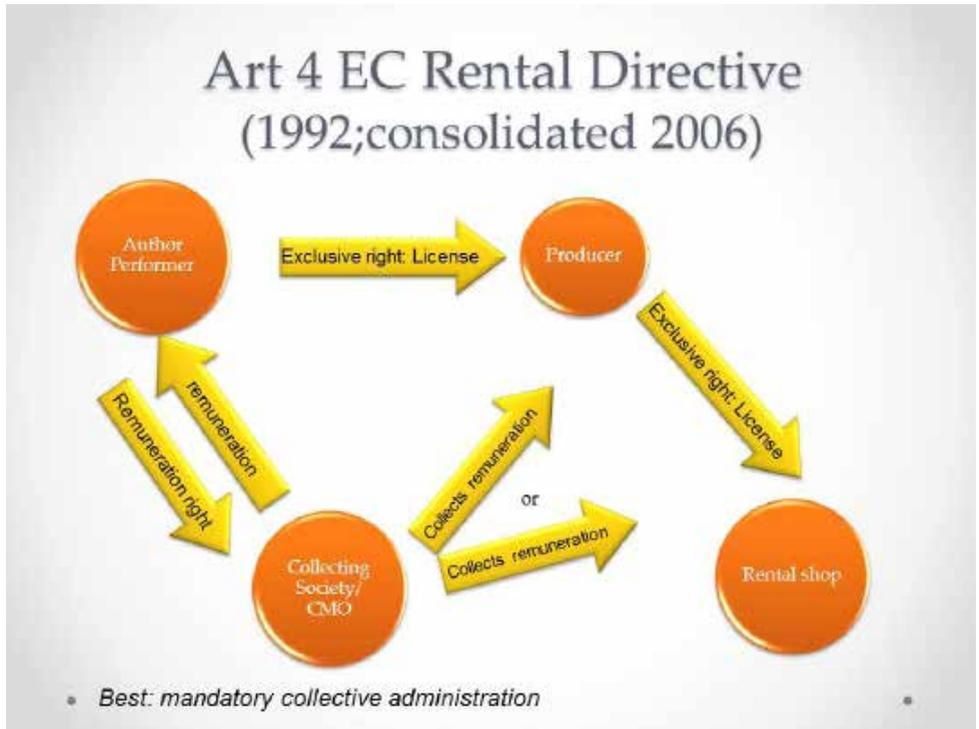
observe initial publishers' strategies to prolong negotiations or otherwise avoid a speedy agreement on such standards and the lack of associations of authors in many branches. Authors tend to be individualists and generally have little interest in joining associations. Accordingly, for several branches of authors, negotiations on standards of 'equitable remuneration' have not even started and might never start. The main systemic obstacle to success of this model is, however, the fact that in the end, it is still the individual author who must address his publisher or other contractual partner to make a claim for such equitable remuneration – even where standards have been agreed on collectively. Thus, the problem of authors who may not dare to make such claims since they fear not being offered a contract again is not removed; in fact, the problem still must be resolved within this sometimes delicate, individual contractual relationship.

The Model of the EC Rental Directive **—Presentation of the model**

In contrast, a third legislative model based on an element of collectivism avoids the above mentioned deficiencies of the other models. It is the model first realized in Article 4 of the EC Rental Rights Directive of 1992 (Article 5 of the version codified by Directive 2006/115/EC). Although the scope of application of this model in this directive is limited to the exclusive rental right, it could in principle (and in some countries already has done so) serve as a model for other economic rights. It was invented by the author of this contribution, when she was an expert to the European Commission and drafted a proposal for that directive.

At that time, different existing models – an exclusive rental right on the one hand, and an exception to that right in combination with a statutory remuneration right on the other – needed to be harmonized for phonograms and films. The concept realized in the EC Rental Directive did so through a combination of the advantages of both concepts. First, an exclusive right without an exception was provided, serving the claimed need of producers to take market decisions on the basis of exclusive rights in order to best amortize their investments. Accordingly, the advantage of an exclusive right on the market and its strength when compared to a mere remuneration right was safeguarded. At the same time, the advantage of a statutory remuneration right administered by Collective Management Organizations (CMOs), namely a regularly better share in revenues for authors than under individual contracts, was added to the exclusive right in an innovative way: namely, authors, after having granted a license, would retain by law a residual remuneration right that would ideally be administered through CMOs. This part of the solution aimed at solving the problem of the typically weak bargaining position of authors in individual contracts and at ensuring that authors would indeed benefit from the rental right granted to them under the law.

This model is now presented in a graph and explained in more detail, and its most effective ways of implementation are presented below.



This model applies where an author has transferred or assigned a particular exclusive right concerning her work or performance to a producer, publisher or other exploitation company, as is the rule regarding exclusive rights. Also, a transfer or assignment presumed by law would be covered by this model. For this situation, the law must determine that the author retains, even after such transfer or assignment, the right to obtain an equitable remuneration for the relevant use. One might interpret this right as a residue of the exclusive right. The law must state that this remuneration right cannot be waived by authors and, ideally, that it can only be transferred to a CMO of authors or performers and has to be entrusted for administration to a CMO representing authors or performers. The law should best specify that the remuneration must be claimed from the professional user, such as the rental outlet, who received an exploitation license from the producer or other company. Alternatively, the CMO would have to claim the remuneration from the producer, publisher or other exploitation company.

Thus, this innovative combination of an exclusive right and, for authors, a residual right to equitable remuneration subject to collective management is based on the general assumption that the author usually cannot obtain an equitable remuneration for granting licenses in individual contracts and should instead obtain such remunerations outside of these contracts, namely through the intervention of CMOs that administer their separate, unwaivable remuneration rights by collecting the revenues from the publishers or other exploitation businesses and distributing them directly to authors. Through this way of ‘outsourcing’ the delicate questions on remuneration from the individual contract with business partners to a ‘service organization’ (a CMO), this model avoids the disadvantages of the above mentioned models that are based on the individual contract.

In order to be efficient as a means to remedy the typically unbalanced situation in individual licensing contracts, it is however crucial that this model integrates the following four factors:

- (1) The statutory basis for the remuneration right;
- (2) the unwaivable nature of the right;
- (3) the fact that it can be transferred only to a CMO for exercise for the benefit of the authors, and
- (4) mandatory collective administration of the remuneration right.

First, the remuneration right under this model is based on a statute rather than on the individual contract. Thus, the law itself provides for the right to claim an equitable remuneration, irrespective of any contractual agreements. Secondly, the author is strengthened by the nature of the right as an unwaivable right; thus, an author could not be forced in the individual contract with any legal effects to waive the right. This element is a necessary corollary to the independent, statutory remuneration right.

Thirdly, the fact that the remuneration right can be transferred only to a CMO is to guarantee that the author does not “lose” this right to an exploitation business on the basis of the individual contract. Fourthly, in relying on the central role of CMOs through mandatory collective administration, the model reveals its underlying philosophy, namely, the perceived need to withdraw the issue of remuneration from the delicate individual contractual relationship in order to import it into the framework of CMOs where authors no longer individually face their publishers and other exploitation businesses but may benefit from their stronger bargaining position as a group. Also, CMOs are existing in most fields of authors’ rights, and the typical individualism of authors is less of an obstacle to join a CMO than it seems to be to join a professional organization that would be needed for the purposes of the German Copyright Contract Law of 2002. In other words, this model is built on the experience that an enhanced bargaining power through a collective element may in practice be more efficient than legal provisions that have to be enforced by the individual author on the basis of the individual contract, like traditional copyright contract rules. The capacity of a CMO to administer rights of authors collectively

who thereby gain an increased bargaining power makes it suitable to fulfil the function of balancing the interests of authors against those of publishers and other exploitation businesses.

Finally, the model is most effective if the law clearly determines the professional user as the debtor of the remuneration of authors. Of course, the professional user in such a case must be made aware of the fact that he will be faced not only with the publisher or other business in order to obtain a license subject to payment, but that in addition, he must expect a separate claim for remuneration from a CMO on behalf of authors. If he takes into account this overall legal situation before concluding the licensing contract, he may from the outset be prepared to conduct the licensing negotiations accordingly. Such a situation is not unique; for example, broadcasting organizations are traditionally faced with the need for obtaining licenses from authors (or their CMOs) and, at the same time, the need for paying statutory remuneration rights of performers and phonogram producers (or their CMOs) for the use of phonograms for their broadcasting activities.

— The potential of the model

This model was devised in the framework of the EC Rental Directive only for the rental right; however, given its generally valid purpose and its basic mechanism, there is no reason not to extend it to certain other rights. In fact, at the time of the implementation of the EC Rental Directive, the German Government had already recognized the potential fundamental importance of this model with a view to balancing interests of authors and exploitation businesses in general: It observed that it might consider this model in the framework of the then future reform of copyright contract law. In addition, this model was adopted for the exclusive cable retransmission right, which has been supplemented by an unwaivable right to equitable remuneration for authors and performers; practice has shown that it works very well for authors and performers.

In the meantime, this model has also been introduced in Spain regarding the right of making available and in Poland regarding other rights. While the model may not be appropriate for all rights in respect of all kinds of uses, one should explore its further application in specific cases, for example, where certain businesses exploit literature or music on the internet but do not properly pay authors, such as is reported from Spotify for music.

Conclusions

To conclude: Unfair contractual terms are widespread, therefore there is certainly a need for improving the situation for the benefit of authors. In any case, in most EU Member States, further development of national law is recommended and can be the basis for specific rules in EU law, if EU harmonization is legally justified and well-conceived. One possibility is to extend the model of the EC Rental Directive as presented above to exclusive rights other than the rental right (for example, the exclusive making available right for e-lending of books in public libraries on the basis of licenses or for internet uses such as through models like Spotify etc.). This model in many cases seems more appropriate than providing for exceptions to exclusive rights combined with a statutory remuneration right.

NB:

This article is largely based on the following works by Silke von Lewinski:

- *International Copyright Law and Policy*, Oxford 2008 (from chapter 3)
- *European Copyright Law: A Commentary (with M. Walter)*, Oxford 2010 (from chapter 16)
- Collectivism and its role in the frame of individual contracts, in: Jan Rosén (ed.): *Individualism and Collectiveness in Intellectual Property Law*, Cheltenham 2012, 117 – 127
- Copyright Contracts, in: Tatiana-Eleni Synoudiou (ed.): *Codification of European Copyright Law Challenges and Perspectives*, Alphen aan den Rijn 2012, 241 – 257

For the German Copyright Contract Law of 2002, see: Dietz, Adolf, *Amendment of German Copyright Law in order to Strengthen the Contractual Position of Authors and Performers*, IIC 2000, pp 828 ff

European Parliament Study on Contractual Arrangements for Creators: a Focus on the Text Sector

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The authors' protection is at the very origin of the copyright and *droit d'auteur* legislation. In spite of that, when one follows the controversial discussion about copyright laws, one has the impression that too often authors are disregarded. Until very recently the issue of copyright contracts has been absent from the copyright legislative agenda. However, both the European Parliament and the European Commission seem to have a renewed interest on the issues, as shown by recent research commissioned by both. The origin of this study on contractual arrangements for creators are the concerns expressed by the EP Juri Committee on the different bargaining power between authors and publishers or producers and the weaker position of the former. There are indeed many reasons for that: the authors' strong desire to be published, different ways of mastering of the law, poorer access to legal advice, and individuals confronted with well-equipped corporations, etc.

