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Remuneration Of Authors Of Books And Scientific Journals, Translators, Journalists And Visual Artists For The Use Of Their Works


Europe Economics

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European
Commission

Remuneration of authors of books and scientific journals, translators, journalists and visual artists for the use of their works

EXECUTIVE SUMMARY EN

A study prepared for the European Commission
DG Communications Networks, Content & Technology by:

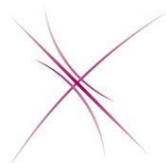
Digital
Agenda for
Europe


Europe Economics


IVAR

This study was carried out for the European Commission by

Europe Economics and Lucie Guibault and Olivia Salamanca of the University of Amsterdam



Europe Economics



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Executive Summary

Europe Economics and the Institute for Information Law at the University of Amsterdam were commissioned by DG Connect to undertake a study on the remuneration of authors of books and scientific journals, translators, journalists and visual artists (all groups are hereafter referred to as “authors”) for the use of their freelance works.¹

The overarching objectives of this study are to analyse the current situation regarding the level of remuneration paid to authors in order to compare the existing national systems of remuneration for authors and identify the relative advantages and disadvantages of those systems for them. We also aim to assess the rationale for harmonising mechanisms affecting the remuneration of authors, and to identify which are the best suited to achieve this. Their potential impact on the functioning of the Internal Market is also examined.

We focus specifically upon:

- authors of books, including fiction, non-fiction, children and young adults' literature, academic and educational books;
- journalists, including both written press (i.e. newspaper, magazine, periodicals and web journalists) and audio-visual (i.e. video and radio journalists);
- authors of articles in scientific/academic journals;
- translators, including both literary (i.e. poems, books, newspaper and magazine articles and advertising/commercial translations) and audio-visual (i.e. voiceover script, dubbing, live subtitling of live broadcasts, subtitles for the deaf and hard of hearing and translations for audio description for the blind and partially sighted) ;
- visual artists, including photographers, illustrators and designers.

The current legal framework

As part of our legal analysis, we approached correspondents (a mix of scholars and practising lawyers) in each of the ten Member States under study.² These Member States were chosen to reflect differences in regulatory approaches and existing regional idiosyncrasies. The questionnaire we prepared for our correspondents focused on legal framework of each country from both a contract law (*lex generalis*) and copyright law (*lex specialis*) perspective. It also focused on the actual contractual practice in their country and whether this practice was aligned or not with the law.

As a rule authors enjoy, under the European *acquis*, the exclusive rights of reproduction, communication to the public and distribution and rental. These rights are commonly

¹ Salary remuneration received by authors in the context of an employment contract was beyond the scope of the study.

² The Member States covered are: Denmark, France, Germany, Hungary, Ireland, Italy, the Netherlands, Poland, Spain, and the UK. We thank our correspondents for their contributions to the study: Prof. Maurizio Borghi and Ms. Evangelia Papadaki (UK Bournemouth University); Dr. Till Kreutzer (Germany, iRights.Law, Berlin); Dr. Brad Spitz (France, YS Avocats, Paris); Ms. Linda Scales (Ireland, Dublin); Ms. Deborah de Angelis (Italy, DDA Studio Legale, Rome); Prof. Raquel Xalabarder Plantada (Spain, *Universitat Oberta de Catalunya*, Barcelona); Dr. Tomasz Targosz (Poland, Truple Konarski Podrecki & Partners Law Firm, Kraków); Ms. Maria Fredenslund (Denmark, RettighedsAlliancen, Copenhagen); Dr. Aniko Grad-Gyenge (Hungary ProArt Alliance for Copyright), Budapest.

transferred to publishers or to broadcasters, in the case of audiovisual journalists and translators, in exchange for the payment of remuneration. Authors also enjoy the right to receive remuneration for the public lending of their works, as well as the right to be compensated for acts of reproduction by means of reprography, private copying and, in some Member States for educational use. This remuneration is commonly administered by CRMOs; depending on the legislation and the contractual practice in each Member State this remuneration can be assigned or not to the publisher.

