

EU Copyright Directive - will it happen, what will it mean?

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Zoey Forbes and Alex Hardy report on new authors' rights that may or may not apply in the UK soon



The new EU Copyright Directive was finally approved earlier this year, and it introduces (among other things) three new statutory rights for authors that have the potential significantly to affect rights contracts in the publishing industry. These rights were introduced to address the perceived imbalance in bargaining power between authors and performers who transfer or license their copyrights to third parties such as publishers or production companies.

EU member states have until 7 June 2021 to implement the directive into their national laws, and can do so at any time within this period. As a result, the effective date and exact scope of each right may vary between member states due to differences in interpretation and implementation. The current uncertainty around Brexit means it is unclear whether the UK will implement the directive at all.

The 'bestseller' right

Article 20 of the directive grants authors the right to claim "additional, appropriate and fair remuneration" from the author's licensees, transferees and their successors in title when the remuneration originally agreed turns out to be "disproportionately low" compared to "all the subsequent relevant revenues" derived from the exploitation of the work.

At the moment, the extent of Article 20's impact is unclear. What is meant by "additional, appropriate and fair remuneration"? How low is "disproportionately low" and at what stage should that calculation be made? Nevertheless, this right will be welcomed by both authors and agents, as it will allow them to renegotiate the financials of a deal when a work becomes an unexpected bestseller. Publishers, however, will not only be concerned about how this right will affect their financial calculations for individual deals, but how it will affect their business models in general. Publishing by nature thrives on the interplay between risk and reward, with commercially successful books effectively subsidising those that are less commercially successful.

Fixed-fee or "buy-out" contracts are expected to receive the most scrutiny. We expect this right to have a smaller impact on deals that are based on a royalty structure, as here remuneration automatically increases

in line with sales, particularly where there is a royalty escalator in play. That being said, authors may use this right to obtain an uplift to low royalty rates. This right also raises important questions about certainty of contract. Publishers who have spent time and effort negotiating a contract could have it unravelled later down the line.

So-called "bestseller" clauses similar to Article 20 have existed in other countries for some time, and do get used occasionally. Earlier this year Andrzej Sapkowski, the author of *The Witcher* series of novels, reached a settlement with CD Projekt Red following his request for additional payment under the Polish Copyright Act in respect of *The Witcher* videogames.

Right to transparency

Article 19 of the directive grants authors the right to receive a report at least annually from any party to whom the author has licensed or transferred his or her rights. The report must contain information about how and to what extent the author's work has been exploited. This information must be "up-to-date, relevant and comprehensive" and, crucially, disclose "all revenues generated" and the remuneration due to the author. This right continues to apply even when the author's rights have been sub-licensed or transferred to a third party.

Member states can consider limiting the scope of information required where the administrative burden of the report is disproportionate to the revenues generated and disapplying the right if the author's contribution is not significant in relation to the overall work. Given the publishing industry has a well-established practice of providing regular royalty statements, we do not expect this right to require significant changes for most publishers. However, publishers will need to start reporting on indirect revenues, and potentially providing reports for assignments and buy-outs of rights even where no royalties are due.

Right of revocation

Article 22 of the directive grants authors the right to revoke (in whole or in part) an exclusive licence or transfer of rights where "there is a lack of exploitation of the work", subject to a reasonable period of time having elapsed since the conclusion of the deal. In order to revert his or her rights, the author must send notice and set a deadline by which the work must either be exploited or the rights will be revoked.

When incorporating Article 22 into their national laws, member states have wide discretions including providing exceptions for multi-author works, applying a time limit to the right and incorporating carve-outs permitted under collective bargaining agreements. Given the range of discretion, it is difficult to assess the impact on the industry's current practices. Some countries, such as Germany and the Netherlands, already have a similar right codified in their national laws while publishers in other countries offer reversion rights to authors by way of contract. Once further detail is provided by each member state, publishers will need to examine whether their current reversion practices meet the new criteria and how to deal with reversion in respect of author assignments or buy-outs.

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