The study reviews in detail the legal framework in eight European Member States focusing on the specific provisions aiming at protecting writers, music composers, film directors, and visual artists when engaging in publishing or producing contracts. The research shows the lack of harmonisation at the European level and concludes that the contractual protection appears not to be effective to secure a fair remuneration to authors or to address some unfair contractual provisions. The weaker position of the author in the negotiation process and the adequate remuneration are not sufficiently ensured by the law. Contracts are not enforced and, in many cases, existing legal provisions (i.e. the obligation of an explicit determination of the scope of transfer of rights) do not prevent all-encompassing assignments of rights. On the other hand, there are no adaptive or corrective measures to amend contracts governing a dynamic and evolving situation, so existing contracts fail to give adequate solution to the new evolving environment. Furthermore, there is a patchwork of national plays against both authors and publishers that are operating in a more and more global environment.

In order to address these issues, the authors of the study suggest to introduce some minimal formalities to ensure the informed consent of the writers, (written forms, mandatory determination of the scope of the transfer, time and geographical scope, etc.), to include "use it or lose it rights", and to think of adopting an unfair terms model that would prohibit certain black terms and provisions that cause a significant imbalance to the detriment of the authors. A fair remuneration for each mode of exploitation should be determined in contracts. Furthermore, reporting obligations should be imposed to publishers and also service providers to have a better understanding of the financial flows of the work. In order to be able to cope with the evolving and uncertain environment and to introduce certain flexibility, the transfer of rights for unknown forms of exploitation, void in some countries, should be allowed —always subject to the payment of fair remuneration.

Other ways to introduce more flexibility to cope with the changing environment could be through limitations to the length of contracts, or reversion right under certain circumstances.

The use of collective tools deserves a separate mention. Recent examples of collective agreements (for example, the agreement concluded in France for Digital publishing) show that they can be a relevant tool, in particular when dealing with new environment. The use of collective agreements, model contracts, and Memoranda of Understanding to secure fair protection in individual contracts should therefore be encouraged. Following the model of some Nordic countries, collective or class actions by professional associations should be allowed particularly in the case of adhesion contracts. The research also reports on good practices that exist all over Europe. Exchange of information on those practices should be encouraged, together with more investment on education and awareness. In many cases authors are simply not conscious of what they sign. This is simply not tolerable.

Standard Contracts in Publishing: Advantages for Authors and Publishers

Trond Andreassen, Secretary-General, the Norwegian Non-Fiction Writers and Translators Association

The primary relationship in the book trade is that between the author and the publisher. To strengthen the author's position in that relationship, the publishing contract is of paramount importance. A standard contract is defined by an agreement between a publishers' association and a writers' association, making it obligatory for each member of the respective association to sign a contract which secures equal and fair treatment both for authors and for publishers.

This Conference: A Small Step Forward?

Eight years ago – the 20th of September 2006 – I stood in another EU building here in Brussels as President of the EWC and made an opening address to a conference on Authors' Rights and the European Agenda 2007-2013. One of the documents that created an important reference for that conference was a newly published EC communication about the necessity of strengthening the publishing sector within EU.

This communication both surprised and saddened me, since the role of the authors was hardly mentioned at all. It is my sincere and deep-rooted conviction that the European book industry's main competitive advantage is the rich and diverse authors' community in our continent and without the authors, the creators, the book industry has nothing to trade.

So I finished my speech in 2006 by expressing a modest hope: that the conference that day would make a small difference – drawing the attention to the importance of authors – and the importance of authors' rights. So – hopefully – one day, before it is too late, we can welcome a paper on How to Strengthen the Role of the Author in Europe.

The conference today nourishes a modest hope that some policy-making can take place to strengthen authors' rights and their position in the book trade.

Conditions for Authors

The vast majority of authors are low-income earners, which, of course, the authors' organisations are sadly well aware of; but the rest of the world seems only to notice the spectacular income of the not too many exceptions. Many authors also have a self-employed status, which makes them very vulnerable when they enter into negotiations with the publishing companies. As we heard from the presentation given by Joanna Trollope this morning, more than 90 % of the published titles in UK don't make a profit. The authors behind these titles do not create a strong position in his/her negotiations with their publisher. The author very, very often is the weaker part and he/she has to sign what the publisher finds reasonable. For most authors the alternative is unbearable, so they are "forced" to sign bad contracts.

When a new legislation was passed in Germany in June 2002 granting the authors' associations – and their contractual partners – a right to collective bargaining, this was in recognition of the very uneven bargaining strength of the parties. The EWC has always advocated a need to harmonise an authors' contractual legislation in order to strengthen the authors' position, and we would like to see binding regulations at a national level.

My speech here refers to the experience authors and publishers have had in Norway, and it includes negotiations with the competition authorities. But all the arguments that I refer to are universal in the sense that they deal with the basic relations between author and publisher, the most fundamental relationship in the book trade.

The Standard Contract

First a definition of what is meant by a standard contract: It is not a model contract and it is not guidelines; it's a binding agreement between two organisations: a publishers' association and a writers' association which agree on a contract that should be signed by all members of the respective associations. That means that all writers belonging to the actual writers' association and all members of the publishers' association are signing an identical contract. The wording in the Agreement between The Norwegian Non-fiction Writers and Translators Association (NFF) and the Norwegian Publishers Association (NPA) is as follows:

- The Norwegian Non-fiction Writers and Translators Association (NFF) and the Norwegian Publishers Association (DnF) have negotiated a set of agreements, which pave the way for publishers and authors to sign safe, balanced agreements with a minimum of individual negotiations, so the parties can concentrate their resources on disseminating Norwegian culture and knowledge, help strengthen Norway's written culture and promote the interest in reading.

- To make it clear: The standard Contract for Non-fiction Literature shall apply to agreements regarding publications of a non-fiction nature that are concluded between publishing houses affiliated with the NPA and authors affiliated with NFF. The associations will seek to extend the set of standard contract agreements to include several publication formats, as determined by the market situation and technological development trends.

This may seem out of reach for the bulk of authors and publishers' associations in Europe today. But I would like to remind you of the tremendous steps being taken in EU countries to regulate the book-market in the last decade by adopting Book-laws which impose fixed book prices. This is a breach with the competition laws to the benefit of a strong and diverse book-market allowing the national languages to prevail. The slogan has been: "Books are a special item". We should assert that "Authors are a special species". So the next step for the EU and the Member States should be the introduction of measures to strengthen the creators' position. It is a tight connection between developing the book-market and the authors' position. Most stakeholders in the book trade benefit from fixed book prices, and consequently most authors suffer from free prices.

Let's take my neighbouring countries Sweden and Denmark as examples. In Sweden and Denmark the book-markets have gone through grave and disastrous transitions on their way to a free market for books, abolishing fixed book prices and standard contracts and thus leaving the authors behind to take care of themselves individually. Only to a very limited degree the authors' associations are capable of helping the individual author to enhance his or her conditions. The best-selling writers, of course, take care of themselves, while the majority is left behind, ditched.

The Competition Laws and the Standard Contract

In 2005 the whole literary system in Norway found itself under threat by a right-wing government in alliance with the Competition Authority. They wanted a free market for books, free book prices and they wanted to abolish the standard contract, arguing/advocating that each individual author and translator is an individual enterprise, and as such should compete with his or her colleagues to sell his or her manuscript (or in their language: product) to the publishers.

Up to 2005 the Competition Authority had granted an exemption from the Competition Act. The Authority argued – wisely – that standard contracts provided efficiency in the form of fewer negotiations, a standardized tool of calculation of the royalty which prevented big publishers from exercising their buying power. Standard contracts meant considerable resource savings for the parties and ensured balanced agreements for all writers with their often stronger negotiating counterparts.

The CA underlined that the focal point of standard agreements was the provision on fixed royalty rates, and by this provision it achieved big efficiency gains; avoiding difficult negotiations between the individual author and the individual publisher. In 2005 The Competition Authority turned around and proposed that the fixed royalty rates in standard contracts between authors and publishers should be converted to recommended rates –to guidelines. In their (updated) mind the market should freely determine the price of each manuscript. The authors' associations feared that this would have adverse consequences.

First, the efficiency gains that the Competition Authority very much wanted, would not at all materialise. Great resources, energy and bureaucracy had to be invested in the negotiations between author and publisher. Current standard contracts make use of domestic agents redundant. If the royalty rates were up to free negotiations, on the other hand, the authors feared the emergence of new and expensive middlemen – agents – in the transaction between writer and publisher. Such creatures are aliens in Europe. In the USA they take a huge part of the value created by both authors and publishers.

Second, the authors argued that the introduction of non-mandatory rates most possibly would cause lower royalties for the Norwegian authors. A few best-selling and already established writers will certainly be able to achieve higher royalty rates. The vast majority of Norwegian authors, however, will have a clearly inferior position in relation to the publisher while negotiating the royalty rate. Reduced royalty rates would possibly lead fewer authors into the author profession, the market of Norwegian books

would narrow down, and the diversity of assortment would diminish.

Standard agreements have secured an equality between authors and equality between publishers. The agreements provide predictability for both parties, they are confidence-building, resource-saving, efficiency-enhancing and they prevent conflicts. This has been the best for both authors and publishers and for Norwegian literature.

The politicians found these arguments valid, overruled the Competition Authority – and the contract system with fixed royalty rate was maintained – the standard contract survived.

Finally I would like to address the language we as authors are confronted with in official documents from the EU today. Publishing is presented solely in terms of “industry”; one that creates employment, is competitive and makes a profit; whereas, disappointingly, the cultural value of its “raw material”, literature, is very often ignored. The reduction of this important cultural activity to the same status as goods and services competing in the market place – almost on quantity and price - is undermining the cultural basis of our society.

Good literature – books that reflect, challenge and question the mores of their times are essential if a society is to maintain and improve its psychological and political health. But with a growing trend within all the developed economies to see everything as being subservient to economic factors, the world of literature is itself now falling victim to the economic imperative. This is a grave error. EU competition strategies may work in the areas of goods and services, but not of culture. And given that there is no reference to culture, or to the impact of these strategies on culture, one is led to fear that through oversight and/or carelessness an important part of our European culture will become inaccessible to its citizens, purely because it does not conform to a business model.