On the basis of the answers provided by the correspondents in the ten jurisdictions, it would appear that the general provisions of contract law play a very limited role in granting support to authors with the negotiation of exploitation agreements and the determination of the level of remuneration in the countries examined. Certain rules of contract law may affect the way a contract is interpreted or executed, but in general they do not influence the outcome of the negotiation on the transfer of rights or the remuneration to be paid. However, the copyright acts of some of the Member States, as '*lex specialis*' to the general rules of contract law, do provide authors some support in the licensing or transfer of their rights.

The analysis of the legal framework applicable to contracts between authors and publishers in Europe shows a fragmented situation between the different Member States and across industry sectors (fiction, non-fiction, educational, translations, news services, illustrations etc.). Two main factors influence the authors' remuneration level:

- the existence of statutory provisions, mainly in copyright law, that protect authors as weaker parties to a contract; and
- the use of model contracts developed as a result of negotiations between representatives of authors and publishers (France, Spain, Germany, Netherlands, UK) or in the form of collective bargaining agreements made applicable to non-employed but economically dependent freelancers.

Understanding payment flows

Supply chains and payment flows in the industries covered in this study involve a number of players and vary both across different types of authors and across Member States.

The purpose of analysing this was to clarify the relationship between authors and the various players that are involved in the supply chain, in the process of identifying potential issues of market functioning and clarifying, as explored in later tasks, the potential impact of asymmetries in bargaining power and legal remedies thereto. We identify important counterparties that interact with authors, the role they play in the assignment or transfer of rights and corresponding remuneration and to explore what differences exist across Member States.

In order to achieve the above, we set out the key players involved in the industries related to the categories of authors covered in this study and map out their interactions. Mapping out the structure of the supply chain in this way allows us to understand payment flows within the industry, and thus understand the role the system itself plays in determining the remuneration of authors.

There are a number of complex relationships in these industries. The key players and the way in which the products reach the consumers depend on the industry and the type of author involved (e.g. authors of books versus photographers). In addition authors who reject the mainstream route to selling their products need to interact with a different set of players and can face different systems in terms of rights management and remuneration. We consider the key relationships for each group.

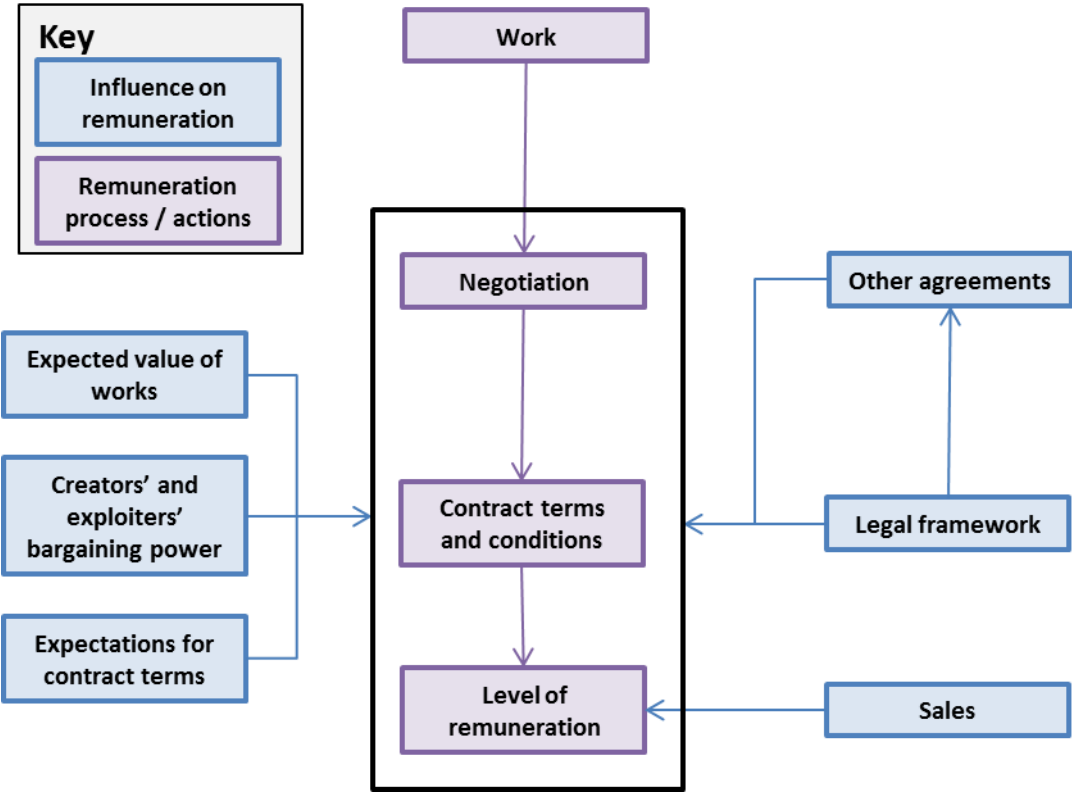
The analysis provided two important insights for the determination of authors' remuneration. First, in most cases, the level of remuneration that authors earn is dependent upon the contract negotiated with the publisher/broadcaster in exchange for a transfer of their exclusive rights. Second, the complexity of supply chains and the associated payment flows can make it difficult for authors (as well as others operating in the industry) to fully understand the source of and rights associated with the remuneration they receive.