Conclusion

What authors in Europe need today is a comprehensive paper on How to Strengthen the Role of the Author in Europe. Such a document should, of course, cover every aspect of authors’ rights: reprographic rights, public lending rights, all rights related to the digitisation of texts and, what I have touched upon in this speech, the authors’ basic contractual rights. An official document like this could create a platform for a real campaign for strengthening authors’ rights and enhance the diversity of the written European languages in times where globalisation also carries with it the threat of us all being absorbed by Google. Or, as my colleague Goce Smilevski so eloquently expressed in his address this morning: the threat of all of us being swallowed by the black hole.

**Judit Fischer, Policy Officer, European Commission, Copyright Unit,
Directorate General for Communications Networks, Content & Technology.**

I thank the organisers for the invitation. This is indeed a very timely discussion on the situation of authors and on the role which the European institutions could play in improving conditions for them in Europe. The downside of the timing is that only two days into the life of the new Commission, I am not going to be able to speak about the future policy, since the relevant decisions have not been taken yet.

But I am going to talk about the current thinking in the European Commission about fair contracts for authors. I am going to address three issues: our findings in the public consultation on the copyright review, the studies that we are conducting in this area, and I am going to explain our main considerations when thinking about future policy in this field.

As the speakers before me indicated: Historically the European Commission has engaged little in examining the question of authors' contracts. Traditionally, contract law has been an area for national competence; hence there is practically no relevant European legislation on this matter. The Commission had a study on contractual practices in the EU in 2002. Later there was a sector-specific inquiry on remuneration in the 2011 Audio-visual Green Paper. Finally, the question of the remuneration of authors and performers, this time with respect to all sectors, was picked up again in this year's public consultation on the review the EU copyright framework.

In the public consultation, our aims were twofold: Firstly, to explore the situation in the different sectors in the market, i.e. to find out about the bargaining position of authors and performers in their relations to publishers, producers, broadcasters, etc.; to see the contractual practices, the role of unions and collecting societies, etc. And secondly, to see if the interested parties consider that there is a need or room for any EU intervention in this area.

The replies were diverse. In the text sector, as in other sectors, publishers and other industry representatives emphasised the relation between the existing contractual practices and legal certainty in the market. They underlined the importance of contractual freedom and that EU intervention in this area could breach the principle of subsidiarity. Book publishers also noted that contracts with writers are nearly always individually negotiated.

On the contrary, authors who responded generally argued that their weak negotiating position often results in unfair contractual terms (e.g. buy-out clauses, one-off payments, too broad right transfers, non-disclosure agreements, etc.). In particular, there were many concerns expressed as regards digital forms of exploitation. Also, many underlined the lack of transparency of accounts and of regular reporting by publishers to authors on the use of their works. Finally, it was often pointed out that in countries where collective bargaining (by collective management organisations or by unions) is functioning well, better contracts can be achieved for authors. All in all, fundamentally, the same problems were articulated as those explained in the 2014 European Parliament study on contractual arrangements for authors.

The Commission also decided to launch its own inquiry in this area. This spring a study was launched on the remuneration of authors and performers in the music and audio-visual sectors. In the coming weeks we expect to launch another one to explore the situation of authors in the text sector. More specifically, the latter will examine the remuneration and contracts of authors of books and scientific journals, translators, journalists and visual artists (illustrators, designers and photographers).

This is not only going to be a legal but also an economic study. It should examine and compare the contracts and copyright laws of ten Member States, as well as examine the contractual practices and collective bargaining agreements; including via discussion with publishers and authors' organisations. Secondly, the contractors should collect data from writers, translators, journalists and visual artists on the level and the sources of their remuneration. Here, the help of unions and collecting societies is going to be indispensable to convince their members of the importance of responding to this survey. Thirdly, on the basis of the economic analysis, the study should try and establish a correlation between the legal and contractual solutions in the different countries and their effect on the remuneration of authors. Finally, the contractors should assess the impact of the current situation on the internal market and, if it proves to be necessary, propose policy options on how to address the problems at EU level. The study will run for 10 months, so the results will probably become available around the next autumn.

All in all, it is clear that there are some issues out there concerning rights transfers, contractual clauses, and termination of contracts, etc. that can fundamentally affect the remuneration of creators in Europe. This situation raises questions of fairness as well as questions of cultural diversity. But what the Commission has to look into very thoroughly is the impact of the existing contractual practices on the functioning of the internal market. For example, whether the diversity of the laws of the Member States significantly fragment the European market or whether these contractual solutions negatively affect the provision of multi-territorial services. But there may be other aspects too.

If there were room for EU intervention, there are a variety of ways to approach this issue. One is contract law: for instance, statutory rights for authors to re-negotiate or terminate contracts under certain conditions, or a "best-seller" clause. Of course, many argue that contract law is reserved for Member States and is not an area where the European legislator can intervene. But this is not necessarily true in all cases. If there are barriers in the functioning of the internal market, there could be room for intervention.

The second possibility to consider would be an unwaivable remuneration right for creators for certain forms of exploitation. This may suit some right holders in certain sectors better than others. Finally, facilitating or providing support for collective bargaining all over Europe is another issue that can be examined.

Of course, legislation is only a possible tool but not the only one. And this is especially important with respect to the last point. There are many other ways to

encourage certain practices to develop: recommendations, a memorandum of understanding, stakeholder dialogues, model contracts... And the list goes on.

But most importantly, and this is very important for the Commission to consider, these interventions can have entirely different impacts on the internal market, on transaction costs or the provision of multi-territorial services. This is what we have to analyse and assess first.

To conclude, as I said at the beginning, this is a relatively new policy area for the European Commission. But it is also a very important one to work on. We are still at an exploratory phase which means that we need to continue our discussions with authors and publishers. And we also need to analyse the outcome of the studies. But I would like to underline that the Commission is much engaged in the groundwork necessary to establish what role authors' contracts play in functioning of the internal market and what role the European Union may have in improving the situation for creators in Europe.

III

Challenges and Solutions for Remuneration and Compensation

What are Words Worth Now?

Barbara Ann Hayes, Deputy Chief Executive, Authors' Licensing & Collecting Society (ALCS), UK

Good morning ladies and gentlemen.

My name is Barbara Hayes, Deputy Chief Executive of the Authors' Licensing & Collecting Society (ALCS) in the United Kingdom and I am delighted to have been invited by our host Julie Ward MEP and the European Writers' Council to be here today. I am going to present to you two pieces of recent research ALCS has undertaken.

The first piece of research looks into the contractual situation for freelance newspaper and magazine journalists in the UK and their typical level of knowledge and bargaining power when negotiating contracts.

The second piece of research is concerning authors' earnings and follows on from a similar piece of research we carried out in 2005, so we can see some clear and sometimes disturbing trends developing and we hope that any politicians here today might be encouraged to share this information with their colleagues, specifically when considering any future legislation that could affect how authors can make a living. Both pieces of research can be downloaded from **www.alcs.co.uk/research**

To add some context, the ALCS is a membership organisation which collects typically secondary royalties for activities such as photocopying, scanning and cable retransmission as well as monies for overseas public lending right for our 85,000 author members.

Like many organizations represented here today, our remit is to protect and promote authors' rights. To help us give evidence-based input into the various and what seems a never ending stream of consultations that comes out of both the Commission and in our case the UK parliament, we have recently carried out these two pieces of research in collaboration with Loughborough University for the research with freelance journalists and with Queen Mary College, London for the research into authors' earnings so these figures are independently validated.

At this stage I'd also like to thank both the Society of Authors and the Writers' Guild of Great Britain who worked with ALCS to develop the questions in the Authors' earnings survey entitled *What Are Words Worth Now?* Which I believe helped us to gain a deeper insight into how authors make a living now.

But we'll start first with the findings from the survey of freelance newspaper and magazine journalists carried out for us by Loughborough University. 1250 journalists were surveyed with many of the participants being longtime freelance journalists writing for an average of 18 years, so these are not typically people in the developing stage of their career. They have honed their skills for quite some time and in many others careers would appear to be towards the top of their game. The number of participants were roughly equal between the genders and 49% of them provided the main income into their household.

In the UK what is considered as the minimum income standard of living sits at £16,680 or around €21,400 Euros. In our survey 58% of participants earned less than half this sum at £8,200 or around €10,500 Euros. Unsurprisingly, 77% of participants said they did not earn enough money to support themselves and I don't think anyone here today would disagree that this is simply not enough. I do hope that those who are in a position to influence any future legislation to improve the plight of freelance journalists will bear these exceptionally dire figures in mind and be concerned enough to work to create an environment in which freelance journalists can make a proper living from their endeavours.

The survey showed us that the majority of both newspaper and magazine freelance journalists (71% and 61% respectively) had worked without contracts for the majority of their commissions over the past 5 years. While, in theory, this ad hoc approach means freelancers often retain copyright, in practice this does not result in greater control or rewards when it comes to the re-use of their work. And we all know that wherever possible writers can be better protected if clear and fair contract terms can be agreed prior to production of the work.

This research showed us that 49% of newspaper freelance journalists retained copyright against 35% of magazine freelance journalists. When it comes to signing contracts, often freelancers are not given the option of retaining copyright—in many cases we know this is why contracts weren't signed in the first place. When contracts do exist, there appears to be a serious lack of understanding and/or transparency around further uses of the work. 36% of newspaper freelance journalists and 40% of magazine freelance journalists were unaware whether their contracts allowed their publisher to syndicate their work or not.

It seems to me there are potentially two issues here. One appears to be a lack of clarity in the contracts and the other is potentially a need for journalists to better understand contracts. ALCS is sponsoring a new publication being developed by the National Union of Journalists that we hope will help address this issue. And a sharing of information between publisher and journalists also seems to be missing. 57% of newspaper and 59% magazine freelance journalists lacked information from publishers regarding sub-licensing decisions that had been made.

I am sure we have all heard numerous reports of journalists whose friends have contacted them from countries around the world saying "I didn't know you wrote for the *Sydney Tribune* or the *Vancouver Times*", when the journalist themselves had no idea their work had been published outside of the UK, much less been paid for it.

And again the situation of a lack of awareness of what a contract allows for stands out with 67% of newspaper and 64% of magazine freelance journalists not aware if the contract allows for publishers to sub-licence their work to other publications.

This might be the place to note that sub-licensing re-uses are very common yet only 13% of respondents were aware of having received fees for this.

The Commission and Parliament are currently examining the issue of remuneration

of creators within the wider copyright reform debate. This research clearly demonstrates some imbalances and inequalities that could undermine future markets for high-quality, reliable journalism.

What's the solution?

As ever, a supportive copyright framework and best practice industry standards providing for clear, equitable terms on rights and payments for freelance contributors.

Now on to our second piece of research which was undertaken by Queen Mary College, London and as I said before with the help and support of the Society of Authors and the Writers' Guild of Great Britain. 2,500 authors took part, the vast majority of them above the age of 45 and slightly fewer women taking part in this survey.