Analytical approach

There is a range of additional factors that may affect the level of remuneration of authors. Together, these factors form a theoretical framework against which the data gathered through the legal review and survey of authors were examined.

The theoretical framework was designed to be general in nature to encompass all types of authors across both print and audio-visual industries and from any Member State. Therefore, it has been simplified. This section presents an overview of the process by which the level of remuneration received by authors is determined and identifies the key influences on their remuneration, such as expectations for the value of the work, bargaining power, the contractual expectations or norms, and the legal framework in place.

Figure 1: High-level process of securing remuneration



Source: Europe Economics.

We analysed and qualified the expected impact of each of these factors on the level of remuneration that authors achieve in their contracts.

Statistical analysis

During the study we gathered primary data on the remuneration and characteristics of authors in order to put the theory to work. To facilitate the gathering of these data we developed four online surveys (one for authors of books and scientific publications, one for journalists, one for translators, and one for visual artists) in consultation with DG Connect and European level representative bodies. The surveys were translated into the native languages of the countries chosen for the study and uploaded onto the EU Survey platform. The survey distribution was facilitated by the cooperation of both European and national representative bodies of authors.

The outcome of the data collection was subject to a number of limitations. First, the distribution method meant that we had no control over representativeness of sample, both across Member States and within each Member State. As a result there are significant differences in the response numbers across countries and we have a limited ability to assess the extent to which the responses received from each country are representative of the population of authors in that country. Second, the opt-in nature of the survey may have created a bias in responses towards those with 'time on their hands' and we may miss some of the most active authors.

Bearing in mind these limitations, our recommendations reflect, in the first instance, the findings of the legal analysis, with the statistical analysis used to test, explore and corroborate the findings of the legal analysis, flagging areas where findings potentially diverge.

Main statistical analysis approach

The main objective of statistical analysis is to understand the impact of legal frameworks on the remuneration of authors. This has been done by constructing "legal indicators" that identify whether certain key provisions of copyright law apply to a Member State, and a "collective bargaining indicator" based on our understanding of the role of trade unions, the existence of model contracts and whether legislation also extends the terms and conditions applicable to members of collective agreements to non-members.

The remuneration levels of authors gathered through the survey were then regressed on these indicators and a set of controls variables that are likely to also influence remunerations (e.g. the typology of author, his/her years of experience, whether an intermediary agent or representative is used, etc.).

The main findings of the legal analysis indicate that, among the set of legal provisions considered (i.e. (1) limitations on scope of transfer of rights, (2) limitations on future works, (3) limitations on future modes of exploitation, (4) rules on the form of payments, (5) formalities on the transfer of rights, (6) obligations to publish/non-usus, (7) best-seller clause) the first three are those likely to have the greatest impact on remuneration. In order to test statistically whether this is the case, we built two separate legal indicators: one "core indicator" (based on provisions (1)-(3)), and a "complementary indicator" (based on (4)-(7)). The statistical results corroborate the results of the legal analysis: the "core indicator" has a positive and statistically significant impact on authors' remuneration levels, whilst the "complementary" one does not.