For the purpose of this survey being presented today the term 'professional author' refers to people who dedicate the majority of their time to writing. Here we have a truly awful trend appearing. Back in 2005 when we carried out our first survey into authors' earnings, 40% of those taking part earned their income as a professional author, earning their living solely from writing. Eight years later in 2013 this number had dropped to just 11.5%. A jaw-dropping statistic! At this rate by 2017 the UK might run out of professional writers!

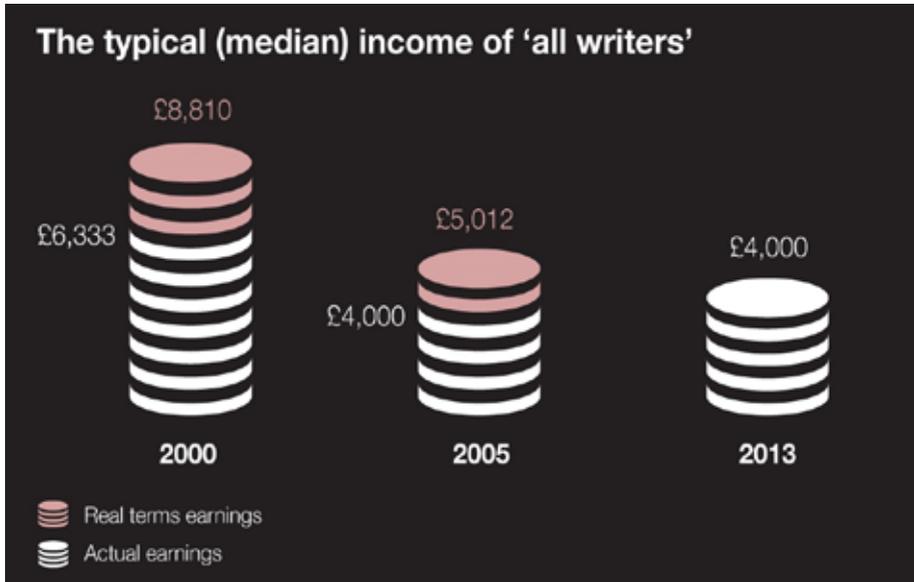
And what authors' are earning has dropped shockingly in the past eight years. This research shows that the incomes of professional authors have dropped from £12,300 (or €15,700) to £11,000 or (€14,000). This is a drop of 29% since 2005. We know that traditional routes to publication are changing, there are changing platforms and there will be even more in the future. Different business models are constantly being developed and tested but if we are to nurture and develop talent throughout Europe we need the right environment to encourage both young and established writers. In 2005 writers between the ages of 25-35 starting off in their career typically earned about £5,000 or €6,340 Euros per year. I wonder how many of us who aren't writers would even consider a career which paid so poorly. We often hear that writers write because they must. Imagine a world where there are no professional writers because we haven't made it financially viable for them. Now that reality would be a shame.

Just to remind you of what I said earlier.... In the United Kingdom the minimum Income Standard of living is considered to be £16,860 or €21,400 and a professional author's income falls significantly below this figure.

So what's the trend?

Next we look at 'All Writers' as a group. The 'All Writers' category includes writers who write occasionally or part time as well as full time writers, perhaps where writing is a by-product of their job or where their expertise in a subject results in them writing a book.

This graph shows the median earnings of all writers in 2000, 2005 and 2013. The figure used from 2000 was provided courtesy of the Society of Authors.



The figures show a drop in both absolute and real terms since 2000 to just £4000. So the ways in which an author earns their living is also changing.... As I said earlier, there are changing platforms and indeed digital publishing is now the third biggest sector in terms of financial importance to writers.

And there is a rise in self-publishing. In many cases this is of necessity where publishers are publishing books by celebrities or cookbooks. They know they will sell. They don't want to take the chances on new talent they would have several years ago. It's a changing world and a changing marketplace. Authors have to adjust, of course they do, many are now self-publishing and making money at it. But they also have to be their own editors, publicists, social media experts, marketing specialists....and also make time to write. So the traditional role of the author is changing and doing it yourself with self-publishing is being done more and more. So our research tells us that around 25% of writers have self published and 86% of those would do so again.

The best contracts set out clearly which rights authors are retaining or transferring. And there are specific sectors of the writing community who more often retain their copyright than others as can be seen from this graph. Retaining copyright and licensing rights according to a publisher's actual needs and proposed uses should put authors in a much stronger position in terms of negotiating where and how their works can be used.

It really does pay to read the small print. 57% of respondents had signed contracts that included a 'rights reversion clause'. Of these, 38% had used or relied on the

reversion clause and of whom 70% went on to earn more money for that work. Again, it shows that awareness of contracts and rights can ultimately lead to making more money for the author. Copyright provides the fundamental basis for authors' rights but it is contracts that determine how these rights are exploited in practice. Basic ground rules are needed to ensure that authors:

- i) only grant the rights required for the exploitations proposed
- ii) retain the right to review terms where circumstances change
- iii) can revert rights no being exploited
- iv) can participate in and receive income from collective licensing schemes.

D-G Internal Policies (Policy Dept C) report on contracts, January 2014 gives a good, clear blueprint for this. We hope the current JURI Committee review picks this up.

So what do authors need?

Both pieces of research presented here today support the need for clear, fair contracts with equitable terms and a copyright regime that supports creators and their ability to earn a living from their creativity.

So what are the next steps?

For authors and authors' organisations more of the same. Lobbying at all levels, making sure politicians at the national and European level understand the environment in which authors are trying to forge successful careers and what's really needed to achieve this. Work together where possible to make a difference. Work with publishers to try to get fair contracts or better still create a 'best practice' for contracts that are fair to all parties. And jointly with publishers—though it would be great if government would step in too would be to educate both creators and the general public on the importance of copyright—and what it means in practice, what's legal and what's not. In the UK the IP Adviser to the Prime Minister recently launched a discussion paper on this subject calling for a number of joint initiatives around education which will be of interest to most of us in this room today. Mainly it seeks a joined up approach to responsibility on this subject.

And the next steps for politicians?

If you want to ensure that writers survive in this changing landscape make sure they can operate in the right environment to encourage their creativity. We are shortly due a White Paper on copyright. Do your duty to authors of Europe and make sure they can make a decent living.

E-Books: Same Content. Improved Usage. Less Money

Mette Møller, Attorney, Secretary General, the Norwegian Authors' Union

Introduction

Thank you, Barbara, for your interesting presentation, despite all those sad figures. My name is Mette Møller and I am Attorney and Secretary General at the Norwegian Authors' Union.

Twenty years ago, we headed towards the DIGITAL HIGHWAY. Today we know that we kind of missed it, as we have all ended up in the CLOUD. We do not buy the book as an object, we gain access to content, to the words. We do not keep music or books in our shelves, we prefer online services from the cloud. I am just waiting for a digital ART ON YOUR WALL SERVICE so that I can enjoy a projection of Edvard Munch's *Scream*, or Michelangelo's *Mona Lisa* on my own living-room wall. Never have literature and art been more immaterial in the right sense of the word. Hard to grasp.

I.

The fiction writers, my members, have not changed their work methods significantly due to the digitization. New writing equipment, a PC or a MAC, is a "tool" that most people purchase anyway for their own private use. The authors' investment in new, digital equipment has not changed in a way I consider extraordinary. Nor has the work itself, the creative process, changed very much due to the shift —from a type-writer to keys and screen. The most precious resource for an author is still: ENOUGH TIME to write undisturbed. Time NOT spent on a bread job. Most writers need a long time to write a book, sometimes years. This means that the "return of invested time" must be quite good, to keep the author alive as an author. In clear terms, the author needs a good enough earning to be able to keep on writing.

NB: I do not say that every writer should become rich. But the hard-working and well established writer deserves to receive reasonable royalty income due for actual sales or use. Anyone can relate to the injustice in EARNING LESS despite the fact that a book may be MORE WIDELY READ than before. But I now just wanted to establish that the writer's way of working has not changed the work results very much, he or she still delivers the same type of content as in the analogue world.

II.

So, SAME CONTENT. BUT the change into digital services on both the publishing and the distribution side has altered the way we both handle and read books.

Now we have e-books, book apps and streaming services for e-books, and audio books. And we have digital self- publishing as an option, made much easier in the cloud. We can find and buy the e-book online, we can listen to it or read it, either online or down-loaded on a mobile device, we can lend it from the library sitting in our sofa or while outdoors skiing, at least we can in Norway, and we can access world class literature, old and new, as long as the batteries stay alive. The literature has left its hard covers and arrived to a device near you.

The digital book has many advantages. The reading itself is made more easily with options of bigger fonts, etc. The book itself, or the reading device, remembers where we last stopped reading. We can even make notes. And it is easy to change from one book to another with only a tap on the screen or a single click, and it is very easy to find free books as well.

In Norway we now have standard agreements for streaming e-books (texts) in a subscription service. One of the services provides the subscriber with the option to switch between text and audio. Needless to say—for no extra payment. This means that as a subscriber you can read an e-book on the train, and continue listening while walking the last 10 minutes to the office.

The book as a concept has definitely changed and the usage of the book has IMPROVED. But neither the change nor the improvement came from the author. The change came from the CREATIVE INDUSTRY. And industry demands investments.

III.

Again: The author's main investment is TIME SPENT on writing a manuscript. It does not matter whether it is a printed book or an e-book, as said before today, the writer does not receive money for writing a novel. But now everyone wants anything with DIGITAL as a prefix. The politicians want digital and the consumers want digital. The investment behind the industry part, meaning digital infrastructure for marketing, distribution, payment solutions and so on, is HARD CASH. Quite different from the authors investing in working hours. And the investors who have spent their hard cash want their money back, with interest. So how will the investors get their Return on Investment?

STOP RIGHT THERE and behold the digital trap: Because today the important question is another one, namely: Do we still want professional writers? Do we still want skilled competent talented people to write all the books we do not know yet that we want, that we do not know yet that we need, until they are written?

There is only one answer to this question: YES, we do want to keep the full time professional writer! So the really important question is: How do we keep the professional writer in a digital environment where everything is expected to be free? Well. I can see why people wish for free books. But their wishes have already come true a long time ago—in the library. Now we need to keep these two paths separated: One—the library—which feeds us all with both knowledge and great literature regardless of our private economy—and two—the commercial path which is meant to feed the author.

So it is a mystery that you can feed a new digital industry and their investors with BIG MONEY, when at the same time the writers are experiencing drastically reduced income from their writing. How come that DIGITAL for the author means LESS MONEY? The author's work and contribution being the same as before? Most people accept that the mobile phone or the reading device can have a steep price. We actually accept this every time we replace our hardware with new models.

And most people accept, without questioning, that it takes money to build a new service on the net. And: Most of us think it reasonable that we should pay, something, for content. But as long as that shopping bag is empty, the willingness to pay the same for access to the e-book as for the hard-cover novel seems to be substantially less.

The challenge is to be aware of the hype. Nothing has been more hyped than the need for low priced e-books. We do not NEED e-books at any cost. What we need is good books, good authors, and we must be prepared to pay for that.

I am looking for, and working for, a sustainable value chain for the e-book. If literature shall continue to be sold as a digital service, the writer will need to be paid, or else he and she will have to spend writing time earning money in other jobs instead. Then the writer will no longer be a full-time writer, then the book will suffer, the literature will lose—and in the end, so will we, the readers.

We are all familiar with the fair use doctrine. I wish that the fair remuneration expression would gain as much attention. It is there all right, in several of the relevant EU directives. But it is time to put it into use!

With great expectations for the low priced content, e-books, the author's royalty must be proportionally higher than from the paper book—to keep up the same income for the same work. This is where investment in content is done, through a price that leaves room for reasonable royalty, not only in percentage, but in real money. Make it possible for the author to gain a reasonable ROI for his or her work. This means that the pricing should reflect more of the content than of the service itself. This is not a demand for more royalty, but a claim to keep at least the same as before.

This is not only a political question, it is not only a demand for fair contracts, it is paying attention to what the creative industry is based on: The author—a single person living in the same analogue world as you—paying bills. So I shall stop now and ask politicians, literary activists and publishers to keep in mind what I think is the core question:

Do we still want to have professional authors?

The American Publishing Landscape in the Digital Age: Amazon, E-books and New Business Models

Jan F. Constantine, General Counsel, The Authors Guild, New York

Introduction

Distinguished Members of the European Parliament (MEPs), esteemed authors and creators, my name is Jan Constantine, and I'm General Counsel of the Authors Guild, the largest and oldest society of published authors in the United States. We've been in existence since 1912, and today we represent a membership of over 9,000 professional authors. At the outset, I'd like to thank MEP Julie Ward for hosting this event, and the European Writers' Council—particularly its Secretary-General, Myriam Diocaretz—for inviting me to speak here today.

Roadmap

I'm calling this talk "The American Publishing Landscape in the Digital Age: Amazon, E-books and New Business Models." First I will explain what I mean by "the digital age," and then I'll discuss the twenty-first century American publishing landscape from an author's perspective. Next, I'll talk about Amazon's ascent to dominance of distribution within the industry, including publishers' initial embrace of the online retailer; next I will chart the rise of e-books and how this phenomenon has been addressed contractually, focusing on publishers' inequitable split of e-book profits with authors; then back to Amazon, where I will discuss the antitrust implications of Amazon's market dominance, including the U.S. Department of Justice's ill-advised prosecution of publishers for e-book price-fixing; and finally, I will touch on the rise of new distribution models, and the challenges and opportunities they present to the American publishing ecosystem.

In the United States, starting in the early 1990s, the publishing industry decried digital media's adverse effect on print sales and predicted that print would be obsolete by now. But the statistics show that these fears are overblown.

I bring this up now because I think we've seen a similar, albeit less extreme, alarmism in the publishing industry today about digital media's effect on print sales. Certainly e-books cut into the print book market, but in America, at least, the numbers seem to be gradually leveling off.

So when we talk about the "digital age" in the American publishing industry, I think we're talking about a period that begins in the early 1990s, when serious electronic rights clauses began to appear in publishing contracts. I know because I drafted them myself. In the past I was in-house counsel at two of the largest American publishers, Macmillan and HarperCollins—this is proof of an international phenomenon: attorneys can change allegiances in the blink of an eye, without looking backward. Interestingly, this period coincides almost exactly with the rise of one of the major threats to the publishing industry today, Amazon. So while e-books haven't completely cannibalized the market for print books, what they have done is altered the balance of power between authors, publishers and distributors—in favor of distributors. And by distributors, I mean—you guessed it—Amazon.

I. Amazon's Rise to Dominance

It's important to remember that American publishers initially embraced Amazon's entrance into the publishing marketplace. While Amazon was starting its ascent in the 1990s, publishers had their attention trained on a different adversary: chain bookstores, Barnes & Noble chief among them. As the U.S. journalist George Packer reported in a recent article in the *New Yorker* magazine, "when Amazon emerged, publishers in New York suddenly had a new buyer that paid quickly, sold their backlist as well as new titles, and, unlike traditional bookstores, made very few returns."

Compare those views with where we stand today, when Amazon sells nearly half of all books sold, both print and electronic. Its market share allows the brazen company to strong-arm publishers. I'm sure many of you are paying attention to what Amazon has been doing to the U.S. subsidiary of the France-based publisher Hachette—and many of you have horror stories from your own countries, which I'm interested in hearing more about. Amazon has been suppressing the sale of books by Hachette authors. It slows delivery of Hachette titles, makes sure that some titles don't surface in search results, and points the reader to similar, (and often less expensive) books. But it's Hachette authors who are really feeling the sting: as a result of these tactics, they are suffering royalty losses of 50 to 90%, according to an informal survey conducted by one of our Council Members, the thriller novelist Douglas Preston, who has been very active in rounding up support among writers (most of whom aren't even Hachette authors) to unite against Amazon's tactics. His group is called Authors United, and it includes international best-selling authors such as Milan Kundera, Salman Rushdie, V.S. Naipaul, Orhan Pamuk, Philip Roth, and others. As of this month, Authors United's head count totals 1,500. I'll talk more about this group later.

The author uprising led by Authors United and the Authors Guild has received a lot of press, and most of that press has placed the blame on Amazon for unfairly targeting authors in a dispute they're not even part of. In fact, it's even been suggested in the American media that all the negative attention Amazon has received throughout the Hachette dispute has led it to painlessly and quietly strike a deal with Simon & Schuster—without holding any authors hostage.

The Authors Guild has spoken out against Amazon's tactics in the Hachette dispute since it was made public in May—and for that, we've been criticized by some as being "pro-publisher," which, as you can imagine, does not sit well with an authors' rights organization. Authors and publishers, you see, are not natural allies. In fact, they are far from it. Publishers have not been giving authors a fair split of e-book profits for a long time; this has allowed e-books to become enormously profitable for publishers, which in turn played directly into Amazon's hand, allowing the online retailer to capture the enormous e-book market share that now allows it to throw its weight around against the very same publishers. But I want to take a break from Amazon-bashing now and talk about the 25% e-book royalty rate major U.S. publishers offer, and why it's unfair to authors.

II. The Rise of E-books and Publishers' Inequitable Split of Royalties

Authors' e-book royalty rates from major U.S. trade publishers coalesced at 25% of the publisher's net receipts back in 2011—and for frontlist books, they haven't budged since, for the most part, although more recently some smaller publishing houses are giving e-book royalties as high as 35%, and we've even heard of a major romance publisher offering 50% royalties—but only once a book sells 10,000 electronic copies, which is quite a feat for any author in the current digital climate. But the bottom line is that the 25% royalty for frontlist e-books is contrary to longstanding tradition in trade book publishing, in which authors and publishers effectively split the net proceeds of book sales (that's how the industry arrived at the standard hardcover royalty rate of 15% of list price). Among the harms of this radical pay cut is the distorting effect it has on publishers' incentives: publishers generally do significantly better on e-book sales than they do on hardcover sales. Authors, on the other hand, always do worse.

So, everything else being equal, publishers will naturally have a strong bias toward e-book sales. And this was another component to the publishers' initial embrace of Amazon: it was Amazon's development of the Kindle that effectively brought e-books to the mass market. It certainly does wonders for cash flow: not only does the publisher net more, but the reduced royalty means that every time an e-book purchase displaces a hardcover purchase, the odds that the author's advance will earn out—and the publisher will have to cut a check for royalties—diminishes. In more ways than one, the author's e-loss is the publisher's e-gain.

In more bad news for authors, the chance of major publishers budging from the 25% rate doesn't look so good—for now, at least. Inertia, unfortunately, is embedded in the contractual landscape. If the publisher were to offer more equitable e-royalties in new contracts, it would ripple through much of the publisher's catalog: most major trade publishers have thousands of contracts that require an automatic adjustment or renegotiation of e-book royalties if the publisher starts offering better terms. These requirements result from contractual terms sometimes referred to as most-favored nation clauses, or MFNs. (Some publishers finesse this issue when they amend older contracts for backlist titles, many of which allow e-royalty rates to quickly escalate to 40% of the publisher's receipts. Amending old contracts to grant the publisher digital rights doesn't trigger the automatic adjustment, in the publisher's view.) Given these substantial collateral costs, publishers will continue to strongly resist changes to their e-book royalties for new books. The burden falls overwhelmingly on midlist and debut authors; some best-selling authors with leverage, on the other hand, are offered higher advances or bonuses for achieving high sales milestones in order to make up for the low royalty share.

We have always had hope that the publishers' resistance, in the long run, will be futile. Some new publishers have shown a willingness to share fairly with their authors. Once one of those publishers has the capital to pay even a handful of authors meaningful advances, or a major trade publisher decides to take the plunge, the tipping point could be at hand, and major publishers could be forced to reconsider their parsimonious profit split. Now let's pick up where we left off with Amazon, which, if you remember, was getting too big for its britches. Here comes the part where the people start crying "monopoly!"

III. DOJ Suit and Amazon's antitrust problems

In the U.S. Amazon commands a share of over 40% of U.S. new book sales across all platforms, a meteoric rise from five years ago, when its share stood at 12%. The retailer possesses 64% of the online sales of physical books and 65% of the e-book market—a share that has steadily increased in the wake of U.S. government's ill-advised prosecution of Apple and five large New York-based publishers for allegedly colluding to establish a pricing model for e-books where the publishers, rather than Amazon, would have set retail prices for their own titles.

The call for antitrust scrutiny of Amazon first rose in 2012, when the DOJ brought the lawsuit against Apple and the five publishers based, in part, on a paper submitted to the DOJ by Amazon itself. The publishers chose to cut their losses and entered into settlement agreements with the government in 2013: only Apple has continued to litigate with the DOJ, and its case is currently on appeal. Regardless of the outcome of the appeal, it was highly regrettable for the government to bring the case in the first place, especially in view of Amazon's continuing decimation of the bookselling markets.

Amazon's predatory pricing strategy has been (and still is) the following: it wants to set a low price for e-books, thereby altering consumer expectations of the value of e-books (and, indeed, of books in general); to lose money on bestsellers in order to squeeze retail stores; and to jack up the price to the reader of "long tail" books to make up for the losses. Long tail books are those in demand only for a small group of readers who are willing to pay high prices for them.

Sparked by Amazon's strong-arm tactics in its negotiations with Hachette this year, the Authors Guild started its own initiative to invite governmental scrutiny of Amazon's outsize market share and anticompetitive practices in the publishing industry. This past summer, we prepared a White Paper on Amazon's anticompetitive conduct, circulating it to the United States Department of Justice and other government entities. As a result of our request, we hosted a meeting with the DOJ in our offices on August 1st so that a group of authors could make their case directly to the government.