The statistical analysis does not however corroborate the legal findings concerning the potentially positive impact of the use of model contracts and collective bargaining agreements on remuneration. This is so because the "collective bargaining indicator" does not have a statistically significant impact on remuneration levels.

Key findings

The key findings of our analysis are:

- Obligations on the scope of transfer — the protective measure with the greatest positive effect on the contractual position and the remuneration of authors relates to the obligation imposed on publishers to specify the scope of transfer of rights (in geographical scope, duration and modes of exploitation) together with the corresponding remuneration. This finding was corroborated by the statistical analysis.
- Formalities, obligations and corrective measures — an array of other measures exist in the laws of the Member States that relate either to the requirement of formalities at the time of formation of the contract, or to obligations regarding the execution (e.g. “non-usus” or “best-seller” clauses) and the termination of the contract. While these measures also contribute to strengthening the position of authors in their contractual relationship with publishers, they lack the kind of direct, up-front impact on remuneration that can be observed in a restriction of the scope of transfer. This finding was corroborated by the statistical analysis.
- Model contracts and collective bargaining agreements — the use of model contracts developed as a result of negotiations between representatives and collective bargaining agreement developed with the support of CRMOs acting as trade unions, were also identified as having a potentially significant impact on remuneration. Practically, model contracts would be expected to influence remuneration as they facilitate the negotiation and conclusion of agreements between authors and publishers. However the statistical analysis was not able to corroborate this finding. There are two possible explanations for such discrepancy. The first is technical and relies on the fact that the static nature of the cross-sectional dataset (which provides a “snapshot” of remuneration levels across types of authors and Member States and at a given point in time) does not allow for a dynamic analysis of the impact of model contracts on remuneration conditions over time. The second is conceptual and relies on the consideration that, whilst collective bargaining agreements could have a positive impact on the remuneration of employed authors they might fail to do so for freelancers.

Internal market aspect

We find that the inconsistencies in the laws governing contractual arrangements between authors create the risk of segmenting the internal market. Authors operating across multiple Member States may be at a disadvantage in Member States where the legal framework provides them with less certainty and confidence as to their bargaining position and contractual rights than in others, with authors based in those Member States, and likely to be more familiar with the practical outworking of such rules, having an advantage.

Furthermore, the presence of different legal frameworks provides publishers with scope for “jurisdiction shopping” when choosing the country’s laws under which authors’ contracts are to be enforced. This may tend to create scope for regulatory arbitrage.

Policy recommendations

Based on these findings we have developed three overarching policy options for consideration. For some of the issues identified, an EU level approach may be necessary,

for example where there is a specific Internal Market issue. For others, policy intervention at the national level may also be effective.

- Policy 1: Specification of remuneration for individual modes of exploitation and respective remuneration. The general principle behind this policy option, designed to empower the author at the contract negotiation stage, would be to introduce the following binding, legal requirements; contracts not adhering to the requirements would then be considered null and void under the law:
 - requirement for written contracts (dependant on MS contract legislation);
 - specifying which rights and modes of exploitation are being transferred;
 - specifying the level and type of remuneration attached to each mode of exploitation; and
 - a reporting obligation imposed on the publisher vis-à-vis the author.
- Policy 2: Limit the scope for transferring rights for future modes of exploitation works and future works modes of exploitation. To ensure that authors have the ability to negotiate terms specific to a new mode of exploitation, a contract may provide only for such fields of exploitation which are known or foreseeable at the time of its conclusion. The transfer of rights relating to *future works* should also be restricted in terms of its duration and in terms of genre of work covered by the transfer.
- Policy 3: Allowing economically dependent freelancers to claim employee status and rights. There are situations in which notionally self-employed freelancers for whom being an author is their main source of income have one or a very small number of clients who provide the vast bulk of their workflow. In some of these situations the “freelancer” works regular hours at the publisher’s offices or is closely monitored and disciplined by the publisher. Therefore the practical reality might be that of an employee-employer relationship and the use of a freelancer-client contracting arrangement might be designed so as to avoid costs associated with employee status, or obligations to recognise rights to collective bargaining. We therefore recommend investigating options to allow certain categories of freelancers to enjoy employee status and rights.

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