The Authors Guild's mission is to protect and support working writers. When an e-tailer—one which sells close to half the books in the country—deliberately suppresses the works of certain authors, those authors are harmed, plain and simple, and we speak out. We will continue to oppose any business tactics, from publishers or retailers, that interfere with working writers' ability to present their products in a fair marketplace and to flourish within their chosen field. Our goal is to ensure that the markets for books and ideas remain both vigorous and free.

But I don't want to paint too bleak a picture for you. There have been exciting developments in the American publishing industry in the last few years. Particularly in the rise of new distribution models, which present both opportunities and challenges to everyone involved.

IV. New Distribution Models, New Challenges

There are many ways the new distribution models that have been taking root in the American publishing industry over the last few years might change the digital landscape going forward. It's hard to say definitively, because the landscape is still developing. When I say "new distribution models" I'm talking about a few different methods of distribution. I'll talk about three here today. First, what we've been calling "subscription services"—that's when a company offers unlimited access to an entire repertory of books for a monthly fee. It's a Netflix-for-e-books type of model. Second, I'll talk briefly about library lending of e-books, then I'll finish up by mentioning a way of selling books that publishers are exploring as a way to gain traction in their negotiations with Amazon: direct sale to readers via a website set up by the publisher.

In America, a few events that happened in the summer of 2014 made it clear that e-book subscription models are here to stay, whether we like it or not. First, we received news in late May that Simon & Schuster was to become the second of the top five U.S. publishers, after HarperCollins, to offer its backlist titles through the two major U.S. subscription services, Oyster and Scribd. Major publishers still don't offer their frontlist books through subscription services, but nonetheless, it was a development worth noting. And then in mid-July, Amazon announced it would enter the e-book subscription market, offering unlimited access to over 600,000 titles a month through its service, Kindle Unlimited.

Like other developments in digital-era publishing, there are both opportunities and risks associated with e-book subscription models. Publishers correctly argue that they give out-of-print and backlist books the chance to find a new audience; on the other hand, publishers and authors both worry that the new model could cannibalize sales of both print books and individually-packaged e-books. Notwithstanding this alignment of interest, it's likely that many contractual disagreements will arise between authors and publishers with respect to subscription services.

For example, we at the Authors Guild recently altered our model contract language to account for the way subscription models have changed the landscape. We used to advise our members to attempt to negotiate into their agreements a clause stipulating "Publisher will not offer the Work through any business model that does not designate a specific price to each copy of the work distributed." We recognized, however, that the rise of e-book subscription platforms makes inclusion of a clause like this less and less likely. Accordingly, we now counsel our members to aim for a more realistic clause, one that states that the author retains approval rights over the publisher's participation in any subscription service.

E-book lending by libraries has a longer history than subscription services, and it hasn't been as disruptive for authors, largely because the contractual arrangements that make it possible are made between the each individual publisher and the library. Two challenges are worth noting here. First, different publishers have different arrangements with libraries. So, for example, when the New York Public Library announced last year that it had secured e-lending contracts with all of the major

publishers, one publisher only offered libraries a limited selection of books; another allowed each book to be checked out only 26 times; and some publishers licensed their titles for one year only, while others sold licenses without a term but charged more per license. One thing they all had in common was that each e-book can be borrowed by only one patron at a time.

The one e-book one patron at a time arrangement is a boon to authors, for the obvious reason that it will lead to more copies sold. Likewise, libraries have been vigilant about ensuring the e-copies lent contain Digital Rights Management (DRM) systems that help secure them from piracy and infringement. But in a vicious irony, these DRM systems have been responsible for data breaches resulting in readers' privacy violations.

And in another recent development, in July 2014, HarperCollins launched a website featuring a direct sales component—which allows it to sell print books directly to its customers, something which it had never done before. HarperCollins' authors can also use the same technology to sell directly from their own websites. Although the publisher hasn't said as much, many in the industry speculate as to whether this is a way for the publisher to protect itself from the sort of tactics Amazon has been using on Hachette during contract negotiations. HarperCollins, after all, will be up for negotiations with Amazon very soon.

Conclusion

When thinking about the recent developments in the American publishing ecosystem, no matter what particular topic we're talking about, Amazon is the elephant in the room. It wields such enormous market power, and it's clear to me that it is willing to trample anything in its path to get what it wants.

This summer Amazon revealed its true stance on e-books while purporting to clarify its objectives in the Hachette dispute. It was the latest in a series of rare public statements revealing just how poorly the corporation understands the literary market—even as it doubled down on its attempts to commodify the written word.

In its statement, Amazon argued that an e-book is far less valuable than a “real” book—the kind that sells in hardcover for \$15 or \$20 or \$30. “With an e-book,” the statement said, “there's no printing, no over-printing . . . no warehousing costs, no transportation costs, and there is no secondary market.” E-books, Amazon says, sidestep the cost of paper, printing, truck fuel, warehousing, and so they should be as cheap as can be. After all, they're just commodities.

But that sentiment betrays a simplistic and harmful understanding of what books are made of. Behind all the dead-tree stuff are costs that cannot be eliminated without seriously compromising the quality of work being published. Reflected in the cost of a book may be five years of full-time work by a single author, the advance that allows that work to take place, plus travel and research expenses, as well as skilled editorial support from a publisher. That is what creates the value of the book for its reader, whatever it may be. So why is Amazon arguing so fiercely to devalue the e-book? Because it suits its business model. No warehousing costs, no shipping costs. The weightlessness of

e-books means higher profit margins for the e-tailer.

Books are books, whether they're made of bits or paper. If they have value for readers, it's because of the work and talent that go into them.

Over the past few years, there has been a mounting, global cry for an antitrust investigation of Amazon. Especially in Europe, where the German Publishers and Booksellers Association has filed an antitrust complaint against Amazon, and both France and Germany have limited book discounting in an effort to save their independent bookstores. We also know that Europe has a great tradition of legislating on behalf of artists and the arts, and we're hopeful that Europe can muster more political will to make it happen than America has been able to—so far at least.

Copyright Levies in the Digital World

Robert Staats, Joint CEO of VG Wort, Vice-President of the Society of Audiovisual Authors

I. Introduction

Legally, the term “private copying” stands for an exception to the exclusive reproduction right of authors and other rightholders. Under such an exception, specific copies for private use are allowed by law. However, in accordance with Art. 5 (2) (b) of the Copyright Directive, such copies have to be “fairly compensated”. Therefore, exception and remuneration are necessarily combined. In almost all countries with a private copying exception the remuneration is organized via a levy system. Levies can be paid by the manufacturers or importers of devices or storage media or by operators of copying machines like copy shops, etc.

Besides the private copying exception, many countries provide for further exceptions to the reproduction right and the making available right (Art. 5 (2) and (3)). As far as the “reprography exception” is concerned (Art. 5 (2) (a)), fair compensation is also mandatory. Here again, the remuneration is normally guaranteed through levies.

II. The Situation in Germany

The private copying exception, the remuneration right and the levy system were introduced in Germany in 1966 as part of a new copyright legislation. The reasons the legislator so decided were manifold:

- With regard to the private copying exception, the lawmakers were convinced that the enforcement of the reproduction right was not possible in the private sphere.
- The reasoning for the remuneration right was the fact that the exception could have negative effects on the exploitation of the works.
- And the levies on devices were introduced because they were the only practical solution to collect the money, and the manufacturers were – according to a decision of the Federal Court of Germany in 1958 – indirectly responsible for the copying by private users.

In 1985 the system was extended from music and films to text and pictures, and from a pure device levy to a combination of levies on devices and storage media for all categories of works, and an operator levy for “heavy users” of texts and pictures like libraries, universities or copy shops. Later the digital revolution made it necessary to reconsider the system. The copyright legislation in 2003 (“First Basket” on Copyright in the Information Society) clarified that also digital – not only analogue – copies are covered by the German private copying exception.

However, there was a discussion about the question, which devices and storage media were subject to the levy. Therefore, in 2008, the German legislator changed

the law again (“Second Basket”) and clarified that all types of devices and storage media that are used for legally allowed reproductions are subject to the levy. The copyright legislation of 2008 also introduced a new tariff setting system, where it is basically up to the collective management organisations (CMOs) and the industry to negotiate the amount of the levy for all devices and storage media – and it is not at all easy to reach agreement. Nevertheless, VG Wort was pretty soon successful in finding solutions for multifunctional copying machines, photocopiers, scanners, fax machines and printers (“reprography”).

Many other tariffs were – and still are – disputed. That is true, in particular, for USB-sticks, CDs, DVDs or mobile phones about which a lot of cases are pending before the courts. However, at the beginning of this year it was possible to conclude an agreement with the industry on PCs. Nevertheless, there should be some changes in the German law with regard to the tariff setting process and we are in the process of discussing this at the national level.

All in all: the levy system is a very important source of income for the authors and publishers we represent.

III. The European Situation

As I said earlier, the Copyright Directive foresees a mandatory remuneration for private copying and for reprographic reproductions. However, the member states are free to decide how the rightholders are compensated. The levy system is the system of choice for almost all member states with respect to private copying. Spain, where the levy system has been abolished and replaced by a state budget system, is an exception and – as you might know – a Spanish court has recently referred to the CJEU the question of whether such a system is in compliance with Art. 5 (2) b of the Copyright Directive. Let’s see what the outcome will be. Also – quite new – the UK has introduced a private copying exception without any remuneration. The position of the UK Government is obviously that the exception is so narrow that there is no harm to compensate. I have severe doubts if this is really correct and we will see if the new law is going to be challenged by the rightholders.

The levy system was and still is heavily criticized by the manufacturers of devices. In 2008/2009 the European Commission organized a stakeholder dialogue. This dialogue was close to agreement on concrete proposals, but in the end the industry sector left the negotiations. In 2012 a “mediation process” under the leadership of former commissioner Antonio Vitorino took place which ended with the publication of the so called “Vitorino Report” in January 2013. This report was welcomed by the industry and criticized by the CMOs. The next step at the European level was the European Parliament resolution on private copying known as the “Castex-Report”. The report supports the levy system and – for very good reasons – has been welcomed by the European authors’ and performers’ organisations. In December 2013 the EU Commission launched a public consultation about copyright issues, which included questions on private copying. A summary of the results was made available in summer 2014 but the expected White Paper was not published by the previous Commission

– so we have to wait and see what the perspective of the new Commission, which started its work two days ago, might be.

Most important for private copying and the levy system were a series of decisions of the European Court of Justice.

“Padawan” (2010). This decision clarified that fair compensation must be calculated on the basis of (possible) harm caused to rightsholders. The Court also decided that private copying levies are only justified if they are paid for private copies. Therefore an indiscriminate application of levies covering also professional uses, which are not allowed under an exception, is not possible. However, the Court introduced an irrefutable presumption of private copying whereby the equipment is sold to natural persons for private purposes.

“Opus” (2011): here the Court established the obligation of the member states to ensure the effective recovery of the fair compensation (“certain result”). Also it was decided that in cases of cross-border sales, the levy is due in the member state where the user lives.

“Luksan” (2012): the Court clarified that the holders of the reproduction right must receive the fair compensation and that the remuneration right is unwaivable.

“VG WORT” (2013): this case was, in particular, important because the Court pointed out that an authorization by the rightholder has no bearing on the fair compensation under the exception.

“Austro Mechana” (2013): here the Court established – as an addition to the Padawan ruling – a rebuttable presumption for private copying where the devices are sold to natural persons, but it is not clear if they are used for private purposes. However, a reimbursement system for professional users is then necessary.

ACI Adam (2014): the Court clarified that only copies from lawful sources have to be remunerated.

Three more cases are currently pending before the European Court:

- Copydan Bandkopi (referred to the CJEU October 2012): one important question to the Court is whether levies are due in cases where the content has been licensed and a license fee has been paid.
- Reprobel (November 2013): here the Belgian Court wants to know if it is in accordance with the directive to provide for a publisher share in the fair remuneration in national law.
- VEGAP/EGEDA/DAMA (referred to the CJEU September 2014): this case is about the state budget based remuneration system in Spain.

I can't go into the details of the decisions but – generally speaking – they were clarifying in many respects and supportive of the levy system.

IV. Questions Concerning the Levy System in the Digital World

The digital revolution makes it necessary to reconsider well-established systems in the field of copyright law. That's also necessary with regard to private copying and levies. I would like to refer to some questions that are currently discussed.

1. Licensing as a Solution for Private Copying?

a) First at all, licensing under the exclusive right is absolutely essential and in many cases the best way for rightholders to do business. But is this true for private copying? Some people believe that we don't need an exception in the future because in the digital age the rightholder can license private copying on a voluntary basis. Actually, this argument could be used in the analogue world as well. But, what would be the consequences if licensing replaced a private copying system?

- From the consumers' point of view, this would lead to the situation that private copies could simply not be licensed by the rightholder and every single copy would be then a violation of copyright. The famous "freedom to copy" would be lost.
- Also, from a rightholder perspective, the licensing model for private copying has clear disadvantages. The control of private copying is only possible by the usage of Digital Rights Management systems (DRM). Therefore, the rightholders would be forced to use DRM systems, which are not accepted by the consumers and might be circumvented in many cases. Also, an additional remuneration for private copying – additional to the sales price – cannot be achieved in most cases. On the other hand the remuneration paid under the levy system is a very important source of income, in particular for authors. One should also take into account that the distribution of the levy money via the CMOs guarantees a fair split between authors and other rightholders, for example, producers or publishers, which wouldn't be so certain if the utilization of a licensing fee for private copying were covered by the direct contracts between authors and their contractual partners.

All in all, I believe that the only stakeholders who could really profit from the licensing model would be the manufacturers of devices and storage media. That is certainly not sufficient to justify such a solution.

b) Please allow me to say a few words about the relationship between licensing and exceptions. The manufacturers of devices always claim that a contractual authorization to get access to a work would override the private copying exception and the obligation to pay a levy. Unfortunately,

the Vitorino Report supported this point of view. Nevertheless, the CJEU very clearly said in the VG WORT decision that an authorization has no legal effect where the exclusive right is subject to an exception or limitation and has no impact on the remuneration owed. However, the question of how to deal with cases where a licence fee is expressly also paid for private copying, may remain. This question has been raised in the pending Copydan-Bandkopi case – let's see what the CJEU is going to say on this point.

2. *Alternatives to the levy system?*

To reiterate: as long as an exception for private copying in the sense of Art. 5 (2) b is in force, remuneration is mandatory. This should be clear, although – I have to say – it is obviously not the position of the UK Government. Anyhow, what is also clear is the fact that it is legally not necessary to organize the remuneration via levies. But I can't see any practical alternatives. Obliging the state to pay – which has been introduced in Spain – depends on the economic situation in a country and might lead to a very low remuneration as it is the case in Spain. Let's see if the CJEU will accept this.

It's also not possible for authors or their CMOs to collect the money directly from hundreds of thousands consumers. So, in reality the levy system is the only one that works in practice.

3. *Cloud computing*

Well, you may ask, what about cloud computing? Is there still room for the levy system? First of all, "cloud computing" can stand for very different business models. Without going into the details, one can say that in all cases where a private copy is made via devices or on storage media in the context of cloud computing there has to be a private copying levy in place. And – as I already said – the licence to get access to a work should not override the private copying levy.

V. *Improvements of the Levy System*

I would like to share with you some considerations about possible changes in the future.

1. *Private Copying exception and levy system should be mandatory*

The private copying exception and the levy system should be mandatory for all member states, which is under the current law not the case. I know that it is not easy to achieve. However, taking into account that most member states have introduced a private copying exception and the levy system, this seems not to be impossible.

2. *Definition of products subject to levies*

As I already mentioned, the German legislator changed the copyright law in 2008 and clarified that there is a levy on all devices and storage media used for private copying. Therefore, in Germany there can be no dispute concerning the question of whether specific devices fall under the levy system. PC's, tablets, USB-sticks,

mobile phones, printers etc. are basically covered. It would be good to introduce this rule at the EU level.

3. Levy setting process

I mentioned it earlier: the amount of the tariffs is currently highly disputed in Germany. None of the parties can be happy about this. The authors don't get any remuneration and the industry doesn't know how much they will have to pay in the end. Nevertheless, tariff setting via negotiations is possible. However, clear criteria would be more than helpful. I believe that it would be good to agree on common principles at the European level.

4. Implementation of the decisions of the European Court

The decisions of the European Court of Justice have to be implemented by the member states. That's very important because the decisions are basically supportive of the whole levy system.

5. European central point for distance sales

According to the Opus decision of the CJEU the levy has finally to be paid in the country where the end user lives (country of destination). Additionally, the CJEU decided in the Amazon case that this obligation remains, even if a levy has already been paid in another member state. However, in that case, the person who has already paid the levy may ask for repayment. A European central point to deal with these distance sales seems to be a good idea. In fact, it was a proposal during the stakeholder dialogue and should be considered again.

6. Transparency

The visibility of the levies for the final consumer, as proposed by Mr. Vitorino and others, can improve the transparency of the levy system, and is clearly supported by the CMOs.

VI. Conclusion

If you want to maintain the exception for private copying in the digital environment, you need a workable remuneration system. The only feasible one is the levy system. However, it needs to be improved in specific points. Some improvements should be dealt with at the national level, others at the European level. In any case it was very interesting to read last week in the newspapers about Commissioner Oettinger's considerations on a sort of internet levy which means perhaps nothing else than to maintain and to improve the already existing private copying levy in the digital world.

IV

Concluding Remarks

Olli Rehn, Member and Vice-President of the European Parliament

Ladies and gentlemen, distinguished writers, dear friends of literature,

First of all I'd like to thank my colleague Julie Ward for organising this event. Let me also thank The European Writers' Council and its President Pirjo Hiidenmaa for inviting me to speak here today.

I was not asked to speak here as an expert for the remuneration and compensation of the authors. Nor am I involved in the copyright discussion on a daily basis. These issues have been presented in depth by the previous speakers, all experts on their fields. However, as a democratically elected politician – and as an active reader – I have a strong interest in the matter. Not least as I have some experience in writing books myself. And ultimately these issues are discussed and dealt with in the plenary of the European Parliament, and will finally land on the desks of all MEPs. So they concern all of us in this House.

Ladies and gentlemen,

Literature has been a crucial part in building Europe, as we know it. From the ancient classics to contemporary works, fiction and non-fiction alike have not only described the development of our continent, but have had an enormous role in the development as such – think of Victor Hugo, think of Vaclav Havel! Writers have been key in describing and interpreting the turmoil of the societies they live in, and the impact of the events to common people's everyday life.

Encouraged by the recent Frankfurt Book Fair where, this year, Finnish literature was the guest of honour, I shall give you an example: one of the first female writers writing in Finnish, Minna Canth was a key person contributing to the fact that Finland developed to a society where education and equality have become core values. A contemporary of Canth and one of the first Finnish writers making a living by writing only, Juhani Aho, described the arrival of the ground-breaking technology (if only a steam-train!) to the Finnish countryside.

These masterful descriptions of the changes in our society have remained as subtle but hearty portrayals of the world of the yesteryear. But these glimpses from the past also underline the role of the contemporary works and writers for the world of tomorrow.

Ladies and gentlemen,

Whereas the book itself is not in crisis, the industry is in the middle of a rapidly and profoundly changing environment, which is already very different from, say, one or two decades ago. The digitisation of markets, e-books and the future of the copyright are just some of the challenges described here by many previous speakers.

I read with major interest and quite some concern the EP / INPO study on contractual arrangements of creators, with selected country cases. It seems to conclude that the existing contractual protection of authors in copyright and contract laws

appears not to be sufficient or effective to secure a fair remuneration for authors. This is especially the case in the context of the digital economy. Thus, an economic study on the remuneration of authors seems indeed justified.

Over the last few decades the cultural and creative industries have become increasingly important for economic development. Culture and expressive arts are and will of course continue to be an important part of human life in general. But writers and the creative industries are part of a long value-chain beneath the work of many enterprises.

The creative industries have the advantage of being at the crossroads of arts, business and technology. They are in a strategic position to trigger spillovers into other industries.

Writers are an essential element for the publishing industry, book industry, library services, literary criticism – even for many transport companies, not to mention the forestry industry. All create growth and prosperity for our economies. All in all, writers have an important and sometimes a surprisingly broad job-creating effect in our societies.

To realise this potential, all the European policies and programmes, such as the Digital Agenda, must support the creative industries. This also implies that artificial barriers in the EU and national legislation must be removed to better boost the creative economy in Europe.

It is essential that intellectual property rights are respected. Copyright system and law-making should keep on track with the new trends. Last but not least, it should enable that the writers in the beginning of the chain will get an appropriate remuneration for their work. Only this will guarantee that the whole chain can prosper.

Ladies and Gentlemen,

In the book I mentioned, Juhani Aho's *Railroad*, the old couple, puzzled by the rapid and unbelievable technical developments in the form of the railroad in their immediate surroundings, "did not know much about the world and the world did not know much about them".

That's where we need literature as well. Good literature broadens our horizons and enables us to deal with novel and sensitive issues. It gives us a way to interpret and understand the world. I believe that we can guarantee a high quality of the European – and worldwide – literature only by acknowledging the value of writers' works.

Therefore, we as lawmakers should make sure that the writers have the legal foundation for sound and solid contracts, so that their job and creations are being rewarded on fair terms, even taking into account the pressure of evolving technologies and modern times.

Conclusion

Dr. Pirjo Hiidenmaa, EWC President

Mr. Rehn, thank you for your encouraging and inspired speech.

It is very important to have new authors, so I congratulate you for your new plan to write a book. Did you know that when you publish a book, and this book is lent by your public library, you have the right to get Public Lending Right (PLR)?

Mr. Rehn nods, agreeing.

However, the Directive to compensate authors through PLR has not been implemented yet in all European Member States. Much remains to be done.

To conclude, I thank the European Commission for the promise that by next Autumn we will have the next steps in the report on contractual agreements. Most professional authors work under strict deadlines, and they cannot wait. It is better to have the necessary improvements made effective as soon as possible.

I also wish to thank our sponsors, and especially all the speakers for their insights into the authors' situations, and their valuable, feasible and interesting proposals and solutions.

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Contributors

Julie Ward MEP

Julie Ward is a writer, theatre-maker and cultural activist who began her working life on the factory floor before becoming a community arts worker for Mid Pennine Arts and Contact Theatre. In 1984 she was appointed director of a regional arts and disability organisation covering 5 counties in the north of England and in 1986 she co-founded Jack Drum Arts, now Co Durham's longest established professional arts company.



She was named NE Woman Social Entrepreneur of the Year in 2003 and has served on the board of Culture North East and Arts Council England as well as being a school governor. In 2009 she decided to go to university and study for a Masters in Education and International Development. Julie is a Churchill Fellow and has travelled and worked all around the world with a particular focus on Europe and neighbouring countries. She sits on the Citizen's Panel of Durham University, the executive board of National Drama and is a volunteer for the Institute of Ideas national youth debating competition.

She is member of Culture Action Europe and the Platform for Intercultural Europe and was recently elected as a Labour MEP to represent the NW of England. She is a member of the parliament's committees on Culture and Education, Regional Development committees as well as the Women rights' Committee.

Olli Rehn MEP

Mr Olli Rehn is Member and Vice-President of the European Parliament since July 2014. Rehn served as European Commissioner for Economic and Monetary Affairs from 2010 to 2014, and in October 2011 he was appointed Vice-President of the Commission responsible for Economic and Monetary Affairs and the Euro.



Before that he served as Commissioner for Enlargement (November 2004 - February 2010) and Commissioner for Enterprise and Information Society (July - November 2004). He was the Head of Cabinet of Commissioner Erkki Liikanen between 1998 and 2002. In 2002-2003 Olli Rehn worked as Professor at the Department of Political Science, University of Helsinki. He was a member of the Finnish Parliament from 1991 until 1995, when he also chaired the Finnish delegation to the Council of Europe. He was a member of the European Parliament in 1995-96. He was deputy chairman of the Centre Party in 1988-94 and chairman of the Centre Youth in 1987-89.

Joanna Trollope OBE

Joanna Trollope has been writing for over thirty years. Her enormously successful contemporary works of fiction, several of which have been televised, include; *The Choir*, *A Village Affair*, *A Passionate Man* and *The Rector's Wife*, which was her first number one bestseller, and made her into a household name. Since then she has written many books including, more recently, *The Other Family*, *Daughters in Laws*, *The Soldier's Wife* and, in 2013, an up to date version of Jane Austen's *Sense and Sensibility*. Joanna's latest novel, *Balancing Act*, was published in February 2014.



image (c) Barker Evans

Joanna also wrote *Britannia's Daughters* – a non-fiction study of women in the British Empire as well as a number of historical novels now published under Caroline Harvey. Joanna was awarded the OBE in 1996 for services to literature.

Goce Smilevski

Goce Smilevski was born in 1975 in Skopje, Macedonia. He was educated at Charles University in Prague, Central European University in Budapest, and Ss. Cyril and Methodius University in Skopje. He is author of several novels and theater plays. His novel *Freud's Sister* won the European Union Prize for Literature (2010) as well as the Premio per la Cultura Mediterranea, and is being published in more than thirty languages.



Dr. Pirjo Hiidenmaa, EWC

Pirjo Hiidenmaa is the author of several educational and academic books and essays. From January 2015 she is appointed as Professor of Non-fiction Literature at the University of Helsinki. Previously she has been the Director of the Centre for Continuing Education, University of Helsinki 2011-2014; Director of Culture and Society Research Unit at the Academy of Finland 2006-2011, and Head of Language Planning at the Research Centre for the Languages of Finland 1997-2006. She has held several positions in steering committees in authors' and literary associations: President of the European Writers' Council since 2009 to the present; Chair of the Finnish Association for Non-Fiction Writers (2003-2011); Board member of Kopiosto (2004-2010); Board member of Sanasto, the Finnish authors' copyright society (2003-2005 and 2013). Ms. Hiidenmaa has a PhD in Finnish language and linguistics (University of Helsinki).



Prof. Silke von Lewinski

Prof. SILKE von LEWINSKI, from the Max Planck Institute for Innovation and Competition, Munich, specialises in international and European copyright law. She was an expert to the European Commission (e.g., for draft of the Rental Directive; at WIPO Diplomatic Conference 1996, resulting in WCT and WPPT (member of EC delegation)). At the WIPO Diplomatic Conferences 2000 and 2012 (Audiovisual Performances, which resulted in the Beijing Treaty) and 2013 (Access for Visually Impaired Persons, which resulted in the Marrakech Treaty), she was a delegate (2012 and 2013: Deputy Head of Delegation) for Germany.

From 1995, she was chief copyright expert to governments within EC's initial TA programs PHARE etc., and works under subsequent programs worldwide.

Latest books: *European Copyright Law* (2010, with Walter); *International Copyright Law and Policy* (2008); *Indigenous Heritage and IP* (2nd edn. 2008); and *Copyright Throughout the World* (2008, with annual updates).

Adjunct professor at Franklin Pierce Center for IP, Univ. of N.H., USA, and at Munich IP Law Center; frequent visiting professor: Paris XI; Toulouse 1 et al.; First Walter Minton Visiting Scholar, Columbia Law School; First Distinguished Visitor to IPRIA (Australia) et al.



Dr. María Iglesias

Dr. María Iglesias is the Head of Research and Studies at KEA. Before joining KEA, she was the Head of the Intellectual Property Research Unit at the Centre de Recherche Informatique et Droit (CRID), University of Namur. She also worked as legal researcher at the Centre of Law and Computer Studies of the University of Balearic Islands (CEDIB) and lectured on Internet law in a Master programme at the Open University of Catalonia. María has more than ten years of experience in conducting legal research on the interaction between New Technologies and Law and has participated in numerous international and European research projects on copyright,

data protection, electronic commerce and ISP liability. She has been main researcher and project manager for different studies at KEA and the CRID (former CRIDS), among them the "European Parliament Study on Contractual Arrangements Applicable to Creators: Law and Practices in Selected Member States", for the Legal Affairs EP Committee.



Trond Andreassen

Trond is the Secretary-General of The Norwegian Authors and Translators Association, former President of the European Writers' Council, and author of works of non-fiction.



Judit Fischer

Judit Fischer is a policy officer in the Copyright Unit of the European Commission's Internal Market Directorate-General. The Unit is responsible for the development of the EU acquis in the area of copyright and related rights as well as for international negotiations in the World Intellectual Property Organisation. Ms. Fischer deals with issues such as collective rights management and the remuneration of authors and performers.



Myriam Diocaretz

Myriam Diocaretz is the Secretary-General of the European Writers' Council since 2006 when it was constituted in Belgium. She is the author, editor, and co-editor of seventeen academic studies and is also a poet. Her latest book is *La inquietud de la gaviota* (Madrid, Torremozas, 2014). During her early career as a literary critic she lectured in the USA and Europe on English and American authors, poetics, translation studies, gender, semiotics and dialogical criticism. In recent years her research topics include future and emerging technologies, philosophy, human aspects of information technology, and social robotics. She is founder and the general editor of the academic interdisciplinary series *Critical Studies* (Amsterdam/New York: Rodopi). She held the "Extraordinary Socrates Chair in Humanism in the Digital Society" (2007-2013) at the Tilburg Centre for Cognition and Communication, Tilburg University (NL). PhD in Comparative Studies, State University of New York, and M.A. in English, Stanford University.

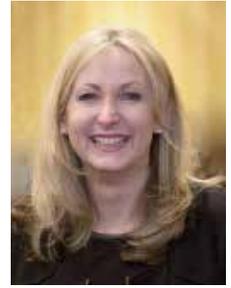


Barbara Ann Hayes

Barbara started her career in direct marketing. Having spent seven years in the US designing and marketing properties, she returned to the UK to work within the International Department of a major multinational HR consultancy.

Barbara is now the Deputy Chief Executive of the Authors' Licensing & Collecting Society, where she has worked since January 2004. She has been heavily involved in lobbying for authors' rights at a national and international level and was instrumental in the establishment of the All Party Parliamentary Writers Group in the UK, seeking opportunities to bring issues regarding writers to the attention of the appropriate parliamentarians.

Barbara represents ALCS on the Board of The Society of Audiovisual Authors (SAA) or Société des Auteurs Audiovisuels.



Mette Møller

Mette Møller has worked within the copyright field from many different angles: from the perspective of the law maker, the collecting society, the legal advisor, in the court as a lawyer, and in the present position as Secretary-General in one of Norway's oldest and most important authors associations. She has followed closely and negotiated the digitisation within the book business. She was a board member of the European Writers' Council (2007-2008), and since 2006 is the Secretary-General of the Norwegian Authors' Union.

An Attorney-at-law specialised in labour and copyright law, she graduated from the University of Oslo.



Jan F. Constantine

Jan F. Constantine has served as General Counsel for The Authors Guild, a non-profit organization representing a membership of over 8,500 published authors and freelancers, since 2005. In addition to her other responsibilities, she has been overseeing The Authors Guild, et al v. Google, Inc., a class action lawsuit, filed in September 2005.

She has over thirty years of legal experience in the practice of general corporate law and litigation, with specific expertise in intellectual property, trade regulation, and employment law. Previously, Ms. Constantine was Executive Vice President of News Corporation and, prior to that, Deputy General Counsel for Macmillan, Inc.



After graduating law school, she worked as a staff attorney for the Federal Trade Commission in Washington, D.C. and the New York Regional Office as well as the United States Attorney for the Eastern District of New York, where she was Deputy Chief of the Civil Division. Ms. Constantine is a longstanding member of The Association of the Bar of the City of New York. From 2005 until 2013, she was an Adjunct Professor at NYU's School of Continuing and Professional Studies. Ms. Constantine received a B.A. from Smith College and is a graduate of George Washington University's National Law Center.

Robert Staats

Robert Staats has been the joint CEO of VG WORT, the German CMO for authors and publishers of textual works, since 2009. He is a lawyer by profession, specializing in copyright law. After studying law in Bonn and Freiburg, he completed his legal training in Berlin. Between 1994 and 2008 he worked as a judge and civil servant at the Ministry of Justice of the Federal State of Brandenburg.

Robert is currently the vice-president of the Society of Audiovisual Authors (SAA) and a member of the Executive Committee of the European Group of the International Federation of Reproduction Rights Organizations (IFRRO).

He is the author of publications on copyright law as well as lecturing at the Humboldt University, Berlin.

